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NOV 7 '60

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RICHARD R. CHURCHILL, Administrator  
of the Estate of Roy W. Brown,  
Deceased,

Appellee,

v.

ELGIN, JOILET AND EASTERN RAILWAY  
COMPANY, a corporation,  
Appellant.

8/60  
22

A

APPEAL FROM CITY COURT,  
CHICAGO HEIGHTS, COOK  
COUNTY, ILLINOIS.

259 I.A. 629

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Richard R. Churchill, Administrator of the Estate of Roy W. Brown, deceased, plaintiff, sued Elgin, Joliet and Eastern Railway Company, a corporation, defendant, in the City Court of Chicago Heights, Cook County, Illinois, in an action of trespass on the case. There was a verdict returned finding defendant guilty and assessing plaintiff's damages in the sum of \$35,500. Judgment was entered on the verdict and defendant has appealed.

The original declaration consisted of two counts and there was afterwards filed an additional count. No point is made as to the declaration. Plaintiff claimed damages on account of the death of Roy W. Brown in an accident upon defendant's railroad. The action is brought under the Federal Employers' Liability Act. The deceased, Roy W. Brown, was employed by defendant as a conductor, and on January 1, 1929, he was in charge of extra train No. 574, consisting of about 67 freight cars, which left Joliet, Illinois, about 3:41 o'clock, a.m. Its destination was Porter, Indiana. It arrived at Matteson, Illinois, 22 miles east of Joliet, about 5:25 or 5:30 o'clock, a. m. There was a driving snow storm from the north, and a strong wind. The train stopped at Matteson to deliver 7 cars to the



NOV 7 '06

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24071

RICHARD M. CHURCHILL, Administrator  
of the Estate of Roy W. Brown,  
Appellee,

v.

NIGHT, JOINT AND EASTERN RAILWAY  
COMPANY, a corporation,  
Appellant.

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CHICAGO HEIGHTS, COOK  
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Railway Company, a corporation, defendant, in the City Court of  
Chicago Heights, Cook County, Illinois, in an action of trespass  
on the case. There was a verdict returned finding defendant  
guilty and assessing plaintiff's damages in the sum of \$25,000.  
Judgment was entered on the verdict and defendant has appealed.  
The original declaration consisted of two counts and  
there was afterwards filed an additional count. No point is made  
as to the declaration. Plaintiff claimed damages on account of  
the death of Roy W. Brown in an accident upon defendant's railway.  
The action is brought under the Federal Employers' Liability Act.  
The deceased, Roy W. Brown, was employed by defendant as a conductor,  
and on January 1, 1902, he was in charge of extra train No. 276, con-  
sisting of about 67 freight cars, which left Joliet, Illinois, about  
3:41 o'clock, a.m. Its destination was Terer, Indiana. It arrived  
at Matteson, Illinois, 22 miles east of Joliet, about 8:25 or 8:30  
o'clock, a.m. There was a driving snow storm from the north, and a  
strong wind. The train stopped at Matteson to deliver 7 cars to the



Illinois Central Railroad Company. At the place of the accident there were east and west bound <sup>main</sup> tracks, and an automatic block signal, No. 944, that regulated train movements, was located about 23 or 25 car lengths west of the westerly limits of the Matteson yard of defendant company. As train No. 574 approached and passed the automatic block signal, the signal light was green and the semaphore arm was in a vertical position, indicating a clear track, and when it passed the signal the color changed from green to red and the semaphore arm dropped to a horizontal position. After No. 574 passed the signal it came to a stop with the entire train within the said yard limits except the caboose and 2 or 3 cars, which remained standing on the main track. Brown and the brakeman, Cooper, were in the caboose when the train stopped and Cooper immediately volunteered to deliver the bills of lading for the 7 cars to the Illinois Central agent at Matteson, and Brown handed him the bills. Cooper told Brown that he would remain in the engine at the head of the train until it reached Chicago Heights, Illinois, the next stop east after Matteson. Train No. 574 remained in the same position for about 30 or 40 minutes, when it started up and had proceeded a distance of about 9½ car lengths when train No. 40 crashed into the rear of No. 574, "smashed up" the caboose, derailed 2 or 3 cars, and caused the caboose and the car ahead of it to telescope. No. 40 was a regular train of defendant and was scheduled to leave Joliet on the morning of the accident at 4 o'clock, a. m. It left that place at 4:35 o'clock, a. m., with approximately 74 freight cars. Defendant admits several times, in its brief, that as this train approached the block signal it was traveling about 18 or 20 miles an hour and that the engineer saw that the block signal was red. The engineer's fireman testified that the engineer called out, "Red block," and that the train was then traveling around





13 or 20 miles an hour. Between the block signal and the place of the collision the train traveled 27 car lengths, or about 1215 feet. Brown was in the caboose and was killed by the impact.

Defendant asserts, rather than argues, that it was not guilty of negligence. It argues fully the question of the negligence of the deceased, and at the conclusion of this argument merely asserts that the negligence of Brown was the sole and only cause of his death. The contention that defendant was not guilty of negligence is without the slightest merit. As we read and understand the record, Berglund, the engineer of train No. 40, was guilty of gross negligence. It is significant that neither he nor the head brakeman on train No. 40, who was riding in the caboose with the engineer, was called by defendant as a witness, although it appears that it had full opportunity to call them if it had seen fit to do so. Defendant contends, in its brief, that from Joilet to Matteson there was a driving snow storm from the north and a very strong wind; that the visibility was poor, and that because of the weather conditions the train traveled only 22 miles in an hour and forty-five minutes. All enginemen were required to be familiar with the location of the automatic block signals along the right of way, and if for any reason Berglund could not see the red block signal it was his duty, under the rules and regulations, to stop at once. There was also in force a rule or regulation that as all trains approached yard limits the engineer should have the train under control and should be prepared to stop it at once. The evidence for defendant was that train No. 40 was equipped with automatic air brakes and that an application of automatic air by the engineer would set the brakes "almost instantly on every wheel in the train." There was evidence that at the time of the collision the rear end of the caboose of train No. 574 was inside the yard limits from  $6\frac{1}{2}$  to  $7\frac{1}{2}$  car lengths. Defendant claims that after the collision the caboose, which



language. Defendant claims that after the collision the witness, who  
consent of John H. Ely was inside the yard limits from 4 to 7 p.  
was evidence that at the time of the collision the train and the  
not the "black" signals in every place in the yard. There  
prints and that an application of brakes was made by the engineer  
two minutes was that John H. Ely was equipped with automatic air  
under control and should be prepared to stop it at once. The evidence  
all trains approached yard limit the engine should have been  
stop at once. There was also a rule or regulation that no  
red signal signal if was his way, under the rules and regulations, so  
the right of way, and it let any person disregard could not see the  
to be familiar with the location of the signal in each signal along  
miles in as many as forty-five minutes. All engineers were required  
and that because of the nature of the train service only 25  
from the north and a very short time that the difficulty was back,  
first, that they failed to observe there was a driving and steam  
call them it had now fit to do so. Defendant contends, in its  
and as a witness although it appears that it had full opportunity to

was at the rear of the train, was at "the point where the yard limits of Matteson begin." As the cars were about 45 feet long the collision, according to the theory of fact of plaintiff, occurred between 290 and 300 feet inside the yard limits. Mitchell, the fireman on train No. 40, testified that his train did not have any priority over No. 574; that they had no orders to pass it at any siding or any place, and that they knew that it was traveling ahead of them. When train No. 40 was within 4 or 5 car lengths of the caboose on train No. 574, the brakeman on train No. 40 "hollered rear end" and he and others in the engine "jumped off." No. 40 was scheduled to leave Joliet at 4 a. m. It did not leave until 4:35 a. m. The accident occurred at 6 o'clock, so that it took the train one hour and 25 minutes to make the run of 22 miles between Joliet and Matteson, or an average speed of approximately 15.6 miles per hour. Defendant, in its brief, states that very bad weather conditions accounted for the slow speed of the train between the two points. The same weather conditions prevailed at Matteson, and in spite of the fact that the engineer knew that he was approaching the red block signal and the Matteson yards and that train No. 574 was traveling ahead of him, still, as he approached the block signal with its red electric light, which he saw, he was then traveling at a speed, according to the admission of defendant in its brief, of 18 or 20 miles an hour. In other words, his speed was then greater than his average speed between the two stations. The engineer's fireman testified that train No. 40 should have stopped west of the block signal but that it did not. Train No. 40 left Joliet late, had lost time as it proceeded and was behind the time table schedule at Matteson, 50 minutes, and the jury were justified in concluding from the evidence that the engineer was trying to make up time as he approached Matteson and to accomplish this result he ignored certain rules and regulations that governed his actions at the time and place in question.

Defendant contends that the deceased was guilty of con-



was at the rear of the train, and at the point where the yard limits of Hatterden begin." As the cars were about 40 feet long the collision according to the theory of fact of possibility, occurred between 250 and 300 feet inside the yard limits. Mitchell, the fireman on train No. 40, testified that his train did not have any priority over No. 574. That they had no orders to pass it at any siding or any place, and that they knew that it was traveling ahead of them. Train No. 40 was within 4 or 5 car lengths of the engine on train No. 574, the fireman on train No. 40 "believed your word" and he and others in the engine "jumped off." No. 40 was supposed to leave before 4 a. m. It did not leave until 4:15 a. m. The accident occurred at 4 o'clock, so that it took the train one hour and 25 minutes to make the run of 25 miles between Hatterden and Hatterden, or an average speed of approximately 18.8 miles per hour. Hatterden, in the brief, states that very bad weather conditions accounted for the slow speed of the train between the two points. The same weather conditions prevailed at Hatterden, and in spite of the fact that the engine knew that it was approaching the red block signal and the Hatterden yards and that train No. 574 was traveling ahead of him, still, as he approached the block signal with the red electric light, which he saw, he was then traveling at a speed, according to the admission of testimony in the brief, of 18 or 20 miles an hour. In other words, his speed was then greater than his average speed between the two stations. The engineer's testimony testified that train No. 40 should have stopped west of the block signal but that it did not. Train No. 40 left Hatterden later, and lost time as it proceeded and was behind the line while enroute at Hatterden, 25 minutes, and the jury were justified in concluding from the evidence that the engineer was trying to make up time as he approached Hatterden and to accomplish this result he ignored certain rules and regulations that governed his actions at the time and place in question.

Hatterden contends that the deceased was guilty of con-

tributory negligence. It concedes that under the Act contributory negligence alone would not bar a recovery, but it insists that the jury in assessing plaintiff's damages at \$35,500 must have found that the deceased was not guilty of contributory negligence, and it argues that the proof clearly shows that he was guilty of such negligence. Plaintiff cites the ruling in Central Vermont Ry. Co. v. White, 238 U. S. 507, that "the burden of proof of contributory negligence, under the Federal Employers' Liability Act, is on the defendant," and strenuously argues that defendant has failed to sustain that burden. We have very carefully considered the entire evidence bearing upon this question and we have reached the conclusion that the instant contention of defendant is a meritorious one. We will briefly state our reasons for reaching this conclusion: Rule 99 of defendant company, introduced by agreement, provides, in part, that "conductors \* \* \* are responsible for the protection of their trains." After No. 574 passed the block signal it came to a stop with the entire train within the yard limits of Matteson except the caboose and 2 or 3 cars, which were standing on the main east bound track of defendant company. The deceased knew that his rear brakeman, Cooper, immediately after the train stopped, had gone ahead - 67 cars - to deliver the bills of lading to the Illinois Central Railroad agent at Matteson and that he would remain in the engine at the head of the train until it arrived at Chicago Heights, the next stop to the east. This action of Cooper was authorized by the deceased, who handed the former the bills of lading. Brown was then alone in the caboose and was the only one left to protect the rear of his train. He knew that there was a driving snow storm from the north and a strong wind; that his train, when it arrived at Matteson at 5:25 or 5:30 a. m., was late; that train No. 40 was scheduled to arrive at Matteson at 5:10 o'clock, a. m., that it was



...negligence. It is contended that when the act of negligence  
 negligence alone would not be a recovery, but it is insisted that the  
 jury in assessing plaintiff's damages at \$25,000 must have found  
 that the deceased was not guilty of contributory negligence, and it  
 argues that the proof clearly shows that he was guilty of such neg-  
 ligence. Plaintiff offers the finding in Verdict No. 1.  
Verdict No. 2, that "the burden of proof of contributory  
 negligence, under the Federal Negligence Act, is on the  
 defendant," and strenuously argues that defendant has failed to dis-  
 cuss that burden. We have very carefully considered the entire evi-  
 dence bearing upon this question and we have reached the conclusion  
 that the finding of defendant is a meritorious one. We  
 will briefly state our reasons for reaching this conclusion: Rule  
 99 of defendant company, introduced by agreement, provides, in part,  
 that "conductors \* \* \* are responsible for the protection of their  
 trains." After No. 874 received the block signal it came to a stop  
 with the engine train within the yard limits of Madison Street  
 Station and 2 cars, which were standing on the main track  
front of defendant company. The deceased knew that his train  
 foreman, Geopert, immediately after the train stopped, had gone  
 ahead - 67 cars - to deliver the bills of lading to the Illinois  
 Central Railroad agent at Madison and that he would remain in the  
 engine at the head of the train until it arrived at Chicago Union  
 the next stop to the east. This action of Geopert was authorized by  
 the deceased, who handed the foreman the bills of lading. It was  
 not then alone in the engine and was the only one left to protect  
 the rear of his train. He knew that there was a driving snow storm  
 from the north and a heavy mist that his train, when it arrived  
 at Madison at 5:10 a. m., was late; that train No. 874 was  
 scheduled to arrive at Madison at 5:10 o'clock, a. m., that it was

following No. 574 on the same track and that it could not be far in the rear of his train. Rule 99 of defendant company is as follows:

"Rule 99. When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with the flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fuses.

When signal 14 (d), or 14 (e), has been given to the flagman and safety to the train will permit, he may return. When the conditions require he will leave the torpedoes and a lighted fuse. The front of the train must be protected in the same way when necessary by the front brakeman or fireman.

When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take such action as may be necessary to insure full protection. By night, or by day when the view is obscured, lighted fuses must be thrown off at proper intervals.

When day signals cannot be plainly seen, owing to weather or other conditions, night signals must also be used.

Conductors and engineers are responsible for the protection of their trains.

Flagman's signals:

Day signals - A red flag, torpedoes and fuses.

Night signals - A red light, a white light, torpedoes and fuses."

Cooper admitted that it was his duty, under the rule, to place the night signals, but he insisted that when he went ahead, with the sanction of the deceased, to deliver the bills of lading to the Illinois Central agent, he was then no longer acting as the brakeman and was not governed by the rule in question. It is certain that he did not place any of the signals, and the proof tends to show that no one did. There is evidence to the effect that Rule 99 does not apply to a train standing or moving within the yard limits and plaintiff argues that because the train "was almost entirely within yard limits" the provisions in Rule 99 in respect to night lights, did not apply. As the caboose and two or three cars remained standing on the main east bound track of defendant company it is plain that the train was not then within the yard limits of Matteson. Train No. 40 was running on this same track and might arrive in Matteson at any moment. Train No. 574 remained in that position for 30 or



Following No. 274 on the same track and that it could not be for  
in the rear of his train. While 274 of defendant company is on

Following:

"While 274. When a train stops under circumstances in  
which it may be overtaken by another train, the train must  
be kept immediately with the flagman's signal a red light  
to show its position, giving the signal  
and when necessary, in addition, displaying flashing lights.  
The signal is (a), or (b), has been, given to the  
flagman and when the train will stop, the flagman  
will be positioned so as to be seen by the train and  
the flagman. The front of the train must be protected  
in the same way when necessary by the train division or  
division."

When a train is moving under circumstances in which  
it may be overtaken by another train, the train must be  
kept with the flagman's signal a red light, giving the  
signal and when necessary, in addition, displaying flashing  
lights, or by day when the view is obscured, it must be  
kept at least 100 feet behind the train.

When day signals cannot be plainly seen, owing to  
weather or other conditions, night signals must also be used.  
The flagman and engine are responsible for the  
protection of their train.

Flagman's signals:  
Day signals - A red flag, lamp or lantern and lantern.  
Night signals - A red light, a white light, lamp or lantern  
and lantern."

Geogor admitted that it was his duty, under the rule, to place the

night signals, but he testified that when he went ahead, with the

connection of the locomotives, to deliver the bill of lading to the

Illinois Central agents, he was then no longer acting as the train-

man and was not governed by the rule in question. It is not a rule

he did not place any of the signals, and the power comes so close

that he was not. There is evidence to the effect that while 274 does

not apply to a train standing or moving within the yard limits and

plaintiff agrees that because the train was almost entirely within

yard limits, the provision in Rule 274 in respect to night lights,

did not apply. The evidence and two or three cars remained stand-

ing on the main east bound track of defendant company it is plain

that the train was not then within the yard limits of defendant. Train

No. 274 was standing on this same track and might arrive at Madison

at any moment. Train No. 274 remained in that position for 30 or

40 minutes. It had certainly stopped under circumstances in which it might be overtaken by another train and therefore it was the duty of Cooper, the brakeman, in the first instance, to go back and place the night signals. He did not do so. Under the circumstances of this case it was the duty of the conductor, under Rule 99, to see that the night signals were placed, and he failed in this regard. He was responsible for the protection of his train, but he seems to have taken no precaution to guard the rear of it. The argument of plaintiff that if the lights or other precautionary signals had been placed it would not have availed to prevent the collision for the reason that the engineer of No. 40 had clearly shown by his conduct that he was not observing signals or rules at the time and place in question, is not persuasive. We would not be warranted in so assuming, and, moreover, the fact that the engineer of No. 40 was guilty of gross negligence would not excuse the negligence of the deceased.

The jury returned the following verdict: "We, the jury, find the defendant, Elgin, Joliet & Eastern Railway Co., a corporation, guilty and assess the plaintiff's damages in the sum of THIRTY-FIVE THOUSAND FIVE HUNDRED DOLLARS (\$35,500); and of this amount we assess the damage sustained by Maude W. Brown, widow of said Roy W. Brown, deceased, in the sum of TWENTY-FIVE THOUSAND FIVE HUNDRED DOLLARS (\$25,500); and of this amount we assess the damage sustained by Betty Elizabeth Brown, daughter of said Roy W. Brown, deceased, in the sum of TEN THOUSAND DOLLARS (\$10,000)." The court, at the instance of plaintiff, gave the following instruction:

"The jury are instructed that if from a preponderance of the evidence and under the instructions of the court you find the defendant guilty, as charged in plaintiff's declaration or any count thereof, then in assessing the plaintiff's damages, if any, the jury are instructed that they should first determine the total amount of plaintiff's damages, if any; that after said total amount, if any, has



to minutes. It had certainly stopped under circumstances in which it might be expected by another train and therefore it was the only of its kind, the first, in the first instance, to go back and place the night signals. He did not do so. Under the circumstances of this case it was the duty of the defendant, under Rule 97, to see that the night signals were placed, and he failed in this regard. He was responsible for the protection of his train, but he seems to have taken no precaution to insure the protection of it. The argument of plaintiff is that if the lights or other precautionary signals had been placed it would not have resulted in the collision for the reason that the defendant at No. 40 had clearly shown by his conduct that he was not observing signals or rules of the line and place in collision, in his negligence. He would not be warranted in so assuming, and, moreover, the fact that the engineer of No. 40 was guilty of great negligence would not excuse the negligence of the defendant.

The jury returned the following verdict: "We, the jury,

find the defendant, James A. Brown, guilty of a corporation,

guilty and assess the plaintiff's damages in the sum of THIRTY-FIVE

DOLLARS (\$35.00) and of this amount we assess

the damages sustained by James A. Brown, widow of said Ray W. Brown,

deceased, in the sum of THIRTY-FIVE DOLLARS (\$35.00).

(and of this amount we assess the damages sustained by Betty

Elizabeth Brown, daughter of said Ray W. Brown, deceased, in the sum

of TWO THOUSAND DOLLARS (\$2,000.00). The court, at the instance of

plaintiff, gave the following instruction:

"The jury are instructed that it is a presumption of the evidence and under the instructions of the court that find the defendant guilty, an attempt to establish the negligence of any other person, but in assessing the plaintiff's damages, if any, the jury are instructed that they should first determine the total amount of plaintiff's damages, if any; that after said total amount, if any, has

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been determined that then you are instructed that you are to apportion said amount between the widow and daughter of said Roy W. Brown; that in apportioning said total sum, if any, you should determine what part of said sum, if any, that Loude W. Brown, widow of said Roy W. Brown, is entitled to receive under the evidence and the instructions of the court; that you should also determine what part of said sum, if any, Betty Elizabeth Brown, daughter of said Roy W. Brown, is entitled to receive, if any, under the evidence and instructions of the court."

Defendant contends that the part of the instruction in which the jury are told to apportion the amount of the damages found between the widow and daughter of the deceased was not warranted by the Federal Employers' Liability Act. Apportionment by a jury was apparently warranted by what was said in Gulf, Colorado & Santa Fe Ry. Co. v. McGinnis, 228 U. S. 173, 176, and several other federal cases, but in the later case of Central Vermont Ry. Co. v. White, 238 U. S. 507,<sup>supra</sup> it was held that the act does not require the jury to make an apportionment and that apportionment is for probate courts and not for jurors. However, in this case, that part of the verdict in which the jury apportioned the damages may be treated as surplusage. If the total amount awarded in a case is warranted by the facts and the law it is, of course, no concern of a defendant how the amount awarded is distributed.

Defendant next contends that "the reference by the instruction to 'plaintiff's declaration or any count thereof' has been repeatedly criticized by our courts." It may be conceded that the language in question, especially when given in peremptory instructions, has been criticized in certain decisions, but no case has been called to our attention in which such language in an instruction, in and of itself, has been held to constitute reversible error. The instruction in question was not a peremptory one and it referred merely to the question of damages. Numerous cases might be cited in which instructions containing similar language were either approved or the giving of the same was held not to constitute reversible







error. Defendant further contends that the instant instruction "omitted any reference to the contributory negligence of the decedent diminishing damages," and directs our attention to that part of the Federal Employers' Liability Act which provides that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." While it is true that the instruction is susceptible to the criticism made, nevertheless, plaintiff's instructions numbers three and eight and defendant's instruction number three fully covered the question of the effect of contributory negligence. Moreover, the present point is not important, in view of the action taken by us in the matter of the amount of damages awarded by the jury.

Defendant next contends that the court erred in refusing to permit two witnesses to testify what Brown's duties were under Rule 99 and that the court "on every occasion when the defendant sought to present to the jury the duties of Brown, in accordance with the observance of Rule 99 which was applicable to the facts, the trial court denied the admission of such evidence." The language of Rule 99 is plain and unambiguous. The questions, in effect, called upon the witnesses to construe the plain rule and to give their judgment as to what were Brown's duties, under Rule 99, at the time and place in question. Counsel has not cited a single case that supports its instant contention. Moreover, the present contention becomes unimportant in view of the fact that we have held that Brown was guilty of contributory negligence.

Defendant contends that the court erred in admitting in evidence Rule 93 and that its admission "probably misled the jury." We find no merit in the contention.

error. Below and further contains that the instant instruction  
"admitted any reference to the contributory negligence of the  
deceased diminishing damages," and directed  
that part of the Federal Highway, liability of which provision  
that "the fact that the employee may have been guilty of contributory  
negligence shall not bar a recovery, but the amount shall be  
diminished by the jury in proportion to the amount of negligence  
attributable to such employee." While it is true that the instruction  
is susceptible to the stated uses, nevertheless, Plaintiff's  
instruction number three and eight and defendant's instruction  
number three fail to cover the question of the effect of contributory  
negligence. Moreover, the present point is not important, in view  
of the action taken by us in the matter of the amount of damages  
awarded by the jury.

Defendant next contends that the court erred in refusing  
to permit the witness to testify that Brown's action was under  
Rule 92 and that the words "on every occasion when the defendant  
sought to prevent the jury the action of Brown, in accordance  
with the substance of Rule 92 which was applicable to the facts,  
the trial court denied the admission of such evidence." The  
language of Rule 92 is plain and unambiguous. The question, in  
effect, relied upon the witness to construe the plain rule and  
to give their judgment as to what were Brown's duties, under Rule  
92, at the time and place in question. Counsel has not cited a  
single case that supports the instant contention. Moreover, the  
present contention becomes unimportant in view of the fact that we  
have said that Brown was guilty of contributory negligence.

Defendant contends that the court erred in admitting in  
evidence the fact that the admission "probably misled the jury."

It is not in the contention.



During the examination of Mitchell, the following occurred: Mr. Patterson (counsel for plaintiff): You heard the engineer, Berglund, say something about that block signal, didn't you? A. Yes sir. Mr. Earlywine (counsel for defendant): I object to that, immaterial, at this time. The Court: Objection overruled. The answer may stand. Mr. Patterson: What if anything was done then in regard to the movement of the engine and train at that time when you heard him make this remark? A. He yelled out 'Red block signal.' Mr. Earlywine: I move the answer be stricken, not responsive. Mr. Patterson: It is not responsive. I will agree to that. The Court: Well the only person that can avail himself of that is the attorney who is asking the question. Mr. Patterson could have it stricken because it is not responsive, but I understand not the other side. Objection overruled." Defendant contends that the court erred in denying his motion to strike the answer. There is no merit in this contention. The sole objection to the answer was that it was not responsive and even when the court called the attention of the counsel to the nature of his objection he failed to change it. Moreover, counsel for defendant brought out the same fact on cross-examination of the witness. It also appears from the evidence that there was a rule of the company that when one man in the engine called out "Signal block," and the color of the same, it was the duty of the other member of the engine crew to look for the light and when he saw it, answer, "Red block," or "Green block," as the case might be. As defendant has several times conceded, in his brief, that the engineer, as he approached block signal No. 944, saw it was red, it is apparent that the present contention has no real merit.

Defendant contends that "the verdict of the jury is excessive." If the deceased had not been guilty of contributory





negligence we would not be able to sustain this contention. The deceased was 46 years of age, his widow was 49 years of age, and his adopted daughter 12 years of age. His average annual earnings were approximately \$2,500, which were used for the support of himself, his widow and daughter. We are satisfied that the amount allowed by the jury was based upon the assumption that the deceased was not guilty of contributory negligence. We have heretofore, in this opinion, held to the contrary. The Act provides that "the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." After a very careful consideration of the question, we have reached the conclusion that the amount awarded should be diminished to the extent of \$15,500 because of the contributory negligence of the deceased. Therefore, if within ten days plaintiff will file in this court a remittitur of \$15,500, the judgment of the City Court of Chicago Heights, Cook County, Illinois, against defendant, will be affirmed for \$20,000, otherwise the judgment will be reversed and the cause remanded for a new trial.

AFFIRMED FOR \$20,000 UPON REMITTITUR;  
OTHERWISE REVERSED AND REMANDED.

Gridley and Barnes, JJ., concur.

testimony we would not be able to sustain this contention. The deceased was 48 years of age, his widow was 49 years of age, and his oldest daughter 13 years of age. His average annual earnings were approximately \$2,400, which was the sum of his net, his wife and daughter. It was admitted that the deceased allowed by the jury was based upon the assumption that the deceased was not fully of conscientious negligence. We have previously in this opinion, held to the contrary. The act provides that "the damages shall be divided by the jury in proportion to the amount of negligence attributable to each employee." After a very careful consideration of the question, we have reached the conclusion that the amount which should be awarded to the estate of E. J. McNamee, because of the contributory negligence of the deceased, is \$10,000. It is the duty of the plaintiff to file in this court a verified bill of particulars of the loss of the deceased, which, under the act, is required, and the judgment will be reversed and the cause remanded for a new trial.

REVEREND JUDGE OF THE COURT OF APPEALS, CHICAGO, ILLINOIS.  
 JUSTICE OF THE PEACE, CHICAGO, ILLINOIS.

Galley and Bower, J. J., counsel.



34086

JOHN E. ERICKSON,  
Appellant,

v.

FRANK J. O'DONNELL  
and MARY V. O'DONNELL,  
Appellees.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

250 I.A. 629<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John E. Erickson, plaintiff, sued Frank J. O'Donnell and Mary V. O'Donnell, defendants, in the Municipal Court of Chicago in an action on contract. A jury was waived and the cause was submitted to the court. The court found the issues against the plaintiff and entered judgment in favor of the defendants. Plaintiff has appealed.

Plaintiff sued to recover upon a judgment note, in the sum of \$1,160.60, executed by the defendants, dated September 26, 1927, and payable on or before one month after the date of the execution of the same. The note was made payable to the order of Richard M. Johnson, who indorsed it in blank. The plaintiff, a brother-in-law of Johnson, claimed that he became the holder of the note before its maturity, that he took it in good faith and for value and that at the time it was negotiated to him by Johnson he had no notice of any infirmity in the instrument. The defendants admitted the execution of the note but they pleaded that no consideration passed between Johnson and them; that the note was executed at the request of Johnson and solely for his accommodation and upon his statement and promise that he required the note for his own use and would discount the same and upon maturity of the note

JOHN F. JOHNSON  
Plaintiff

vs.  
JOHN F. JOHNSON  
and JOHN F. JOHNSON  
Defendants

THIS CASE ORIGINATED IN THE

COURT OF

25 11. 69

JOHN F. JOHNSON, Plaintiff, vs. JOHN F. JOHNSON, Defendant.

JOHN F. JOHNSON, Plaintiff, vs. JOHN F. JOHNSON, Defendant. In the foregoing case, the Plaintiff has filed a motion for summary judgment. The motion is based upon the fact that the Defendant has failed to file a responsive pleading. The Plaintiff has also filed a motion for summary judgment. The motion is based upon the fact that the Defendant has failed to file a responsive pleading. The Plaintiff has also filed a motion for summary judgment. The motion is based upon the fact that the Defendant has failed to file a responsive pleading.

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he would pay it; that the said Johnson retained possession of the note until after maturity thereof and that thereafter he indorsed the same to the plaintiff; that plaintiff is the attorney for Johnson and did not pay any consideration for the note and acquired the same after maturity and with notice of the fact that no consideration passed between Johnson and the defendants; that at the time of the execution of the note Johnson promised and agreed upon the maturity thereof to return the note cancelled to the defendants and that he has wholly failed to do so.

Plaintiff contends that the evidence clearly proves that he was a holder in due course and that he became the holder of the instrument before its maturity, that he took it in good faith and for value, and that at the time it was negotiated to him by Johnson he had no notice of any infirmity in the instrument. The trial court found that plaintiff became the holder of the instrument after the maturity of the same, and we would not be justified, under the evidence in this record in holding to the contrary. However, we have reached the conclusion that justice between the parties requires a retrial of the cause, for the reason that we are not satisfied with the state of the record as to the defenses that there was no consideration for the note by the defendants and that they were mere accommodation makers of it. As the case may be tried again we refrain from analyzing and commenting upon the facts and circumstances that have caused us to reach this conclusion.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Barnes, JJ., concur.



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THE WITNESS

34113

ELKAN BERGER,  
Appellee,

v.

LINUS EWALD RÖDER,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 629<sup>3</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Linus Ewald Röder, defendant, prayed an appeal from a judgment entered against him in a first class case in the Municipal Court of Chicago, confirming a judgment by confession in favor of Elkan Berger, plaintiff, and against him, for \$3,338. The case was tried before the court, with a jury.

The statement of claim and cognovit allege that the claim is for money due upon a certain promissory note, executed by defendant, in the sum of \$2,500, dated December 4, 1922, payable on demand to the order of Swanson & House; that it was indorsed for value received before maturity to J. Edwin Anderson, and by him for value received indorsed, sold and delivered before maturity to plaintiff; that plaintiff is the legal holder in due course of the same and that there is due upon the note in principal, interest and attorneys' fees the sum of \$3,283. Defendant filed his motion to vacate and set aside the judgment, and in support of the same filed a sworn petition in which he stated (inter alia) that he did not execute or deliver the note in question, that he did not owe Swanson & House \$2,500 on December 4, 1922, or any other date, and that he did not authorize anyone to execute the said note for him. Thereupon the judgment was opened and leave was granted defendant to appear and defend, the petition to stand as his affidavit of merits. Plaintiff's theory of fact is, in part, that there was a written contract for the exchange of real estate entered into on November 7,

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John Warner, President, and Eugene M. Smith, Secretary, The Warrenton Club, Warrenton, Ore.

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1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.



1922, between one J. Edwin Anderson and defendant; that Swanson & House, the payees of the note, who were real estate brokers, had brought the parties to the contract together; that the deal was never consummated because defendant refused to perform his part of the contract; that the contract contained the following clauses: "Each of said parties have executed a note for \$2500.00, payable to Swanson & House, to be held for the mutual benefit of the parties and to insure good faith. If either of said parties refuse to proceed with this agreement, the other shall on demand receive the note of party so refusing from Swanson & House, and shall be entitled to collect the same as liquidated damages for the breach of this contract;" "It is Further Mutually Agreed, That brokerage fees or commissions shall be paid to Swanson & House \$2500.00 by the respective parties hereto as heretofore agreed between them and said broker," and that the note of defendant was given in accordance with the requirement of the escrow clause. At the time that plaintiff claims to have received the note, it bore, on the reverse side, the following indorsements: "Pay to the order of J. Edwin Anderson without recourse Swanson and House Pay to the order of Elkan Berger without recourse J. Edwin Anderson." Swanson, a witness for plaintiff and a member of the firm of Swanson & House, testified that when the deal was not consummated he indorsed the note to J. Edwin Anderson and gave it to him, and that Anderson thereupon gave it back to him "for my commission which I was entitled to in the deal;" that he thereupon cancelled a note of Anderson for \$2,500 which he held; that he (Swanson) kept the note of defendant for some time and that as he owed a large bill to plaintiff, his lawyer, who was pressing him for the money, he finally told plaintiff that he had the note and would give it to him in payment of the bill, and that he "then signed the note, indorsed it and gave it to Berger."

1922, between one J. Edwin Anderson and defendant; that defendant  
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 ceed with this agreement, the other shall on demand receive the note  
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 collect the same as liquidated damages for the breach of this con-  
 tract." It is further mutually agreed, that should one of the  
 companies shall be paid to Swanson & House \$2500.00 by the respective  
 parties hereto as heretofore agreed between them and said broker,  
 and that the note of defendant was given in accordance with the re-  
 quirement of the above clause, at the time that plaintiff claims  
 to have received the note, it bore, on the reverse side, the following  
 indorsements: "Pay to the order of J. Edwin Anderson without re-  
 course Swanson and House. Pay to the order of John Hager without  
 recourse J. Edwin Anderson." Swanson, a witness for plaintiff and  
 a member of the firm of Swanson & House, testified that when the deal  
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 bill to plaintiff, his lawyer, who was pressing him for the money, he  
 finally said plaintiff that he had the note and would give it to him  
 in payment of the bill, and that he then signed the note, indorsed  
 it and gave it to Hager."



It was the theory of plaintiff that the alleged note of defendant was given to Swanson & House in accordance with the escrow clause in the alleged contract between Anderson and defendant, and Swanson, in his testimony, justified his delivery of the note to Anderson upon the ground that the escrow clause empowered him to do so when defendant refused to consummate the deal. There is no evidence that Anderson was ready, able and willing to go on with the contract or that a forfeiture of the contract was ever declared by him or anyone acting for him, and there is no proof that defendant wilfully and without any legal justification refused to go on with the contract. The undisputed evidence is that defendant refused to exchange properties with Anderson on the ground that he had discovered that fraudulent misrepresentations had been made to him concerning the leases upon the Anderson property. If it be assumed that defendant signed the note and also signed the contract, and in its present form, nevertheless, it could not be reasonably argued that merely because defendant refused to consummate the deal contemplated by the contract, and regardless of the nature of the reasons he assigned for so doing, that Swanson was given the arbitrary power by the escrow clause to indorse the note and deliver it to Anderson and that the latter thereby acquired full right and title to the same. We are satisfied, from the facts and circumstances in the case, that the negotiation of the note by Swanson was entirely unwarranted and was such a breach of faith as amounted to a fraud upon defendant. That the negotiating of the note by Swanson amounted to a fraud upon defendant is not seriously questioned by plaintiff. In fact, during the examination of Swanson, plaintiff, a lawyer, who was represented in the trial by counsel, arose and stated to the court that "either Mr. Swanson or somebody committed a fraud," but that he was an innocent purchaser of the note. Defendant testified that he never signed or delivered the note in question, and, while



It was the theory of plaintiff that the alleged note of defendant was given to Swanson a house in accordance with the agreement in the alleged contract between Swanson and defendant. In his testimony, plaintiff testified that the note was given to Swanson upon the ground that the note was empowered him to do so when defendant returned to consummate the deal. There is no evidence that Swanson was ready, able and willing to go on with the contract or that a termination of the contract was ever decided by him or anyone acting for him, and there is no proof that defendant willfully and without any legal justification refused to go on with the contract. The undisputed evidence is that defendant returned to consummate the contract with Swanson on the ground that he had discovered that defendant's misrepresentation had been made to him concerning the issues upon the Anderson property. If it be assumed that defendant signed the note and also signed the contract, and in the process form, nevertheless, it could not be reasonably argued that merely because defendant refused to consummate the deal contemplated by the contract, and regardless of the nature of the reasons he assigned for so doing, that Swanson was given the arbitrary power by the contract clause to insert the note and deliver it to Anderson and that the latter thereby acquired full title and title to the same. We are satisfied, from the facts and circumstances in the case, that the negotiation of the note by Swanson was entirely unwarranted and was such a breach of faith as amounted to a fraud upon defendant. That the negotiation of the note by Swanson amounted to a fraud upon defendant is not seriously questioned by plaintiff. In fact, during the examination of Swanson, plaintiff, a lawyer, who was represented in the trial by counsel, arose and stated to the court that "either Mr. Swanson or somebody committed a fraud," but that he was an innocent purchaser of the note. Defendant testified that he never signed or delivered the note in question, and, while

plaintiff introduced evidence to the contrary, it must be noted that the escrow clause states that "each of said parties have executed a note for \$2500.00, payable to Swanson & House," and the note sued upon is dated December 4, 1922, while the contract is dated November 7, 1922. Swanson testified that defendant signed the note and delivered it to him on December 4, 1922, but in another part of his testimony he stated that he received it back from Anderson two or three weeks after the making of the contract. Plaintiff's statement of claim states that, for value received, Anderson sold and delivered to him, before maturity, the note. Anderson was not produced as a witness. Both plaintiff and Swanson testified that the note was sold and delivered to plaintiff by Swanson in payment of a bill that plaintiff had against Swanson for legal services. It is significant that while Swanson testified that Anderson gave him back the note on account of commissions due Swanson & House, that Anderson did not indorse the note back to Swanson & House and the latter did not indorse the note to plaintiff, but Anderson, who had no business dealings with plaintiff, indorsed the note to the latter.

Section 59 of the Negotiable Instruments Act provides that every holder of a negotiable instrument is prima facie to be deemed a holder in due course, but that when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some other person under whom he claims acquired the title as a holder in due course, and Section 52 provides that a holder in due course is one who has taken the instrument in good faith and for value and who at the time it was negotiated to him had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Defendant contends that plaintiff is not a holder in due course of the note. Plaintiff contends that defendant cannot raise this question



plaintiff introduced evidence to the contrary, it was not held that the answer charges states that "each of said parties have executed a note for \$2500.00, payable to Johnson & House," and the note each upon its face recites, "I, J. H. Johnson, do hereby certify that I have received of the plaintiff the sum of \$2500.00, payable to Johnson & House, and in payment of the debt due to the plaintiff from the plaintiff's account with the plaintiff." The note and delivered it to him on December 4, 1924, but in another part of his testimony he stated that he received it from the plaintiff two or three weeks after the making of the contract. Plaintiff's statement of claim states that, for value received, Johnson sold and delivered to him, before maturity, the note. Johnson was not produced as a witness. Both plaintiff and Johnson testified that the note was sold and delivered to plaintiff by Johnson in payment of a bill that plaintiff had against Johnson for legal services. It is admitted that while Johnson testified that Johnson gave him back the note on account of commission the Johnson & House, that Johnson did not introduce the note back to Johnson & House and the latter did not introduce the note to plaintiff, but Johnson, who had no business dealing with plaintiff, introduced the note to the latter.

Section 52 of the Negotiable Instruments Act provides that every holder of a negotiable instrument is prima facie to be deemed a holder in due course, but that when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some other person prior to him was a holder in due course in due course, and that when he cannot establish the title as a holder in due course, and Section 52 provides that a holder in due course is one who has taken the instrument in good faith and for value and who at the time it was negotiated to him had no notice of any defect in the instrument or defect in the title of the person negotiating it.

Defendant contends that plaintiff is not a holder in due course of the note. Plaintiff contends that defendant cannot raise this question



for the reason that by the rules of the Municipal Court of Chicago all material allegations in the statement of claim not specifically denied by defendant in his affidavit of merits stand admitted and that plaintiff in his affidavit of claim alleged that for value received the note was indorsed, sold and delivered to plaintiff by Anderson before the maturity of the note and that plaintiff is the legal holder in due course of the same, that defendant did not make any denial of these material allegations in his affidavit of merits and that therefore these allegations stand admitted by defendant. It is a sufficient answer to this contention to say that both parties tried the case upon the theory that the question as to whether or not plaintiff was a holder in due course, was an issue in the cause. Plaintiff introduced evidence to prove he was a holder in due course and he insisted that the trial court should allow the parties to go into this question fully. Counsel for plaintiff stated to the court that defendant, in his affidavit of merits, had stated that plaintiff was not a bona fide purchaser and therefore plaintiff had a right to go fully into the circumstances under which he became the holder of the note, and the trial court allowed him to do so. At one stage of the trial the court stated that both sides had gone into the entire transaction to such an extent that he was of the opinion that it would be well to have the whole transaction gone into, to which plaintiff responded, "as a matter of fairness to all parties here." Counsel for plaintiff and defendant both expressed satisfaction with this position of the court. Under the record plaintiff is in no position to urge his present contention.

We have considered with great care all the facts and circumstances bearing upon the question as to whether or not plaintiff was a holder in due course of the note and we are satisfied that the weight of the evidence sustains the contention of defendant that he was not. As this case may be tried again we refrain from stating and commenting

For the reason that by the rules of the National Bar Association all material allegations in the statement of claims are specifically denied by defendant in his affidavit of denial, and it is alleged that plaintiff received the note was introduced, said note delivered to plaintiff by defendant before the maturity of the note and that plaintiff is the legal holder in due course of the note, that defendant did not make any denial of these material allegations in his affidavit of denial, and that therefore these allegations stand admitted by all parties, it is a sufficient answer to the contention of the defendant that he is not the owner of the note, that the question as to whether or not plaintiff was a holder in due course, was not in issue.

Plaintiff introduced evidence to prove he was a holder in due course and he insisted that the trial court should allow the parties to go into this question fully. Counsel for defendant stated to the court that defendant, in his affidavit of denial, had stated that plaintiff was not a bona fide purchaser and therefore plaintiff had a right to go fully into the circumstances under which he became the holder of the note, and the trial court allowed him to do so. At one stage of the trial the court asked that both sides had gone into the entire transaction to such an extent that he was of the opinion that it would be well to have the whole transaction come up, so which plaintiff responded, "as a matter of fairness to all parties here." Counsel for plaintiff and defendant both expressed satisfaction with this position of the court. When the record plaintiff is in no position to urge his present contention.

We have considered with great care all the facts and circumstances bearing upon the question as to whether or not plaintiff was a holder in due course of the note and we are satisfied that the weight of the evidence sustains the contention of defendant that he was not, as this case may be tried again we refrain from stating and commenting



upon the facts and circumstances that have forced us to this conclusion.

We are also satisfied that there is merit in the contention of defendant that he was denied a fair trial by prejudicial conduct of the trial court and plaintiff. During the examination in chief of defendant, counsel for plaintiff objected to a certain question on the ground that it was leading in form, to which objection the court replied: "Well, he isn't as intelligent as the others, and we will have to allow something for that." Later in the same examination counsel for plaintiff moved that certain evidence be stricken as not the best evidence, to which the court replied: "I tell you, I want to allow him the latitude. This fellow doesn't seem to have the intelligent -- doesn't seem to have the intelligence that your witnesses seemed to have, and -- Mr. Verhoeven (counsel for defendant): I object to the remarks of the court. The Court: What remarks did I make? That he hasn't the intelligence of the others? If you think he has, go ahead. I will hold you to the rules of evidence. Mr. Verhoeven: Now, then, I desire to take exception to the remarks of the court." During the examination of Swanson plaintiff arose and said: "As a matter of fairness to all parties here, I am an officer of this Court. He said that there was a settlement made here by the defendant, and that he didn't sign the note. Counsel has opened the door and I want everything gone into. I am an innocent party here, and either Mr. Swanson or somebody committed a fraud. I want the Court to take cognizance of the testimony here, and go into the matter fully. I don't know who it is, either Swanson or Roder, but I am an innocent purchaser of this instrument, your Honor. The Court: Say, counsel, this is wholly improper. Mr. Verhoeven: I ask for a mistrial, if the Court please. \* \* \* Mr. Berger: I am the plaintiff. The Court: Now listen, you have counsel here, and the statement by the plaintiff,



upon the facts and circumstances that have been set out in this case-  
 vision.  
 a fact which is stated in the evidence  
 of testimony that was given at the trial by the individual concerned  
 of the trial court and the jury. The jury has been instructed in this  
 of testimony. I am not going to object to a certain question on  
 the ground that it was leading in fact, it was leading in fact, it was  
 replied: "All right, the fact is that the fact is that the fact is that  
 have to allow something for that." I am not going to object to a certain  
 counsel for the plaintiff moves that certain evidence be excluded as not  
 the fact is that, as stated in the case, the fact is that, I am not  
 to allow him the fact is that. This fact is that the fact is that the  
 intelligent -- I am not going to have the fact is that the fact is that  
 witness seems to have, and -- Mr. Verboven (counsel for defendant):  
 I object to the wording of the question. The Court: That is correct.  
 of it is that the fact is that the fact is that the fact is that the  
 think he has, go ahead. I will take you to the fact is that the fact is that  
 Mr. Verboven: Now, then, I desire to take exception to the wording  
 of the question. During the examination of the witness, the fact is that  
 said: "I am not going to take exception to the fact is that the fact is that  
 of this fact. He said that there was a statement made here by the  
 defendant, and that he didn't sign the note. Counsel has opened the  
 door and I want everything gone into. I am an innocent party here.  
 and either Mr. Verboven or somebody committed a fraud. I want the Court  
 to take exception to the fact is that the fact is that the fact is that  
 I don't know who it is, either Verboven or the fact is that the fact is that  
 purchase of this instrument, your Honor. The Court: Yes, counsel.  
 this is really important. Mr. Verboven: I am not a mistake. It  
 the fact is that. \* \* \* Mr. Verboven: I am the plaintiff. The Court:  
 Now listen, you have counsel here, and the statement by the plaintiff,

who is a lawyer, may be disregarded, gentlemen. Let this counsel -- we don't want you to make speeches at this hearing. You can testify if you want to."

We are satisfied that justice requires a retrial of this case. The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Barnes, JJ., concur.

-- who is a lawyer, may be designated, mentioned. In this council --  
we don't want you to make speeches at this meeting. You can testify

if you want to."

So one suggestion that I made regarding a revival of this  
movement. The judgment of the Municipal Board of Chicago is reversed  
and the case is remanded for a new trial.

THE CHICAGO TRIBUNE.

Chicago, Ill., January 11, 1911.



34122

DENNIS J. EGAN, for use of  
ATCHISON, TOPEKA and SANTA FE  
RAILWAY CO., a corporation,  
Appellee,

v.

A. M. GERBER and ISAAC WARD,  
Appellants.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

252 I.A. 630

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The appellants appeal from a judgment entered against them in the Municipal Court of Chicago on a trial without a jury. The action was in debt and arose out of a replevin bond signed by appellant Gerber as principal and appellant Ward as surety. From the statement of claim it appears that Gerber sued out of the said court a writ of replevin against the City of Chicago et al. for the recovery of certain goods; that appellee Egan, former bailiff of said court, under the writ, replevied and made delivery of the goods and chattels to said Gerber; that on July 30, 1925, the said court adjudged that Gerber should take nothing by his writ, that the property in the said goods was in the City of Chicago et al. and that Gerber should return the goods to them; that Gerber did not make a return of the goods or any part thereof, but has refused and still refuses so to do. In the affidavit of merits of Gerber he states that on October 2, 1924, in said replevin case, his writ of replevin was sustained by the court and that an order to that effect was entered by the court, that the court was without jurisdiction to enter the order of July 30, 1925, and that the order was therefore null and void and of no effect. The affidavit of merits

3410

PAUL J. WALKER, for one of  
Attorneys, for one of  
Attorneys, for one of  
Attorneys, for one of

PAUL J. WALKER, for one of

Attorneys, for one of

A. M. GORDON and IRVING WARD,  
Appellants.

25-11-630

THE FOLLOWING IS THE VERDICT OF THE COURT:

The appellee signed from a judgment entered against him  
in the Municipal Court of Chicago on a trial without a jury. The  
action was in debt and arose out of a reprieve bond signed by  
appellee Gordon as principal and appellant Ward as surety. From  
the statement of claim it appears that Gordon owed one of the said  
counts a writ of reprieve against the City of Chicago et al. for the  
recovery of certain goods; that appellee Ward, former partner of  
said count, under the writ, reprieved and made delivery of the goods  
and chattels to said Gordon; that on July 30, 1925, the said count  
alleged that Gordon caused him to receive by his wife, that the  
property in the said goods was in the City of Chicago et al. and  
that Gordon should return the goods to them; that Gordon did not  
make a return of the goods or any part thereof, but has returned  
and still refuses to do so. He has admitted at trial of Gordon  
he states that on December 2, 1924, he said reprieve owner, his wife  
of reprieve was maintained by the count and that an order to that  
effect was entered by the court, that the count was placed in  
default to enter the order of July 30, 1925, and that the count was  
therefore null and void and of no effect. The affidavits of motion



of appellant Ward is to the same effect.

The major contention of appellants is that "the finding of October 2, 1924, was the only legal, valid and subsisting order," and that the court was without jurisdiction to enter the order of July 30, 1925, and therefore the plaintiff in the replevin suit prosecuted his suit successfully and appellants were absolved from the bond. We find no merit in this contention. Par. 505, Ch. 37, Cahill's Ill. Rev. Stat., 1929 (p. 391), provides that "every judgment, order or decree of said (Municipal) court final in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a Circuit Court during the term at which the same was rendered in such Circuit Court; provided, a motion to vacate, set aside or modify the same be entered in said Municipal Court within thirty days after the entry of such judgment, order or decree." The record in the replevin suit shows that on October 31, 1924, a motion to vacate the judgment of October 2, 1924, was filed by the defendants in that suit and that the hearing of said motion was postponed until November 19, 1924; that the hearing of the motion was postponed a number of times; that on April 24, 1925, it was continued generally, by agreement; that on July 29, 1925, the defendants in that case served notice upon the plaintiff (Gerber) that on July 30, 1925, they would call up for hearing the motion to vacate and that on July 30, 1925, the court vacated and set aside the judgment order of October 2, 1924, and entered a judgment, in the usual form, for the defendants in said suit. It further appears that on March 20, 1926, Gerber filed, in the replevin suit, a sworn petition in which he prayed the court to expunge from its records the order of July 30, 1925, on the ground that the judgment of October 2, 1924, was the only valid judgment in the case and that no writ of error or appeal had been prosecuted from



of appellants' bond is to the same effect.

The major contention of appellants is that "the finding of October 2, 1934, was the only legal, valid and binding order," and that the court was without jurisdiction to enter the order of July 22, 1935, and therefore the plaintiff in the present case prosecuted his suit successfully and appellants were relieved from the bond. As this is made in this contention, the court in Cabell's Ill. Rev. Stat., 1933, (p. 831), provides that "every judgment, order or decree of said (Hennepin) court shall in its nature shall be subject to be vacated, set aside or modified in the same manner and to the same extent as a judgment, order or decree of a circuit court during the term at which the same was rendered in such circuit court; provided, a motion to vacate, set aside or modify the same be entered in said Hennepin court within thirty days after the entry of such judgment, order or decree." The record in the present case shows that on October 2, 1934, a motion to vacate the judgment of October 2, 1934, was filed by the defendants in that suit and that the hearing of said motion was postponed until November 19, 1934; that the hearing of the motion was postponed a number of times; that on April 24, 1935, it was continued generally, by agreement; that on July 22, 1935, the defendants in that case served notice upon the plaintiff (Hennepin) that on July 30, 1935, they would call up for hearing the motion to vacate and that on July 30, 1935, the court vacated and set aside the judgment order of October 2, 1934, and entered a judgment in the usual form, for the defendants in said case. It further appears that on March 2, 1935, the court filed, in the register said, a sworn petition in which he prayed the court to expunge from its records the order of July 22, 1935, on the ground that the judgment of October 2, 1934, was the only valid judgment in the case and that no writ of error or appeal had been prosecuted from

the same. In the petition he stated that on July 30, 1925, he was confined in the Fort Leavenworth penitentiary and had no knowledge or information of the court proceedings held on that date. On April 30, 1926, this motion of Gerber was denied. The motion to vacate the order of October 2, 1924, was filed within thirty days after the entry of said judgment and the mere fact that the said motion was not determined until July 30, 1925, did not in any way deprive the court of jurisdiction to determine the said motion on the last mentioned date. It has been frequently held in this state as to courts that have regular terms that motions which are undisposed of at the end of the term are continued from term to term by operation of law without a formal entry by the court. In fact, the statute (Par. 102, Ch. 37, Cahill's Ill. Rev. Stat., 1929, p. 839) so provides. (See also The People v. Noonan, 276 Ill. 430, 437; Miller v. Miller, 219 Ill. App. 212.) While it is true that the Municipal Court has no stated terms of court, a period of thirty days is substituted by the Municipal Court Act in which a party may move to vacate a judgment, and where this procedure is followed the judgment does not become final until the matter is disposed of. (See Hosking v. Southern Pacific Co., 243 Ill. 320; Grubb v. Milan, 249 Ill. 456, 460.) Par. 407, Ch. 37, Cahill's Ill. Rev. Stat., 1929 (p. 869), provides that "the practice in the municipal court shall be the same, as near as may be, as that which may from time to time be prescribed by law for similar suits or proceedings in circuit courts."

"The appellants contend that the plaintiff in the original suit prosecuted his suit to effect and without delay and that the appellant Ward, the surety, was thereby released from the bond. This contention is necessarily based upon the assumption that the judgment order of October 2, 1924, was final so far as the surety, Ward, was concerned. There is no merit in this contention. The appeal bond







was conditioned to the effect that if the appellant did not prosecute his appeal to effect, and make his plea good, the surety was to be liable.

"The words of the recognizance, taken in their established popular meaning, are clear and unambiguous. The bond was broken, if the appellant did not prosecute his appeal to effect, and make his plea good. The word plea, as used, is obviously commensurate with the term defense; in converting the negative stipulation into its correspondent affirmative, it necessarily comprises this position; that the appellant shall effectually prosecute his appeal. In other words, that at the final termination of the controversy between the parties, he shall be successful in his defense; - not that at some period of the contest, he shall obtain a judgment, erroneously and against the merits of his case, which shall appear to be final, in the strict sense of the term, but that ultimately his defense shall be crowned with success. \* \* \*

A recognizance suspended on the condition, that the appellant should prosecute his suit to a temporary effect, and that, at some period of the cause, he should erroneously obtain a final judgment in his favor, that would not be the ultimate termination of it, would almost seem ludicrous. \* \* \* And that a judgment rendered for the appellant, and afterwards set aside for error because it never ought to have been rendered; that this nullity in law, which was always unjust, and against the merits of the case, should be followed up, by stripping the injured plaintiff of his security, and giving an important benefit to the appellant, is peculiarly unfounded. Not less strange does it appear, that a recognizance to secure the plaintiff his costs, should be suspended, by the parties, on an event, to happen in the midst of their controversy; and not at its termination." (Lockwood v. Jones, 7 Conn. 431.)

The replevin suit was not ultimately and finally determined until the entry of the judgment order on July 30, 1925. (See Hosking v. Southern Pacific Co. and Grubb v. Milan, supra.) There is no merit in the argument of the appellants that Ward, the surety, was prejudiced by the delay in passing upon the motion to vacate. He was a brother-in-law of Gerber and his act in signing the bond was a voluntary one and, as was said in Lockwood v. Jones, supra, it would seem ludicrous that a recognizance should be suspended merely because at some period of a cause the principal to the same should erroneously obtain a final judgment in his favor. The goods in question had been stolen from a railroad car and it appears that when the writ of replevin was issued, under the order of October 2, 1924, it was Ward, not Gerber, who took possession of the same. It is difficult to con-





sider seriously the argument of counsel for the appellants that it would be highly inequitable to hold Ward on the bond. It is without the slightest merit in view of all the facts and circumstances in this case.

The appellants contend that the judgment should be reversed for the reason that "plaintiff offered no competent testimony as to the value of the merchandise replevied." We find no merit in this contention.

The appellants contend that the finding is against the great weight of the evidence. This contention is based upon the assumption that the evidence in the case establishes conclusively that the court was without jurisdiction to enter the order of July 30, 1925. What we have heretofore said as to the first contention of the appellants disposes of the instant one.

The judgment of the Municipal Court of Chicago is a just one and it should be and it is affirmed.

AFFIRMED.

Gridley and Barnes, JJ., concur.



It is noted that the above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information. It is noted that the above information was obtained from the files of the FBI, New York Office, and is being furnished to you for your information.

For the reason that "the plaintiff claimed no independent testimony as to the value of the merchandise registered," the Court so ruled in this case.

of the evidence of the financial work.

33, 1918. And we have Representative Hall as the third defendant that the same was almost identical to each the other at 1917 assumption that the evidence in the case established conclusively exact extent of the evidence. This conclusion is based upon the The evidence contains that the finding is against the

that, as an example, the above mentioned is the same, and

1994

• 77 •

34161

LENA HOHN,  
Plaintiff in Error,

v.

OTTO FRERKS and META FRERKS,  
his wife,  
Defendants in Error.

MEMORANDUM TO SUPERIOR COURT,  
COOK COUNTY.

259 I.A. 630<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Lena Hohn, plaintiff, sued Otto Frerks and Meta Frerks, his wife, defendants, in an action of case. There was a trial before the court, with a jury, and at the conclusion of plaintiff's evidence the court directed the jury to find defendants not guilty. Judgment was entered on the verdict and plaintiff has sued out this writ of error.

The declaration consisted of four counts. The first alleged, in substance, that defendants breached their duty to provide for plaintiff a reasonably safe place in which to work. The second alleged that defendants breached their duty to refrain from ordering plaintiff to do anything dangerous to the life of plaintiff, by ordering plaintiff to burn a pan of grease. The third alleged that defendants breached their duty to provide plaintiff with reasonably safe tools and appliances for use in her work. The fourth alleged that defendants breached their duty to refrain from ordering plaintiff to do anything dangerous to plaintiff's life by ordering and directing plaintiff to burn a pan of grease in a furnace.

Plaintiff was twenty-eight years old and was born in Austria. She left that country when she was fourteen years of age and went to Canada. When she was sixteen years of age she started to work. When she was twenty she did general housework, which

MISS

LENA MURPHY

Plaintiff in error

v.

OTTO BRENNER and WILLY BRENNER

Defendants in error

State of Kansas

County

25 L.A. 680

THE COURT OF APPEALS, in its decision, has affirmed the verdict of the jury.

It is the duty of the court to affirm the verdict of the jury unless it is clearly wrong.

In this case, the evidence is such that the jury's verdict is supported by the facts.

The court finds that the evidence is sufficient to sustain the verdict of the jury.

Therefore, the court affirms the verdict of the jury and the judgment of the court below.

This is the only case in which the court has affirmed the verdict of the jury.

The court finds that the evidence is sufficient to sustain the verdict of the jury.

Therefore, the court affirms the verdict of the jury and the judgment of the court below.

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The court finds that the evidence is sufficient to sustain the verdict of the jury.

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The court finds that the evidence is sufficient to sustain the verdict of the jury.

Therefore, the court affirms the verdict of the jury and the judgment of the court below.

This is the only case in which the court has affirmed the verdict of the jury.

The court finds that the evidence is sufficient to sustain the verdict of the jury.

Therefore, the court affirms the verdict of the jury and the judgment of the court below.



included cooking. She followed this line of work in Canada until she was twenty-four years of age and she then came to the United States, where she continued to follow the same line of work until the time of the accident. In her work she had used coal, gas and electric stoves, and had cooked on all of these. Sometime in August, 1925, she was hired by defendant Mrs. Frerks to do general housework and cooking in the home of defendants. The family consisted of Mr. and Mrs. Frerks and four children. In the basement of the home there was a furnace for heating the premises. Plaintiff testified that when she went to work she had a talk with Mrs. Frerks about the disposition of the garbage and that the latter told her that they burned everything up; that "they put it in papers and put it in the furnace" and that if there was not a fire in the furnace when plaintiff had garbage to dispose of, she should make one; that she inquired of Mrs. Frerks what she should do with the grease and that Mrs. Frerks told her to dispose of it in the same way. Plaintiff further testified that there was a basket to hold the garbage and that it was her custom to put garbage, including fats and grease, into papers and put it in this basket until it was full and that she would then take the garbage in the basket down to the basement and throw it in the furnace, and that she followed this practice for two months prior to the accident, which occurred on November 26, 1925, at 7:30 a. m. Plaintiff further testified that the day before the accident "there was some grease there" and Mrs. Frerks told her not to put it in the sink as it would clog it, and to "throw it in the furnace." Plaintiff further testified that she had before that time taken grease "and put it in a paper and roll the paper up and put it in the basket. And I threw that in the furnace, and that would burn." Plaintiff further testified that on the morning of the accident she found that the grease which she had left in the pan the night before had not hardened and

included seeking. The following table of work in Canada until she was twenty-four years of age and then came to the United States, where she remained at least the same time of work until the time of the accident. In her work she had used coal, gas and electric stoves, and had cooked on all of these. Something in August, 1914, she was injured by a stovepipe. This is no general statement and nothing in the line of explanation. The family consisted of Mr. and Mrs. Wright and four children. In the house of the home there was a furnace for heating the premises. This will be stated later when it is said that she had a cold at the time. Wright about the description of the accident and how the latter told her that she was very much surprised that they got it in paper and put it in the furnace, and that it should not be a fire in the furnace when it is put in the furnace, and should make out that the injury of Mrs. Wright when she should be with the gas and that Mrs. Wright told her to stop it in the same way. Wright further testified that there was a gas pipe in the house and that it was not used to put gas in, but that the gas and gas, Mrs. Wright and put it in the house until it was full and that she would then take the gas in the house down to the basement and there it is in the furnace, and that she followed this practice for the months prior to the accident, which occurred on November 24, 1914, at 1:30 a. m. Wright further testified that she saw before the accident "there was some gas in there" and Mrs. Wright told her not to put it in the stove as it would blow it out and "there it is the furnace." Wright further testified that she had before the time taken gas and put it in a paper and roll the paper up and put it in the furnace, and a burner that was lit, and that was the "furnace" Wright further testified that on the morning of the accident she found that the gas was on and she had left in the gas the night before had not answered and



was "oily," and that she took the pan and opened the furnace door and as she was about to throw the grease in "it all came out and caught me the flames." Plaintiff was seriously burned. She stated that she had thrown grease in the furnace prior to the day of the accident and that it had burned and that from her experience in this regard she knew that it would burn. From her whole testimony it is clear that she had burned grease in the furnace for two months prior to the accident.

Plaintiff has seen fit to cite many cases that bear upon the question of the duties of a master towards his servant. The principles of law that apply to the instant case are well established. The sole question, however, is, in the light of the law bearing upon the subject, did the plaintiff make out a prima facie case? She had been a cook for eight years, and while it is true that she first stated that she did not know that grease would burn, nevertheless, this testimony was palpably false and her subsequent admissions that she had burned grease prior to the date of the accident and knew that it would burn, entirely negatived her first statement. No other reasonable conclusion can be drawn from her whole testimony than that she knew that it would burn. It would be against common sense and every-day experience to believe that a cook with eight years' experience would not know that grease and fats would burn. Wrapping garbage in paper and burning it in a furnace is now a common way of disposing of it. For over two months plaintiff had disposed of the garbage, which included fats and grease, in this manner, and there is nothing in her testimony to indicate that she experienced any danger in so doing. Mrs. Frerks had told her that before she threw the garbage in the furnace she should wrap it in paper, and that she should follow the same practice as to grease, but on the morning of the accident she chose to disregard Mrs. Frerks' instructions and she was



was "olly," and that she had been opened the instant that  
and as she was about to enter the house in "it all came out and  
opened up the window." "It was a very beautiful scene," she  
stated that she had before opened in the instant when in her  
day of the window and that it had looked out over the bay  
experience in this regard was that it was a very beautiful scene. It was  
whole testimony is in that when she had opened the window in the  
instant the two windows were in the window.

Witnessing the scene in the instant when the two windows  
the question of the window of a window looking out over the bay.  
reference of the instant when the window was in the instant when  
the window, however, in the light of the instant when  
the window, and the window was in the instant when the window  
had been a scene for the instant, and that it is the instant when  
stated that she had before opened the window, and that it is the instant  
this testimony was completely false and was completely untrue.  
that she had before opened the window in the instant when the window  
that it was true, and that it was true, and that it was true.  
reasonable conclusion was to draw from the testimony that the  
and that it was true. It would be a very true statement, and  
everyday experience to believe that a man with a very true  
would not have been the window, and that it was true.  
anyway in the instant when it is a window in the instant when  
discussion of it. For over two months ago, and that it is the instant  
instant, which included the instant when the window, and that it is the instant  
nothing in the testimony to believe that the window was opened up  
in so doing. Mrs. Burke had said that she had before opened the window  
anyway in the instant when it is a window, and that it is the instant  
follow the same conclusion as to believe, but in the instant when  
nothing was done by the instant when the window, and that it is the instant

attempting to throw "oily grease," that was contained in an open pan, into the furnace when she was burned.

Under the facts of this case and under the principles of law governing the same the trial court did not err in instructing the jury to find for defendants. The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Gridley and Barnes, JJ., concur.

attempting to show "only success," and was contained in an open  
part, into the furnace when the case was closed.  
Under the facts of this case and under the principles  
of law governing the case the trial court did not do in-  
correcting the fact of the testimony. The judgment of the  
superior court of this county is affirmed.

WITNESSES:

Attorney for Plaintiff, J. J. [Name]

[The following text is extremely faint and largely illegible, appearing to be a continuation of a legal document or a series of notes. It contains several lines of text, possibly including names and dates, but the characters are too light to transcribe accurately.]



34170

OSCAR RUBIN,  
Appellee,

v.

LOUIS KAPLAN and  
JACOB KAPLAN,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 630<sup>3</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Oscar Rubin, plaintiff, sued Louis Kaplan and Jacob Kaplan, defendants, in the Municipal Court of Chicago in an action of the first class. There was a trial before the court, with a jury, and a verdict was returned in favor of plaintiff in the sum of \$872.97. Judgment was entered on the verdict and this appeal followed. On a former trial of this case there was a verdict returned in favor of plaintiff in the sum of \$1,200 and judgment was entered on the verdict. On an appeal to this court the judgment was reversed and the cause remanded on the ground that the trial court erred in excluding from the consideration of the jury certain testimony offered by defendants. Plaintiff's claim was based upon a written contract between the parties in which defendants agreed to keep and save harmless plaintiff from any loss occasioned by him on account of the expenditure of moneys in making alterations to certain store premises as provided for in a lease entered into between plaintiff and one Jacob Greenman.

The sole contention of defendants is that counsel for plaintiff, in his closing argument to the jury, made certain unfair and prejudicial statements. One of the items claimed by plaintiff in his statement of claim was for glass purchased from Hooker & Company, in the amount of \$885, and another one was for mosaic and

24170

LOUIS KAPLAN and  
JACOB KAPLAN,  
Appellants.

259 I.A. 680

APPEAL FROM CIRCUIT COURT  
OF CHICAGO.

THE FOLLOWING IS THE DECISION OF THE COURT IN THIS CASE.

George Kaplan, plaintiff, and Louis Kaplan and Jacob Kaplan, defendants, in the Municipal Court of Chicago in an action of the first class. There was a trial before the court with a jury, and a verdict was returned in favor of plaintiff in the sum of \$875.97. Judgment was entered on the verdict and this appeal followed. On a former trial of this case there was a verdict returned in favor of plaintiff in the sum of \$1,200 and judgment was entered on the verdict. On an appeal to this court the judgment was reversed and the cause remanded to the ground that the trial court erred in excluding from the consideration of the jury certain testimony offered by defendants. Plaintiff's claim was based upon a written contract between the parties in which defendants agreed to keep and save harmless plaintiff from any loss occasioned by him on account of the expenditure of money in making alterations to certain store premises as provided for in a lease entered into between plaintiff and one Jacob Grossman. The sole contention of defendants is that counsel for plaintiff, in his closing argument to the jury, made certain misstatements and prejudicial statements. One of the items claimed by plaintiff in his statement of claim was for glass purchased from Hooker & Company, in the amount of \$300, and another one was for mason's and



tile work, amounting to \$250. Defendants claim, and with justification, that there was no proof to sustain these two items. During the closing argument of counsel for plaintiff he made the following statements: "We are not to be allowed for the mosaic we put in because we couldn't make the necessary proof," and "We couldn't make the necessary proof on the glass because we couldn't get our glass man here." Counsel for defendants objected to these statements and the objection was sustained. Plaintiff's counsel at another point attempted to make statements of a similar kind and the court sustained the objection made to them and stated to the jury that they should not allow any amount for mosaic and tile work or glass, and counsel for plaintiff thereupon stated to the jury that the court was right in his statement to them. Defendants now insist that because of the aforesaid statements to the jury by counsel for plaintiff the judgment in the present case should be reversed and the cause remanded for a new trial. We find nothing in the verdict of the jury to justify the argument that they were improperly swayed in making up their verdict. There are certain other items in the statement of claim that were clearly sustained by the evidence. These items are, carpenter work (bill of E. Dickman), \$672.97; plumbing work (bill of Joseph Gordon), \$75; amount paid laborers for removing dirt and debris, \$30; amount paid Kedzie Iron Works for steel beams, \$75; total, \$852.97. There was some confusion in the evidence as to the amount paid by plaintiff for labor, and this fact alone could account for the amount of the verdict, \$872.97.

Accordingly, if within ten days plaintiff files in this court a remittitur of \$20, the judgment will be affirmed for \$852. 97, defendants to pay the costs of the appeal; otherwise the judgment will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR;  
OTHERWISE REVERSED AND REMANDED.

Gridley and Barnes, JJ., concur.



the work, amounting to \$250. Defendant claims, and with justification, that there was no proof to sustain these two items. During the closing argument of counsel for plaintiff he made the following statement: "We are not to be allowed for the money we put in because we couldn't make the necessary proof," and "we couldn't make the necessary proof on the glass because we couldn't get any glass men here." Counsel for defendant objected to these statements and the objection was sustained. Plaintiff's counsel at another point attempted to make statements of a similar kind and the court sustained the objection made to them and stated to the jury that they should not allow any money for moccasins and the work on glass, and counsel for plaintiff thereupon stated to the jury that the court was right in his statement to them. Defendant now insists that because of the above said statements to the jury by counsel for plaintiff the court in the present case should be reversed and the case remanded for a new trial. We find nothing in the verdict of the jury to justify the argument that they were improperly swayed in making up their verdict. There are certain other items in the statement of claim that were clearly sustained by the evidence. These items are, carpenter work (bill of E. Dickman), \$272.97; plumbing work (bill of Joseph Gotsen), \$75; amount paid laborers for removing dirt and debris, \$20; amount paid Keadie from work for steel beams, \$78; total, \$445.97. There was some confusion in the evidence as to the amount paid by plaintiff for labor, and this fact alone would account for the amount of the verdict, \$272.97. Accordingly, it is in our opinion that the court's remission of \$20, the judgment will be affirmed for \$252.97, defendants to pay the costs of the appeal; otherwise the judgment will be reversed and the case remanded.

ALVIN L. BROWN, JUDGE.  
 GEORGE A. BROWN, C. L. K. BROWN.

Griffey and Barnes, 11, corner.

34237

JEANETTE R. FEINGOLD,  
Appellant,

v.

MAURICE R. FEINGOLD,  
Appellee.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

259 I.A. 630<sup>4</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Jeanette R. Feingold, complainant, filed her amended bill for divorce on July 10, 1929, against Maurice R. Feingold, defendant. The defendant, on July 29, 1929, filed a plea of res adjudicata, in which he averred that he had filed a petition for divorce in the Court of Common Pleas, in the County of Tuscarawas, State of Ohio, on February 23, 1929; that service was procured upon the complainant by publication and that on May 20, 1929, the following decree was entered in that court:

"And now comes the said plaintiff, by J. M. Richardson, attorney, and the defendant having been legally summoned by publication, the court finds that the defendant is in default for answer or demurrer to the petition, thereby confessing the allegations thereof to be true.

The Court also finds that the plaintiff, at the time of filing his petition had been a resident of the State of Ohio for one year next prior thereto, and was at the time of filing said petition and for at least thirty days immediately preceding the same, a bona-fide resident of this county of Tuscarawas and that the parties hereto were married on the 13th day of August, 1918, as in said petition set forth.

The Court further finds, upon the evidence adduced, that the defendant has been guilty of gross neglect of duty and extreme cruelty and by reason thereof the plaintiff is entitled to a divorce as prayed for. It is therefore ordered and adjudged by the Court, that the marriage contract heretofore existing between the said Maurice R. Feingold and Jeanette R. Feingold be and the same is hereby dissolved and both parties are released from the obligations of the same.

The said child not being within the jurisdiction of this court, the court makes no finding as to its custody.

It is further considered and it is ordered that the said Jeanette R. Feingold be, and hereby is divested of all dower, and other rights arising and growing out of the marriage relation in and to the real estate and personal property of Maurice R. Feingold in and within the county of Tuscarawas in the State of Ohio.



JOHNSTON E. WILSON,  
Plaintiff.

v.

MARION E. WILSON,  
Defendant.

JOHNSTON E. WILSON,  
Plaintiff.

255 L.A. 680

U.S. DISTRICT COURT, DISTRICT OF COLUMBIA

Johnston E. Wilson, complainant, filed her amended bill

for divorce on July 14, 1933, against Marion E. Wilson, defendant.

The defendant, on July 20, 1933, filed a bill of interpleader

in which he asserted that he had filed a petition for divorce in the

Court of Common Pleas, in the County of Lancaster, State of Ohio,

on February 23, 1933; that service was procured upon the complainant

by publication and that on May 30, 1933, the following decree was

entered in said court:

"and now comes the said plaintiff, by J. E. Richardson,  
attorney, and she petitions for divorce from the said  
defendant, the court finds that the defendant is in default  
for answer or consent to the petition, thereby waiving the  
allegations thereof to be true.

The court also finds that the plaintiff, at the time of  
filing her petition had been a resident of the State of Ohio  
for one year next before, and was at the time of filing  
said petition and for at least thirty days immediately preceding  
the same, a bona-fide resident of said county of Lancaster and  
that the parties hereto were married on the 14th day of January,  
1913, in said petition was true.

The court further finds, upon the evidence submitted, that  
the defendant was then guilty of gross neglect of duty and wilful  
cruelty and by reason thereof the plaintiff is entitled to a  
divorce as prayed for. It is therefore ordered and adjudge by  
the court, that the marriage contract heretofore existing between  
the said Marjorie E. Wilson and Johnston E. Wilson be and the  
same is hereby dissolved and both parties are released from the  
obligations of the same.

The said bill was being taken into consideration of this  
court, the court makes no finding as to the validity of the  
divorce as prayed for and it is ordered that the said  
Marjorie E. Wilson do, and hereby is directed to do, within  
and after thirty days next following the date of this order, return  
to the court a bill of interpleader and proceed to the trial of the  
same in and within the county of Lancaster in the State of  
Ohio.



It is further considered by the Court and it is ordered that the said plaintiff pay the costs of this prosecution."

To the plea of res adjudicata the complainant filed a replication in which she alleged the following:

"That she will aver and prove her said bill to be true, certain and sufficient in the law to be answered unto; and that the said plea of the defendant is uncertain, untrue and insufficient to be replied unto by this repliant; that in truth and in fact said defendant, Maurice R. Feingold, was not a resident of the State of Ohio for at least one year prior to the 23rd day of February, 1929, and was not a resident of the State of Ohio for more than one year last past before the filing of the alleged petition set forth in said plea."

Thereafter the issues raised by the plea came on for trial before the chancellor. By stipulation the Ohio statutes relating to divorce were placed in evidence. At the outset of the hearing the solicitor for complainant made the following statement to the chancellor: "There is only one issue before this court. That is: everything is admitted by replication except that this man was a resident of the State of Ohio for one year, as provided by the statutes of Ohio. That is the only issue in this case." The solicitor further stated that there was only constructive service in the Ohio proceeding and that if the statement of Feingold in his petition that he was a resident of the State of Ohio for one year prior to the filing of the petition was false, this constituted a fraud upon the Ohio court, and the complainant in the present proceeding might treat the decree of the Ohio court as a nullity. The defendant in the present proceeding strenuously contends that under the established practice the complainant by replying to the plea admitted its entire sufficiency and merely denied the truth of the plea, but in the view that we have taken of this appeal we deem it entirely unnecessary to pass upon this contention, for in the trial of the issue raised by the plea the chancellor adopted the theory of the complainant's solicitor and there was a lengthy hearing had





upon the issue as to whether or not the defendant was a resident of the State of Ohio for at least one year prior to the filing of his petition for divorce and a resident of the County of Tuscarawas at least thirty days before the filing of the petition, as is required by the laws of that state. At the conclusion of the hearing of the evidence the chancellor sustained the defendant's plea in bar and dismissed the complainant's amended bill of complaint. The decree specifically finds:

"That on May 20, 1929, a decree of divorce was duly entered in said proceedings in favor of Maurice R. Feingold, as is more fully set forth in the plea in this cause.

That the defendant was a resident of the State of Ohio at least one year prior to the filing of his petition for divorce and a resident of the County of Tuscarawas at least thirty days before the filing of his petition, as is required by the laws of the State of Ohio. That the defendant, Maurice R. Feingold, proved each and every allegation of the plea in bar, and that the matters set forth in said plea were proven as true, and that the decree of divorce entered in Ohio was in full force and effect prior to the filing of the original bill of complaint in this cause."

The complainant contends that "the evidence overwhelmingly shows that defendant was not a bona fide resident of Ohio for one year prior to February 23, 1929." We find no merit in this contention. After a careful consideration of all the evidence bearing upon the instant contention, we are satisfied that the finding of the chancellor that the defendant was a resident of the State of Ohio for at least one year prior to the filing of his petition for divorce was fully warranted by the evidence, and we approve of his finding in that regard. We may add that it is not disputed that the complainant was legally summoned by publication in the Ohio case and that she received a copy of the petition in that case and turned the same over to her solicitor, who now represents her, and that this solicitor communicated with the solicitor for the defendant (petitioner in the Ohio case) in reference to the proceedings in Ohio. The solicitor for the complainant suggested, in a letter to the latter solicitor,



upon the issue as to whether or not the defendant was a resident of the State of Ohio for at least one year prior to the filing of his petition for divorce and a resident of the County of Cuyahoga at least thirty days before the filing of the petition, as is required by the laws of that State, at the conclusion of the hearing of the evidence the chancellor sustained the defendant's plea in law and directed the complainant's motion for judgment. The record specifically shows:

"That on May 22, 1926, a divorce was granted to the complainant in the case of *John A. Smith vs. Mary A. Smith*, as is more fully set forth in the plea in this cause. That the defendant was a resident of the State of Ohio at least one year prior to the filing of his petition for divorce and a resident of the County of Cuyahoga at least thirty days before the filing of his petition, as is required by the laws of that State, and the defendant, Mary A. Smith, proved each and every allegation of the plea in law, and the motion for judgment was granted in this case in full force and effect prior to the filing of the original bill of complaint in this cause."

The complaint contained the following averments:

Whereas the defendant was not a bona fide resident of Ohio for one year prior to February 22, 1926, he finds no merit in this contention. After a careful consideration of all the evidence bearing upon the instant contention, we are satisfied that the finding of the chancellor that the defendant was a resident of the State of Ohio for at least one year prior to the filing of his petition for divorce was fully sustained by the evidence, and we approve of his finding in that regard. We say and find it is not disputed that the complainant was legally summoned by publication in this case and that she received a copy of the petition in that case and knew the same over to her solicitor, who now represents her, and that this solicitor communicated with the solicitor for the defendant (petitioner in this case) in reference to the proceedings in this. The solicitor for the complainant requested, as a matter to the latter solicitor,

that the parties get together and straighten the matter out, and that if this were not done he would select an Ohio attorney to fight the case in that state. We state these circumstances so that it may appear clear that the complainant had full knowledge of the proceedings in the Ohio court and ample opportunity to defend the same. That she might have raised the question as to the defendant's residence in Ohio in the proceeding in that state is conceded.

The complainant contends that "to hold the Ohio decree good, would be a violation of the Constitutional provision with reference to 'due process of law' in that the complainant would be debarred of her rights without due process of law." As we understand the argument of the complainant as to this contention, it amounts to this: When the papers in the Ohio suit were served upon her by mail she learned from reading the same that the defendant had sworn in his petition that he was a resident of the State of Ohio for one year prior to the commencement of the proceedings in that state; that "every person is presumed to know the law. Therefore the complainant is presumed to have known that the law is (as laid down in Field v. Field case, 215 Ill.) that a divorce in a foreign state procured by a false statement as to the jurisdictional fact of residence, is deemed to be void in Illinois. Void means void and not merely voidable. Relying on that law, the complainant did not interpose any defense in the State of Ohio," and that "if this Court were to hold the Ohio decree good, on substituted service by mail, in effect, she would be divested of her marital rights without the due process of the law that she would have a right to count on in this state." It is a sufficient answer to this argument to say that the chancellor found that the defendant was a resident of the State of Ohio for one year prior to the commencement of the proceedings in that state. We may add that in the case of Field v. Field, 215



that the parties got together and stipulated the matter was, and that it was not done as would be the case in this attorney in filing the case in that state. We state these circumstances as that it may appear clear that the complainant had this knowledge of the proceedings in the state and was in possession of the same. That she might have raised the question as to the defendant's residence in Ohio in the proceeding in that state is conceded.

The complainant submitted that in Ohio the Ohio courts could, under the provisions of the constitutional provision with reference to "the process of law," in that the complainant would be deprived of her rights without the process of law. As we understand the argument of the complainant as to this contention, it amounts to this: That the parties in the state were never heard by each other. The learned trial judge found the defendant had sworn in his petition that he was a resident of the State of Ohio for one year prior to the commencement of the proceeding in that state; that every person is presumed to know the law. Therefore, the complainant is presumed to have known that the law in Ohio laid down in Field v. White, 215 Ill. 1, that a divorce in a foreign state procured by a false statement as to the jurisdictional fact of residence, is deemed to be void in Illinois. Void means void and not merely voidable, nothing on that law, the complainant did not introduce any evidence in the State of Ohio, and that "it is well known to all the Ohio people, an established custom for many years past, that the courts of that State are not to be disturbed at any material rights without the due process of the law and she would have a right to know as to this state." It is a well-known answer to this argument to say that the complainant knew that the defendant was a resident of the State of Ohio for one year prior to the commencement of the proceeding in that state. We say and that in the case of Field v. White, 215



Ill. 496, supra, it appears that Field, the complainant, caused the Nebraska court to believe that the residence of his wife was unknown, and she never received any notice of the proceedings and was not aware of the same nor of the decree of the Nebraska court until after the death of her husband. She had no opportunity to make a defense to the suit. That case, upon the facts, is different from the one before us.

The defendant has assigned certain cross-errors, viz., the refusal of the chancellor to grant the petition of the defendant to vacate certain orders for the payment of alimony and solicitor's fees and to direct the complainant and her solicitor to refund to the defendant the alimony and solicitor's fees that the defendant was compelled by the said orders to pay. The defendant contends (1) that the court was without jurisdiction to enter orders for the payment of alimony and solicitor's fees after the filing of the plea in bar, and (2) that it clearly appears that the orders for the payment of solicitor's fees, alimony and court costs were procured by fraudulent representations made to the chancellor by the complainant and her solicitor and that it was the duty of the chancellor under such a state of facts to grant the prayer of the petition of the defendant and to enter an order that the moneys so fraudulently procured be returned to the defendant. On June 29, 1929, the defendant was ordered to pay the complainant \$250 for temporary alimony and \$150 for temporary solicitors' fees, but he did not appeal from this order. On October 16, 1929, complainant moved for an increase in the payment of temporary solicitors' fees and her solicitor filed an affidavit, in support of the motion, in which he claimed that he was entitled to \$1,500 additional solicitor's fees and an additional \$500 as trial costs, and on November 21, 1929, the chancellor directed the defendant to pay \$500 for additional temporary solicitor's fees and \$250 "to defray necessary expenses of the complainant and

[illegible]

The defendant has received certain orders from the court, viz.,  
the payment of the balance due to the complainant as shown by the bill of exchange  
to which certain orders for the payment of attorney's fees and costs were attached,  
and he directed the complainant and her attorney to return to him such bills or receipts as they had issued to the defendant.  
The defendant also ordered the complainant to pay the same. The complaint contained a  
statement that the court was without jurisdiction to enter orders for the pay-  
ment of attorney's fees and costs, and that it was after the filing of the plea  
that, and (2) that it clearly appears that the orders for the payment  
of attorney's fees, attorney's fees and court costs were procured by  
fraudulent representations made to the chancellor by the complainant  
and her attorney and that it was the duty of the chancellor to  
such a state of facts to grant the prayer of the petition of the  
defendant and to enter an order that the money so fraudulently pro-  
cured be returned to the defendant. On June 20, 1928, the defend-  
ent was ordered to pay the complainant \$250 for temporary attorney's fees and  
also for temporary collector's fees, but he did not appeal from this  
order. On October 16, 1928, complainant moved for an increase in the  
payment of temporary collector's fees and her attorney filed an  
affidavit, in support of the motion, in which he claimed that he was  
entitled to \$1,000 additional collector's fees and an additional  
\$500 as trial costs, and on November 21, 1928, the chancellor disposed  
the defendant to pay \$500 for additional temporary collector's

See page 17.



her solicitor in the further prosecution of her suit." The defendant did not appeal from this order. On January 24, 1930, the defendant filed a petition which prayed (inter alia) that all orders for the payment of alimony and solicitors' fees and trial costs be vacated and set aside. An order was entered on the same day denying this petition, and the defendant did not appeal from this order, but on the same day there was also entered, on motion of the solicitors for the defendant, the following order:

"And it appearing to the court that there is now due the complainant the sum of \$1450.00, being \$500.00 allowed to her for temporary solicitors' fees, \$250.00 for costs and \$525.00 on the basis of \$25.00 per week for temporary alimony up to the date of the surrender of the defendant to the custody of the Sheriff, and that the defendant has paid over all of said moneys so due the complainant in open court and has, therefore, purged himself from the rule to show cause why he should not be held in contempt of court, and did deposit with the Clerk of this court the further sum of \$400.00 to be held by the said Clerk until the further orders of this court;

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Writ of habeas corpus be and the same is hereby quashed, and the Sheriff be and is hereby directed to immediately release the defendant, MAURICE R. FLINGOLD from his custody.

IT IS FURTHER ORDERED that the above entitled cause be and same is hereby set for trial on February 27, 1930 for hearing upon the issues then presented by the pleadings in this cause, the sufficiency of the plea interposed by the defendant to the complainant's amended bill of complaint to be disposed of in the meantime by the complainant, and that the sum of \$400.00 deposited with the Clerk of this court be held by the said Clerk of the court until the further order of this court."

Under this state of the record we are unable to sustain the instant contention of the defendant. While the chancellor had jurisdiction to enter orders in reference to alimony and solicitors' fees after the defendant had filed the plea of res adjudicata, nevertheless, we think it would have been better practice if he had first disposed of the issue raised by the plea of res adjudicata, as the right to alimony arises from the relation of marriage. The solicitors for the defendant, in support of their contention, strenuously maintain that the record clearly shows that the complainant and her solicitors combined to extort money from the defendant by keeping him in jail



not collected in the further prosecution of her suit. The balance  
and all not appeal from this order. On January 24, 1935, the balance  
and filed a petition which purports (inter alia) that all orders for  
the payment of alimony and solicitors' fees and trial costs be vacated  
and set aside. An order was entered on the same day denying this  
petition, and the defendant did not appeal from this order, but on  
the same day there was also entered, on motion of the solicitors for  
the defendant, the following order:

"And it appearing to the court that there is now due the  
complainant the sum of \$1500.00, being \$500.00 allowed to her for  
solicitors' fees, \$500.00 for costs and \$500.00 on  
the basis of \$15.00 per week for temporary alimony up to the date  
of the payment of the balance of the balance of the balance,  
and that the defendant has paid every bill of costs payable to her  
complainant in open court and has, therefore, properly satisfied them  
the rule is now set aside and the bill is set aside in respect of  
costs, and the balance with the Clerk of this court the balance  
sum of \$1500.00 to be paid by the defendant to the complainant  
on or before this date;  
IT IS THEREFORE ORDERED, ADJUDGED, DECREED AND DECREED that the  
bill of no record be and the same is hereby vacated, and the  
defendant is and is hereby ordered to immediately release the  
complainant, making no further claim for costs.  
IT IS THEREFORE ORDERED that the above vacated order be  
and same is hereby set for trial on February 27, 1935 for hearing  
upon the issues then presented by the pleadings in this cause,  
the defendant to the effect intended by the defendant to the  
complainant's amended bill of complaint to be disposed of in the  
meaning by the complainant, and that the sum of \$500.00 deposited  
with the Clerk of this court be held by the said Clerk of the  
court until the further order of this court."

Under this state of the record we are unable to sustain the instant  
contention of the defendant. While the chancellor had jurisdiction  
to enter orders in reference to alimony and solicitors' fees after  
the defendant had filed the plea of res judicata, nevertheless,  
we think it would have been better provided if he had first disposed  
of the issues raised by the plea of res judicata, as the right to  
alimony arises from the relation of marriage. The solicitors for the  
defendant, in support of their contention, strenuously maintain that  
the record clearly shows that the complainant and her solicitors  
combined to extort money from the defendant by keeping him in jail

on false representations made to the court. We find merit in this charge and we regret that we find ourselves unable, because of the state of the record, to order the return of the money that was obtained from the defendant. It is apparent from the letter from complainant's solicitor to Feingold's solicitor in Ohio, dated February 23, 1929, that neither Mrs. Feingold nor her solicitor raised any objection to a divorce. In fact, the letter states that "if he is through with Mrs. Feingold, the best thing for him and for her is that they separate as quickly and as speedily as possible and with the least possible ill-will. She has no desire to 'bleed him' for alimony so far as she is concerned. In fact, she practically asks nothing so far as she is concerned. She is not even asking anything for the boy. It is up to him." From the tenor of the letter it is clear that all that the complainant asked was that Feingold should give a quit claim deed to his interest in certain properties. The letter concludes: "I think it would be a good stunt if you and Mr. Feingold could both come up here and put our feet under the table and settle this thing definitely and conclusively and without further delay. I realize that Feingold would hesitate to do this fearing that perhaps some action might be commenced against him by his wife and so I rather anticipate that Feingold will refuse to come to Chicago. However, if you could convince him that it is proper and in order for him to come here and tie in with the various parties, - think that that would be a move in the right direction." Feingold's Ohio solicitor, on February 18, 1929, wrote Mrs. Feingold a letter in which he stated that Feingold would love to have her with him and would gladly assume the duties of husband and father and head of the household, and urging her to come to Dennison (Ohio) and take up her home there with Feingold as "there is no reason that you should not reestablish the most amicable relations between you." The defendant came to Chicago in June, 1929, and was at once arrested on a warrant for wife abandonment issued by the



on this representation as to the matter. We have heard in this  
 respect and we repeat that we find ourselves unable, because of the  
 state of the record, to make the determination of the matter that we  
 desired from the beginning. It is apparent from the record that  
 defendant's belief in defendant's belief in this, dated January  
 22, 1937, that defendant was not a defendant in this case.  
 objection to a verdict. The fact, the latter stated that it was in  
 through with this. Defendant, the fact that the fact was in fact  
 they agree as an entirely and an agreement to homicide and with the issue  
 possible in this. The fact we desire to "show that" the witness  
 for as who is concerned. In fact, the fact that the fact is  
 as who is concerned. The fact is not even being accepted for the fact. It  
 is up to him. From the fact of the fact it is clear that all that  
 the defendant said was that defendant should give a full claim back  
 to his interest in certain property. The latter statement "I think  
 it would be a good thing if you and the defendant could come up  
 here and get out of the fact under the fact and state the fact  
 and defendant, and without taking a case. I realize that the fact  
 could be made as to the fact that the fact is not a fact  
 concerned with the fact of the fact and as I stated earlier that  
 defendant will return to the fact. However, if the fact con-  
 vince the fact it is proper and to allow for him to come back and the  
 in with the fact, - that the fact that the fact is a fact in the  
 fact situation. Defendant's belief in this, dated January 22, 1937,  
 that the fact is a fact in this case. The fact that the fact is  
 love to have her with him and would gladly assume the burden of husband  
 and defendant and head of the household, and would have a home in  
 defendant (who) and take up her home with defendant as "show" is  
 no reason that you should not establish the most reliable relations  
 between you." The defendant came to Chicago in 1935, 1936, and was  
 as once arrested on a warrant for wife abandonment issued by the



Municipal Court. This arrest had been carefully planned prior to the arrival of the defendant, although the latter had been granted a decree of divorce on May 20, 1929. The defendant was released on bail and when the case was called for trial on June 3, 1929, it was continued, at complainant's request, to June 27, 1929. The complainant filed her original bill, which was for separate maintenance, on June 26, 1929, and obtained, without notice to the defendant, a writ of ne exeat. (The bill made no reference to the proceedings in the Ohio court.) As the defendant was leaving the Municipal Court room on June 27, 1929, he was arrested on this writ. Bond was fixed at \$10,000 and the defendant, being unable to furnish the same, was confined in the county jail. On July 6, 1929, the defendant was taken from the jail into court and on complainant's motion the chancellor entered an order directing the defendant to pay \$250 temporary alimony forthwith, \$25 per week thereafter, and \$150 on account of solicitors' fees. The defendant remained in jail until July 10, 1929, when he was released on a bond furnished by a surety company, his father having furnished collateral security to the company for furnishing the bond. On October 16, 1929, complainant's solicitor filed a motion for the payment of additional solicitors' fees and for trial costs, and in support of his motion filed an affidavit as to alleged legal services rendered and to be rendered. The service sheet attached to the affidavit scheduled services alleged to have been rendered from November 14, 1928, to the time of the filing of the bill of complaint. The items cover eight pages of the printed abstract. As the solicitor could ask for compensation only for services rendered in the instant case, the claim for additional solicitor's fees was a fraud upon the defendant and the court. An order was entered directing the defendant to pay \$500 additional solicitors' fees and \$250 for trial costs. On December 2, 1929, the surety company surrendered the defendant into

Municipal Court. This arrest had been previously planned prior to the arrival of the defendant, although the latter had been granted a degree of divorce on May 20, 1939. The defendant was released on bail and when the case was called for trial on June 1, 1939, it was continued, at complainant's request, to June 27, 1939. The complaint filed for original bill, which was for separate maintenance, on June 26, 1939, was obtained, without notice to the defendant, a bill of replevin. (The bill made no reference to the proceedings in the Ohio court.) As the defendant was leaving the Municipal Court room on June 27, 1939, he was arrested on this writ. There was filed at \$10,000 and the defendant, being unable to furnish the same, was confined in the county jail. On July 6, 1939, the defendant was taken from the jail into court and on complainant's motion the same was entered on order directing the return of the writ to the county sheriff, \$25 per week thereafter, and this on account of complainant's testimony. The defendant remained in jail until July 10, 1939, when he was released on a bond furnished by a surety company. His father having furnished collateral security to the company for furnishing the bond. On October 12, 1939, complainant's petition filed a motion for the payment of additional collector's fees and for trial costs, and in support of his motion filed an affidavit as to alleged legal services rendered and to be rendered. The services above mentioned to the relative scheduled services alleged to have been rendered from November 14, 1938, to the time of the filing of the bill of complaint. The items cover eight pages of the printed abstract. As the collector would not for compensation only for services rendered in the instant case, the claim for additional collector's fees was a claim upon the defendant and the court. An order was entered directing the defendant to pay \$200 additional collector's fees and \$250 for trial costs. On December 1, 1939, the county sheriff delivered the defendant into



the custody of the sheriff and the defendant was again committed to jail. In order to prevent the defendant's father from receiving the collateral that had been placed with the surety company by him, the complainant filed a supplemental bill alleging that the collateral was the property of the defendant, and an injunction was issued, without notice, ordering the surety company to retain possession of the collateral. The defendant's father then filed a petition alleging that he was the owner of the collateral and praying that the injunction be dissolved and the surety company directed to deliver up the collateral to him. Thereupon, upon motion of the complainant, an order was entered dismissing the supplemental bill of complaint and dissolving the injunction. The defendant remained in jail until January 24, 1930, when he was released by the order entered upon that day, which we have heretofore quoted in full. But reprehensible as was the conduct of complainant's solicitor whereby defendant was thus unjustly mulcted and incarcerated, unfortunately no relief can be had on his cross-errors. We deem it necessary to state that nothing that we have said should be taken as a reflection upon the fairness of the chancellor who tried the issues raised by the plea of res adjudicata.

The decree in the present case is a just one and it should be and it is affirmed.

AFFIRMED.

Gridley and Barnes, JJ., concur.





34249

ERNST CONSTRUCTION COMPANY,  
a corporation,

Appellant,

v.

JOE BUZYNSKI,

Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 630

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On December 20, 1929, the Municipal Court of Chicago vacated and set aside a default and judgment that had been entered against the defendant, Joe Buzynski, on June 24, 1929. Plaintiff, Ernst Construction Company, a corporation, has appealed from the order of December 20, 1929. The defendant has not filed a brief in this court.

On June 17, 1929, a statement of claim was filed by the plaintiff in which it was alleged that the defendant was indebted to the plaintiff in the sum of \$228 on a contract for paving the alley in the rear of certain property owned by the defendant. A summons returnable on June 24, 1929, was issued by the clerk of the court. The bailiff's return on the back of the summons is as follows: "Served this writ on the within named defendant, Joe Buzynski, by delivering a copy thereof to him, with a praecipe and statement of claim and affidavit attached thereto, and at the same time informing him of the contents thereof, in the City of Chicago, this 18th day of June, 1929. Bernard W. Snow, by Max Leiberman, Deputy." The defendant did not appear on the return day, June 24, 1929, and he was defaulted and judgment<sup>was</sup> entered against him on the same day for \$228. On September 6, 1929, the defendant entered his appearance in the cause and made a

2501A.830

2501A.830

Mr. [Name] [Address] [City] [State] [Zip]

On November 11, 1951, the [Name] [Address] [City] [State] [Zip] was  
 and not only a [Name] and [Name] but also [Name] [Address] [City] [State] [Zip]  
 the [Name] [Address] [City] [State] [Zip] on [Date] [Month] [Year] [Time]  
 [Name] [Address] [City] [State] [Zip] was [Name] [Address] [City] [State] [Zip]  
 December 11, 1951. The [Name] [Address] [City] [State] [Zip] was [Name] [Address] [City] [State] [Zip]  
 On June 17, 1951, a [Name] [Address] [City] [State] [Zip] was [Name] [Address] [City] [State] [Zip]  
 [Name] [Address] [City] [State] [Zip] is [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 the [Name] [Address] [City] [State] [Zip] in the [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 in the [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 [Name] [Address] [City] [State] [Zip] on June 11, 1951, was [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 [Name] [Address] [City] [State] [Zip] on the [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 this [Name] [Address] [City] [State] [Zip] on the [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 a [Name] [Address] [City] [State] [Zip] to him, with a [Name] [Address] [City] [State] [Zip] of [Name] [Address] [City] [State] [Zip]  
 [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip] and at the [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 [Name] [Address] [City] [State] [Zip], in the [Name] [Address] [City] [State] [Zip], this [Name] [Address] [City] [State] [Zip] of [Name] [Address] [City] [State] [Zip]  
 [Name] [Address] [City] [State] [Zip], by the [Name] [Address] [City] [State] [Zip]. The [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 report on the [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip] on the [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]  
 6, 1951, the [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip] in the [Name] [Address] [City] [State] [Zip] [Name] [Address] [City] [State] [Zip]



motion to vacate the said judgment and in support of the motion he filed a petition and his affidavit, which averred, in substance, that the bailiff had not served him but had served his wife; that the defendant did not authorize the plaintiff to do the work set up in the statement of claim and that the signature to the contract, upon which the plaintiff relied, was that of defendant's son, who was a minor. The defendant also filed, in support of the motion and petition, an affidavit of his wife, in which she averred that the bailiff served her with a summons and statement of claim, on or about June 18, 1929, and at the same time he advised her that she could disregard entirely the summons and pay no attention to it.

On December 20, 1929, the petition of the defendant came on for hearing before the trial court on an agreed state of facts. It was agreed that if the defendant were present he would testify that he was not personally served with summons in the case, and that if the son of the defendant, who was about nineteen years of age, were present, he would testify "that the bailiff gave the summons to his mother, wife of the defendant." The plaintiff agreed that if the wife of the defendant were present, and the court ruled that her testimony were competent, she would testify "that the bailiff served her," but the plaintiff objected to the admission of such testimony on the ground that the wife was an incompetent witness under the statute. It was further agreed that if the deputy bailiff, Max Leiberman, were present he would testify "that he has known the defendant for several years and has a distinct recollection of personally serving him in this case." The foregoing, together with the summons, constituted all the evidence that was offered or heard by the trial judge.



The plaintiff objected to the admission of the evidence of the wife of the defendant on the ground that her testimony was clearly incompetent as it did not come within any of the exceptions mentioned in the statute (Chap. 51, par. 5 (p. 1304) Cahill's Ill. Rev. Stat., 1929), but the court, apparently, did not pass upon the objection. When the court entered the order vacating the judgment he assigned as reason for his action the following: "It seems to me that the tendency in the later cases is to vacate the judgment upon any showing that the defendant was personally not served."

The plaintiff first contends that the judgment of the Municipal Court was final after the expiration of thirty days from its rendition, and the court then lost jurisdiction of the parties and the subject matter. This contention is without merit, as Section 21 of the Municipal Court Act provides: "If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity," and our Supreme Court has held that "where a sheriff or other officer has made a false return, whether wrongfully and intentionally or innocently by mistake, relief may be granted by a court of equity or law, according to the circumstances, to the person injured by the false return, against the consequences, and this has frequently been done. (Owens v. Hanstead, 22 Ill. 161; Brown v. Brown, 59 id. 315; Hickey v. Stone, 60 id. 458; Sibert v. Thorpe, 77 id. 43; Jones v. Neely, 82 id. 71; Kochman v. O'Neill, 262 id. 110;





Hilt v. Heimberger, 235 Id. 235.)" (Marnik v. Cusack, 317 Ill. 362, 363-4.) The petition in the present case set forth grounds for vacating the judgment "which would be sufficient to cause the same to be vacated \* \* \* by a bill in equity." The trial court, however, erred in holding that it was the tendency of the law to vacate a judgment on any showing that the defendant was personally not served. The law on the subject is thus stated in Marnik v. Cusack, *supra*, p. 364: "The stability of judicial proceedings, however, requires that the return of an officer made in the due course of his official duty and under the sanction of his official oath should not be set aside merely upon the uncorroborated testimony of the person on whom the process has been served but only upon clear and satisfactory evidence. Davis v. Dresback, 81 Ill. 393; Kochman v. O'Neill, *supra*." (Italics ours.)

At common law the wife was incompetent to testify for her husband in any case in which he had a financial interest in the final result of the litigation, and it is clear that the wife of the defendant was not made competent by any of the exceptions mentioned in Section 5 of the statute. Her testimony in the present case must therefore be disregarded. In Marnik v. Cusack, *supra*, the court refused to set aside the judgment upon the uncorroborated testimony of the defendant in that case, although the two deputies who were concerned in the service of the writ had absolutely no recollection of the actual service of the writ and could not remember where they served it nor upon whom. In the present case the only competent evidence offered by the defendant in support of his testimony was that of his minor son, and his testimony does not directly attack the service of the writ upon the defendant. Moreover, we have here presented the positive evidence of the bailiff that he had known the defendant for several years and that he had a





distinct recollection of personally serving him in this case. After a careful consideration of all the competent evidence heard on the hearing we are satisfied that the defendant did not show by clear and satisfactory evidence that the writ was not served upon him.

The judgment order of the Municipal Court of Chicago of December 20, 1929, is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Gridley and Barnes, JJ., concur.

discovery of the fact that the company had been  
 a party to the transaction of all the company's business in the  
 matter of the sale of the land and the fact that the company had  
 been a party to the transaction of all the company's business in the  
 matter of the sale of the land and the fact that the company had  
 been a party to the transaction of all the company's business in the

The judgment of the court in the case of the company of Chicago is

reversed, 30, 1928, is reversed with a finding of fact.

REVEREND WITH A FINDING OF FACT.

Calvin and Harlow, 12... common.

34249

FINDING OF FACT.

We find as a fact that the bailiff of the Municipal Court of Chicago, Bernard W. Snow, by Max Leiberman, Deputy Bailiff, in the instant case served the summons upon the defendant, Joe Buzynski, on June 18, 1929, in the City of Chicago, by delivering a copy thereof to him, with a praecipe and statement of claim and affidavit attached thereto, and at the same time informing him of the contents thereof.



1919

# REPORT ON THE

It is a pleasure to report the results of the investigation  
 conducted at Chicago, Illinois, during the month of May, 1919.  
 The results of the investigation are as follows:  
 The investigation was conducted at Chicago, Illinois, during the  
 month of May, 1919. The results of the investigation are as follows:  
 The investigation was conducted at Chicago, Illinois, during the  
 month of May, 1919. The results of the investigation are as follows:  
 The investigation was conducted at Chicago, Illinois, during the  
 month of May, 1919. The results of the investigation are as follows:

34280

PRINTERS MACHINERY CORPORATION,  
Appellant,

v.

A. J. CARON and ANTHONY V. BARWIG,  
Appellees.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

259 I.A. 631

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This was a suit on contract in the Municipal Court of Chicago. The case was tried before the court, with a jury, and at the close of plaintiff's case the trial court, upon motion of the defendants, directed a verdict for the defendants. Judgment was entered on the verdict and plaintiff has appealed.

Plaintiff's amended statement of claim alleged that the plaintiff dismantled, moved and erected a Pony Niehle Press at the special instance and request of the defendants, Barwig and Caron, for the price of \$275. The affidavit of merits filed by the defendant Barwig denied joint liability, admitted the dismantling, moving and erection of the press, and averred that the press was not put in good running order by the plaintiff. The affidavit of merits filed by the defendant Caron denied joint liability, denied that the plaintiff did the work claimed and denied any indebtedness to the plaintiff whatsoever.

The evidence for the plaintiff shows that the plaintiff dismantled, moved and erected a Pony Niehle Press at 3600 Potomac avenue, Chicago, that the work was done in a workmanlike manner and that the plaintiff was not paid for its work. The evidence also

2483

THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

v.

J. J. CROFT AND GEORGE A. BAKER,  
Defendants.

2591A 031

1. THAT THE PLAINTIFFS HAVE BEEN IN THE COURT.

That was a bill on complaint in the Southern District of  
Chicago. The case was tried with the jury, and  
of the class of plaintiffs were the trial jury, upon motion of  
the defendant, directed a verdict for the defendant. Judgment  
was entered on the verdict and plaintiff has appealed.

Plaintiff's amended statement of claim alleged that the  
plaintiff dismissed, moved and evaded a party who was from at the

special business and request of the defendant, party and firm.

for the price of \$1000. The affidavit of service filed by the defendant

stated that plaintiff, within the reasonable, moving and

execution of the process, and averred that the process was not put in good

keeping order of the plaintiff. The affidavit of service filed by the

defendant stated that plaintiff, within the reasonable, moving and

the work claimed and denied any indebtedness to the plaintiff.

Wherefore.

The defendant for the plaintiff avers that the plaintiff

dismissed, moved and evaded a party who was from at the

process, Chicago, that the work was done in a workmanlike manner and

that the plaintiff was not paid for the work. The defendant also



shows the liability of the defendant Barwig. To show the joint liability of the defendant Caron the plaintiff called defendant Barwig under Section 33 of the Municipal Court Act. Under this section the plaintiff has the right to examine Barwig as if he were under cross-examination. The plaintiff contends that the testimony of Barwig showed joint liability of Caron with Barwig. While there is much force in the contention, we do not deem it necessary to pass upon the same. The plaintiff further contends that the trial court by his rulings unfairly limited the cross-examination of the defendant Barwig by the plaintiff and thereby prevented the plaintiff from clearly proving joint liability of Caron. We are satisfied from a reading of the record that this contention is a meritorious one.

The plaintiff, in order to show the joint liability of the defendant Caron, offered evidence of several telephone conversations between the latter and the secretary of the plaintiff which, if admitted, would have tended to prove joint liability of the defendant Caron. The defendants objected to the introduction of this evidence unless the witness was able to identify the voice over the telephone as that of the defendant Caron, and the court ruled that before he would permit the introduction of this evidence the witness would have to first testify that he was able to identify the voice over the telephone as that of Caron. The plaintiff then offered to prove by the witness "that on three or more occasions after August 24, 1927, he called the telephone number of the place of business of A. J. Caron and asked the party answering the phone if Mr. Caron was there, and was told to hold the wire, and that in a few moments a voice answered; that this witness asked if it was Mr. Caron speaking and received a reply from the voice that it was; that thereupon he held a conversation with Mr. Caron in



which Mr. Caron said that he would pay the bill of the Printers Machinery Corporation for moving a certain press." Counsel for the defendants objected to the offer upon the sole ground that the voice over the telephone was not identified, and the court sustained this objection. The court erred in this ruling. (See Gedair v. Ham Nat. Bank, 225 Ill. 572, 574-5. See also Cohen v. A. F. & S. Fe Ry. Co., 193 Ill. App. 174, 176.) Other cases to the same effect might be cited.

For the errors indicated in this opinion the judgment of the Municipal Court of Chicago will be reversed and the cause will be remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Barnes, JJ., concur.





34310

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

v.

LEON HILL,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT

OF CHICAGO.

259 I.A. 631

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Leon Hill, defendant, was tried before the court, without a jury, and was found guilty of pandering. He was sentenced, under the finding, to the house of correction for six months and to pay a fine of \$300. He has sued out this writ of error.

The second amended information filed, and the one upon which the defendant was tried, charged that the defendant, on or about December 15, 1928, did take, accept and receive two dollars from Ellen Karzewska, a certain female person, which said two dollars was a part of the earnings of said Ellen Karzewska from the practice by her of prostitution.

The defendant has assigned and strenuously argues a number of alleged errors, but in the view that we have taken of this appeal, it will be necessary for us to notice one only. The defendant contends that the judgment should be reversed because the evidence fails to show his guilt beyond a reasonable doubt. After a careful examination of the evidence we are satisfied that this contention is a meritorious one, and as The People may see fit to again try this case we refrain from analyzing and commenting upon the facts and circumstances that have caused us to reach this conclusion.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Barnes, JJ., concur.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 08-19-2010 BY 60322 UCBAW

180.41958

THIS SET OF RECORDS ARE CLASSIFIED SECRET. DATE 1-1-78 BY

[illegible]

The second numbered international line, and the one upon which the telephone was tested, showed that the telephone circuit between it, NEW YORK, and the New York office of the American Telephone and Telegraph Company, was in good working order. This was a part of the equipment of said New York office. The telephone was tested, showing that the telephone circuit between it, NEW YORK, and the New York office of the American Telephone and Telegraph Company, was in good working order. This was a part of the equipment of said New York office.

The defendant has argued and repeatedly argued in brief and alleged errors, but in the view that we have taken of this appeal, it will be necessary for me to write one only. The defendant contends that the judgment should be reversed because the evidence fails to show his guilt beyond a reasonable doubt. After a careful examination of the evidence we are satisfied that this contention is a mistaken one, and as the judge said in his opinion we find that we believe from analyzing and considering what the facts and circumstances that have come out in this case indicate.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

Very truly yours,  
William H. Barker, Jr., Clerk.



34179

PEOPLE OF THE STATE OF  
ILLINOIS ex rel., etc.,  
Defendant in Error,

v.

CHARLES LIPSICZ and  
ROSE LIPSICZ,  
Plaintiffs in Error.

ERROR TO CIRCUIT  
COURT, COOK COUNTY.

259 I.A. 631

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a habeas corpus proceeding in which the petitioner was awarded the custody and care of a sixteen months old son. Respondents, the child's maternal grandparents, have sued out this writ of error.

The child was born in June, 1928. Its mother was afflicted with puerperal psychosis and died in July, 1929. Because of her condition, and at the suggestion of respondents, she and the child were taken about two weeks after its birth from the hospital to their home. Also upon their invitation the father went to live with them, apparently to await the outcome of his wife's illness, and that the child might receive in the meantime the care and attention the home of the grandparents afforded.

With the exception of brief intervals, (when on advice of physicians that the child be separated from the mother, petitioner took her back to their apartment and also for a trip to Florida for her health) he and his wife continued to live at respondents' home until her death. He and his child remained there for about two months longer when disagreement, arising apparently over certain property rights to the wife's estate, led to petitioner's leaving the home of respondents, demanding the custody of the child and suing out this writ for its possession.



Respondents base their claim of right to the custody of the child on two grounds: (1) that the infant's welfare is best consulted by being left with them, and (2) that petitioner had agreed to give them its custody.

Neither of these contentions is supported by the greater weight of the evidence. In support of the first much stress is laid upon the better financial resources of the grandparents, their natural fondness and affection for the child and the superior advantages it might enjoy at their hands by reason of the grandfather's wealth, he having acquired property valued at about \$400,000. None of these matters is controlling. The father has ample means to give the child requisite care and advantages. He is 32 years old, commands a salary of \$10,000 from a firm with which he has been employed for the last twelve years, and offers a commodious home for this, his only child, along with himself and married sister, a competent woman of unblemished character, at her home amid surroundings, physical and moral, equally good and conducive to the general welfare of the child.

The evidence, too, discloses that the father has deep and normal affection for and interest in the child and is desirous of retaining custody of it and giving it a home with himself. It affirmatively appears that he is an industrious man of good habits and of unquestioned good character. It is mainly, if not wholly, from bitterness of feeling arising over controversies of such property rights that any reflections are cast upon his character, and they seem far fetched and unreasonable.

We are not impressed with the argument on this phase of the case, nor with the contention that there was any binding agreement or understanding that the child was to remain permanently in the care and custody of respondents. Petitioner denied making



respondents bear their claim of right to the custody of the child on two grounds: (1) that the infant's welfare is best promoted by being left with them, and (2) that petitioner has acted in the best interests of the child.

Neither of these contentions is supported by the greater weight of the evidence. In support of the first which seems to rest upon the better financial resources of the respondents, their natural tendency and affection for the child and the superior advantages it might enjoy at their hands by reason of the greater father's wealth, he having acquired property valued at about \$40,000. None of these matters is controlling. The father has ample means to give the child suitable care and advantages. He is 32 years old, commands a salary of \$10,000 from a firm with which he has been employed for the last twelve years, and enjoys a comfortable home for his wife and child, along with suitable and well-kept estate, a competent woman of unimpaired character, of her home and surroundings, physical and mental, generally good and conducive to the general welfare of the child.

The evidence, too, discloses that the father has deep and natural affection for and interest in the child and in securing of retaining custody of it and giving it a home with himself. It affirmatively appears that he is an industrious man of good habits and of unimpaired good character. It is unlikely, it is hardly from bitterness of feeling arising over controversy of such property rights that any reflections are cast upon his character, and that room for hatred and unreasonableness.

We are not impressed with the argument on this point of the case, nor with the contention that there are any binding precedents or understanding cases the child was so removed permanently in the care and custody of respondents. Petitioner denied making

any such agreement, and even if under the circumstances conversations may have been had indicating a disposition to leave the child to their care they would not be binding, where there was no absolute or legal surrender of the child under them. Certainly the circumstances are not such as indicate the intention of the father to surrender his natural right of custody and care of the child to its grandparents or any one else. The love and attention he gave to it continued the same as if in the meantime it had been kept in his own household.

The determinative question in such a case is whether the surviving parent is competent to transact his own business and if a fit person to have the custody of the child. That in fact is the test laid down by our statutes. (Cahill's Stats. 1929, Ch. 64, sec. 4.)

The burden of proving the parent's unfitness rests on respondents, (Gormack v. Marshall, 211 Ill. 519; Wohlford v. Burekhardt et al., 141 Ill. 321; People v. Hoxie, 175 Ill. App. 563,) and no convincing proof of petitioner's unfitness has been advanced. In the cited cases the courts emphasize the surviving parent's natural and superior rights to the custody of his child when a fit person to have it and so circumstanced "that he can provide the necessities of life and administer to the requirements of the charge." (Gormack case, supra, p. 523.)

While the financial interests of the child are not to be disregarded they are not controlling. (id. 523.) It has frequently been said by our courts that the father has the right of custody "as against the world" unless he has forfeited such natural right or the welfare of the child demands that he should be deprived of it. (Stafford v. Stafford, 299 Ill. 438; Harmon v. Starbody, 219 Ill. App. 603, 605; People ex rel. v. Nagel, 243 Ill. App. 490.)



any such agreement, and even if under the circumstances some  
 variations may have been made in the manner of its  
 the child so that they would not be binding, these facts  
 was no absolute or legal surrender of the child under them.  
 Certainly the circumstances are not such as indicate the intention  
 of the father to surrender his natural right of custody and care  
 of the child to his grandparents or any one else. The law and  
 attention he gave to it is contained in the same as it in the meaning  
 it has been held in this case.

The administrative question in such a case is whether the  
 surviving parent is competent to exercise his own custody and if  
 a fit person to have the custody of the child. That in fact is  
 the test laid down by our courts. (Coburn v. Coburn, 1905, 10  
 44, 45, 46.)

The burden of proving the parent's unfitness rests on  
 respondents. (Coburn v. Coburn, 1905, 10 44, 45, 46.)  
 Respondent's affidavit, 1911, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 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1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680, 1681, 1682, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183



There is absolutely nothing in this record that would justify depriving the petitioner of his natural right to the custody and care of his child. It would subserve no good purpose to review in detail the preponderating proof of his affection for the child, his competency to give it adequate care and attention, and his entire fitness to have its custody.

The court's order will be affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

There is absolutely nothing in this record that would justify depriving the petitioner of his natural right to the custody and care of his child. It would appear no good purpose to review in detail the proceedings prior to his affection for the child. His competency to give it adequate care and attention, and his entire fitness to have the custody. The court's order will be affirmed.

1911

Reverend, P. J., and Stanley, J., concur.

34219

JOSEPH SIEGEL, doing business,  
etc.,

Appellant,

v.

UNITED STATES FIDELITY &  
GUARANTY COMPANY, a corporation,  
Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 631<sup>4</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff has appealed from a judgment against him in an action he brought to recover on a policy of burglary insurance in the amount of \$1,000 on a stock of ladies dresses.

The defense relied upon at the trial was failure to comply with a provision of the policy as to keeping books. The provision reads:

"Nor shall the company be liable for any loss or damages (b) unless books and accounts are regularly kept by the assured and are kept in such manner that the exact amount of loss can be determined therefrom by the company."

Plaintiff's exhibit 1 was the only book or record of accounts kept or submitted for examination to the accountants or introduced in evidence. Said exhibit begins with a statement of "Dresses on hand March 3rd" (1927). Each dress is designated and described therein only by a number in a column headed by the word "Style". Opposite each number are figures in a parallel column under the word "Cost". Opposite these figures in another parallel column headed "S.P." are other figures intended to designate, as orally explained, the price at which the dresses so marked were sold.

It was orally explained that the figures in the second column indicated the manufacturer's price for the particular dress



10-11-67  
10-11-67

1. THE UNITED STATES OF AMERICA  
2. THE STATE OF TEXAS  
3. THE COUNTY OF DALLAS

[illegible]

130 .A.1 029

THESE ARE THE NAMES OF THE PERSONS WHOSE NAMES ARE LISTED IN THE

[illegible]

trially explained, the price at which the houses are marked were  
column headed "B.V." and other figures intended to designate, as  
under the word "Cost". Opposite these figures in another parallel  
"style". Opposite each number are figures in a parallel column  
described therein only by a number in a column headed by the word  
"Process on Hand Water No." (1937). Each figure is designated and  
indicated in witness. This exhibit began with a statement of  
accounts kept or submitted for examination to the Government in  
January, 1937. I see the only book or record of

It was orally explained that the figures in the second column indicated the number of "times" a price for the particular dress

(though no evidence was produced from which the cost price could be verified or otherwise determined), and that the figures in the third column indicated the selling price, which figures, it was explained, were entered therein after the sale of the dresses. There were no data or other means of determining from the book when these sales were made.

After March 3rd and up to November 14th, 1927, (just prior to the burglary) the so-called "book" or "inventory" continued to be kept in substantially the same manner except that it gives the date when dresses thereafter were added to the stock, designating them by numbers in a new column under the words "Lot No." instead of in the column headed "Style".

Prior to July 23rd, 1927, the stock so inventoried was purchased from manufacturers and invoices for some of the purchases were handed to both plaintiff's accountant and defendant's accountant for examination after the burglary, which was some two years before the trial, together with checks and stub books purporting to show disbursements, but which were not produced or called for at the trial. Both accountants testified that they were insufficient and too incomplete to enable them to determine with any degree of accuracy the cost of dresses so purchased. After July 23rd (which was after plaintiff's bankruptcy, as may be inferred from the evidence) plaintiff having no credit, made his own dresses in a shop over his store. His wife and daughters conducted the sales.

After July 23rd the inventory or book gives the cost of each dress as furnished by plaintiff to his young son, sixteen years old, who made up and kept said exhibit 1, the so-called book or inventory, after school hours. The father testified that the cost so furnished him was based upon the value he put on his labor, the

(though no evidence was produced from which the cost price could be verified as otherwise determined), and that the figures in the third column indicated the selling price, which, however, it was explained, were entered therein after the sale of the dresses. There were no data or other means of determining from the book when these sales were made.

That a certain kind and up to November 1937, (last entry to the bankruptcy) the so-called "book" or "inventory" continued to be kept in substantially the same manner except that it gives the date when dresses thereafter were added to the stock, designating them by numbers in a new column under the words "Not No." instead of in the column headed "Sells".

After the July 1937, the book as inventoried was purchased from Mary Elvira and inserted for some of the dresses were handed to both Plaintiff's accountant and defendant's accountant for examination after the bankruptcy, which was some two years before the trial, together with checks and cash books purporting to show disbursements, but which were not produced or called for at the trial. Both accountants testified that they were dissatisfied and too incomplete to enable them to correlate with any degree of accuracy the cost of dresses so purchased. After July 1937, which was after Plaintiff's bankruptcy, he may be inferred from the evidence Plaintiff having no credit, made his own entries in a book over his store. His wife and daughter conducted the sales.

After July 1937 the inventory or book gives the cost of each dress as furnished by Plaintiff to his young son, Elvira Fern, who made up and kept said exhibit 1, the so-called book or inventory, after school hours. The father testified that the cost as furnished him was based upon the sales he put on his label, the



cost of material and his estimated overhead expense. No documents, bills, receipts or data were introduced in evidence or shown to the accountants to show the amount or yardage, or quality of material, or amount of labor or overhead expense, or were apparently kept in any form by which the actual cost of these items, or the disbursements or number of dresses on hand at any particular date, could be determined, or in fact anything from which anything in the nature of an audit of plaintiff's accounts could be made. Plaintiff could neither read nor write (except his name). He kept no journal, day book or cash book. Said exhibit 1 was his sole book of accounts and was kept by the boy in the following manner:

Each dress as it came into the store for sale, whether purchased or made by plaintiff, was tagged by the boy with a number which he entered in the "inventory" with a cost price obtained either from an invoice of the dress when purchased, or from an estimated cost given to him orally by his father when the dress was made by the latter. When it was sold the tag was removed and placed on a spindle or desk from which the boy in the evening, or within a day after, entered in the "S.P." column the selling price as it appeared on the ticket. The date of sale was not shown and could not be determined. It was only by subtracting the number of dresses so indicated as sold from the entire number so inventoried that the number on hand at the time of the burglary could be determined. Not even from that book could the number be ascertained at any particular prior date. There was no other record, document or book by which either the number on hand at any time, or cost, or sales price, or value could be ascertained. The tags or pin tickets were not preserved. In fact nothing from which the entries were made except a few invoice bills not presented in evidence and admittedly in-

cost of material and his estimated overhead expenses. No documents, bills, receipts or data were introduced in evidence to show or to substantiate to show the amount of material, or quantity of material, or amount of labor or overhead expense, or were apparently kept in any form by which the actual cost of goods shown, or the amount of money or number of ounces on hand at any particular date, could be determined, or in fact anything from which anything in the nature of an audit of plaintiff's accounts could be made. Plaintiff could neither read nor write (except his name). He kept no books, any books or cash book. This exhibit I was not able to examine and was kept by the boy in the following manner:

Each dress as it came into the store for sale, whether purchased or made by plaintiff, was tagged by the boy with a number which he entered in the "Inventory" with a cost price obtained either from an invoice of the dress when purchased, or from an estimate cost given to him orally by his father when the dress was made by the father. Then it was laid the tag was removed and placed on a separate card with the tag which the boy in the evening, or within a day after, entered in the "Inventory" column the selling price as it appeared on the label. The date of sale was not shown and could not be determined. It was only by comparing the number of dresses as indicated on each tag with the number of dresses as indicated that the number on hand at the time of the buying could be determined. For every time that would the number be ascertained as any particular price was. There was no other record, statement or book of which either the number or date of any sale, or date of sale, or value could be ascertained. The tags or price labels were not preserved. In fact nothing from which the entries were made except a few invoice bills was presented in evidence and admitted in-



sufficient and too incomplete to enable the auditors or accountants to verify or determine accurately the number of dresses manufactured, purchased or sold by plaintiff.

Plaintiff's own accountant testified:

"There were other records (than said Exhibit 1) submitted to me, but in my opinion they were such that we were unable to arrive at any kind of figure from them. They were very incomplete, very inadequate, and this (Exhibit 1) was the only adequate record in my opinion that could prove the number of dresses on hand at that particular date after the robbery."

But he added, "You can't make an audit without records."

Defendant's accountant testified that even the invoices (covering purchases) were not all complete, no cash record was kept covering the sales, the records were incomplete, there was no method of determining accurately the number of dresses on hand, and that his investigation indicated all sales had not been recorded.

The boy who kept the books testified that he could not tell from his record (exhibit 1) how many garments were on hand at any date prior to November 17, and only on that date by the method of addition and subtraction as aforesaid, nor which of the stock unsold was purchased or made by his father, nor the dates of sale, and that he entered the cost of dresses made by his father as the latter would "figure it."

By the method of addition and subtraction he testified that from the exhibit the least number of dresses on hand July 23, (when plaintiff began making all of his dresses) was 56. But a schedule made out by plaintiff under oath at that time (apparently in the bankruptcy proceedings) showed only 47 on hand, thus tending to impeach the accuracy of said inventory record.

The jury were instructed that if they found from the evidence that plaintiff failed to keep proper books of account from which the company could accurately determine the amount of the alleged



efficient and too numerous to handle the entire set of documents  
to verify or determine accurately the number of documents mentioned.  
presented as held by plaintiff.

Plaintiff's two statements testified:

"There were other records (than what Exhibit 1)  
submitted to me, but in my opinion they were such that  
we were unable to arrive at any kind of figure from them.  
They were very incomplete, very incomplete, and also  
(Exhibit 1) was the only document received in my opinion  
that could give the number of records on hand at that  
particular date after the robbery."

But he added, "You can't make an exact figure from this."

Plaintiff's statements testified that when the inventory

(covering purchases) were not all complete, no exact figure was kept  
covering the sales, the records were incomplete, there was no method  
of determining accurately the number of records on hand, and that

his investigation indicated all sales had not been recorded.

The day after the bank testified that he could not

tell from his record (Exhibit 1) how many payments were on hand at  
any date prior to November 17, and only on that date by the method  
of addition and subtraction as explained, and that of the week  
records was purchased as made by the ledger, and the sales as made,  
and that he entered the cost of records kept by his father as the

father would "figure it."

By the method of addition and subtraction he testified

that from the records the latest number of records on hand July 17,

(when plaintiff began making all of his business) was 22. And a

schedule made out by plaintiff about July 17 of that time approximately  
in the handwriting (Exhibit 1) shown him on June 17, then finding

so impossible the accuracy of said inventory record.

The jury were instructed that if they found from the evi-

dence that plaintiff failed to keep proper books of accounts from

that the company could accurately determine the amount of the alleged

loss, plaintiff could not recover. No complaint is made of this instruction. If the jury followed it we cannot say their finding was manifestly against the weight of the evidence.

While it was said in Garten v. Gen. Accident & Fire Ins. Co. Ltd., 206 App. Div. N. Y. 154, the courts adopt liberal interpretations of what constitutes books of accounts, to the end that the insurer will be held to perform his contract, however crude and unscientific they may be, the provisions of the insurance policy will be given such reasonable interpretation as will protect the insurer against fraudulent and excessive claims. On very much similar proof in that case the court said:

"No where so far as I can discover was there any record kept of the amount of goods used in any order, the cost of material, of labor, the item of profit or any other data which would enable the plaintiff, unassisted by his memory or any other person, to check up the invoices and his sales, and to determine with any degree of accuracy the amount of stock on hand at a given time."

There, as here, plaintiff was obliged to resort to his memory to determine the amount of his sales and of his stock and of his loss.

In setting aside the verdict the court said:

"Such a verdict in an action on a policy of this nature must be based upon proof contained in some kind of books and accounts which fairly show the stock on hand at the time of the burglary without being supplemented in major details by the memory of an interested party."

On somewhat similar facts, calling for construction of the identical provision of the policy here involved, the court in Weinstein v. Globe Indemnity Co., 277 Pa. State Reports, 388, said:

"It was the duty of the insured to keep books and accounts so that in case of theft the exact loss could be ascertained 'therefrom', and, unless this was done, or a substantial compliance with the requirement appeared, a verdict for the plaintiff was not justified. \* \* \* there must be sufficient written evidence to enable the Company to determine with accuracy the amount of its liability." (Italics ours.)

Cases cited by appellant are readily distinguishable in their facts from the case at bar.

The judgment is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.



been, Plaintiff could not recover. He complained in none of this  
testimony. If the jury believed it to be a fact, they should  
not necessarily against the weight of the evidence.

This is an error in Plaintiff's testimony.

Plaintiff's testimony is that he was not a partner in the firm.

Protection of that consideration of evidence, to the end that  
the Plaintiff will be held to have been a partner, however small  
and unimportant it may be, the provisions of the Partnership Policy  
will be given such reasonable interpretation as will protect the  
interest against Plaintiff and against others. In very small  
similar cases in this case the court said:

"We were as far as I can discover was there any record  
any of the amount of money paid in any other, and none of it  
received. I asked the firm of Plaintiff at any other date which  
would enable the Plaintiff, according to his money or any  
other person, to check up the Plaintiff and his money, and he  
refused to do so, and refused to answer any question of check on  
him at a given time."

There, as here, Plaintiff was obliged to answer in his money to  
determine the amount of his share and of his stock and of his loss.

In a case like this the court said:

"When a witness in an action on a policy of life  
insurance is asked upon oath to produce in some kind of  
books and accounts all the money which he has received in  
the time of the policy without being asked to produce in  
any other way the money of an interested party."

On somewhat similar facts, calling for production of the  
financial provision of the policy were involved, the court in  
Plaintiff v. Globe Insurance Co., 277 Pa. 280, 282, said:

"It is the duty of the insured to keep books and  
accounts so that in case of death the exact loss could be  
ascertained 'therefrom', and, unless this was done, or a  
substantial compliance with the requirement appeared, a  
verdict for the Plaintiff was not justified. . . . There  
must be sufficient evidence to enable the company  
to determine with accuracy the amount of its liability."  
[Emphasis added.]

Cases cited by appellants are really distinguishable in  
their facts from the case at bar.

The judgment is affirmed.  
Graham, P. J., and Grady, J., concur.



34240

WLADYSLAWA JANKOWSKI and  
JOHN JANKOWSKI,  
Appellants,

v.

POLISH ROMAN CATHOLIC UNION  
OF AMERICA, a corporation,  
Appellee.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

259 I.A. 632

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree ordering that if the sum of \$9,146.08 with interest, found due from complainant John Jankowski to defendant, be not paid within a period of sixty days from the date of the decree a warranty deed from complainants (husband and wife) to defendant of certain property, their home, the fee of which was in the wife, which was found to have been given as security for the indebtedness of the husband to the defendant, be absolute and binding on complainants, and that they and all persons claiming through or under them be barred and foreclosed from all right, title and interest in and to the premises, and that the second amended bill of complaint be dismissed. The decree further ordered a surrender of possession of the premises to defendant in the event of failure to pay said amount, but in the event of payment that they be reconveyed by defendant.

It is conceded that the debt in question was given to secure an indebtedness of the husband to defendant. The controlling fact in dispute is whether it was given to secure a specific indebtedness of some \$8,600 (which has since been paid) which the husband in the capacity of general counsel for the defendant had collected and not previously accounted for, or whether to secure all of his indebtedness then existing, which the master

24240

STATE OF NEW YORK  
IN SENATE  
JANUARY 1, 1904

v.

THE PEOPLE OF THE STATE OF NEW YORK,  
PLAINTIFFS,  
vs.  
THE STATE OF NEW YORK,  
DEFENDERS.

STATE OF NEW YORK  
IN SENATE  
JANUARY 1, 1904

2591.A.632

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS,

vs.

THE STATE OF NEW YORK, DEFENDERS.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS,

vs.

THE STATE OF NEW YORK, DEFENDERS.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS,

vs.

THE STATE OF NEW YORK, DEFENDERS.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS,

vs.

THE STATE OF NEW YORK, DEFENDERS.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS,

vs.

THE STATE OF NEW YORK, DEFENDERS.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS,

vs.

THE STATE OF NEW YORK, DEFENDERS.

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS,

vs.

THE STATE OF NEW YORK, DEFENDERS.

found to be over \$9,000 in excess of the item of \$8,600.

On this particular question it is contended the findings are clearly against the weight of the evidence. If the point be well taken it will be unnecessary to discuss alleged errors of law, among them that the decree grants affirmative relief without a cross-bill on which to base it.

With respect to the contested question of fact as to what the deed was given to secure, it appears that John Jankowski had been for several years prior to May 1, 1928, general counsel for defendant and in that capacity had collected various sums of money and been paid for various alleged legal services claimed to have been performed.

In April, 1928, it was discovered that he had collected and not accounted for the sum of \$8,600, proceeds from a mortgage foreclosure of property known as No. 2701 Northwestern avenue, and a committee of three of defendant's officers was appointed to wait upon him with respect to such specific indebtedness and adjust the matter. A conference held April 24, 1928, in Jankowski's offices, at which his wife was present, resulted in the execution of the deed in question on that date, solely, as the evidence indicates, to secure repayment of that specific sum.

Both Mr. and Mrs. Jankowski testified that no other indebtedness than the collection from said foreclosure was mentioned or claimed at that time for which the security was asked and then given. She knew nothing of this particular indebtedness until that time, nor the other indebtednesses to defendant afterwards found to exist.

The committee consisted of Prabyliniski, then one of defendant's directors, Mrs. Zolinski, the vice president of defendant,



found to exist.

The committee consisted of Franklyn, John and of

attorneys' services, was advised, the vice president of the

given. The main matter of this particular interview was

or advised that the fact that the company was named and then

statements from the corporation that the corporation was authorized

John and Mrs. Janowski testified that no other in-

accuse repayment of that specific sum.

in question on that date, namely, on the evidence indicated, to

of which his wife was present, resulted in the execution of the deed

master. A copy of the deed was, in Janowski's office,

upon him with respect to each specific indebtedness and adjust the

a committee of three of defendant's officers was appointed to wait

representative of property owner as to the corporation's affairs, and

and not accounted for the sum of \$5,000. Proceeds from a mortgage

in April, 1935, it was discovered that the deed was

been retained.

and been held for various alleged legal purposes claimed to have

obtained and in that capacity had collected various sums of money

been for several years prior to May 1, 1935, generally known as

the deed was given to secure, it appears that John Janowski had

with respect to the contested question of fact as to what

exists--all on which to base it.

among them that the degree of affirmative relief without a

well taken it will be unnecessary to discuss alleged errors of law,

are clearly against the weight of the evidence. If the point be

on this particular question it is contained in the findings

found to be over \$5,000 in excess of the item of \$5,000.

and Rev. Celichowski. The latter did not testify.

Mr. Przbylinski was called to the witness stand by complainants and testified that at the conference Mrs. Jankowski was informed that Mr. Jankowski "was short in his accounts," for which the company would require security for reimbursement; that while he did not remember any amount was stated he believed that nothing else was discussed except security for said \$8,300.

Mrs. Zolinski testified that she said at the conference that "Mrs. Jankowski must understand that if she signed over the property in which she lived, that the property would be the property of defendant until all moneys owed by Jankowski to defendant be paid back." But she did not testify, nor did any other witness, that there was any mention or claim of any other money as due defendant than what was due from that one specifically mentioned transaction. If her testimony can be construed as including any other specific matters of indebtedness it is contrary to that of all three other persons at that conference.

Supporting the testimony of said three witnesses are the minutes of defendant's board of directors at a meeting purporting to have been held on the same day the deed was executed, and the further fact that it was not discovered until afterwards that Jankowski had failed to account for other sums of money, amounting, according to the proof, to \$9,146.08, for which the decree finds the property was also given as security.

The minutes of the board, as read in evidence - and their authenticity is not questioned - show that at that meeting the treasurer informed the board that the loan on said property, No. 2701 Northwestern Avenue, Chicago, had been collected but not received by him, and that attorney John Jankowski had declared he would guarantee its repayment. The minutes then recited that said committee was appointed to adjust the matter and had reported



and Rev. J. J. ... The latter is not really.

Dr. ... was called to the witness stand by

complaints and testified that at the conference the ... was informed that ... "was about in his ...", for which the ... would testify ... while he did not remember the ... he believed that ...

... testified that she said at the conference

that ... must understand that it was ... the property in ... the ... of ... will ... to ... be paid back". ... there was ... of ... then ... If ... of ... persons at ...

... of ...

the minutes of ... have been held on the ... further ... that it was not discovered until afterwards that ... according to the ... the property was also given as security.

The minutes of the board, as read in ... and their

authenticity is not questioned - when ...

thereupon informed the board that the ...

... had been ...

received by him, and that ...

The minutes then ...

said committee was appointed to ... and had reported



the execution of the deed in question.

Under a later date of May 8, 1928, the minutes state that the loan on said property together with interest and insurance amounting to \$8,910.92 was paid by John Jankowski, and that the payment was made within a few days after the deed was given is not questioned. He testified that he then made a written demand for reconveyance of the property, and that testimony was not denied. No reference was made in these minutes to any other indebtedness and transaction. It was not until later that it developed that he owed for other matters. The minutes thus harmonize with the testimony that no other matter or transaction was considered or alluded to at the conference than the specific one so adjusted, and with the theory that the deed was intended to secure the indebtedness arising out of that single transaction only.

Much of the testimony before the master related to other items of indebtedness from Jankowski to defendant that appear to have been subsequently discovered. The master's findings that the deed was also intended to secure as well this additional indebtedness, which so far as the record shows does not appear to have been known or even suspected at the time the deed was executed, was followed by the decree but is not supported by the evidence.

We think it is almost too clear for discussion that the deed was given solely to secure Jankowski's repayment of what he had collected of defendant's loan on said Northwestern avenue property, and that it having been repaid, Mrs. Jankowski was entitled to a reconveyance of her property without any condition other than payment of whatever defendant has paid out for taxes on the property or installments of mortgages thereon. Some such payments appear to have been made.

the execution of the deed in question.

Under a letter dated May 2, 1934, the witness states

that the loan on said property involved with interest and insurance amounted to \$1,111.22 was paid by John Janowski, and that the pay-

ment was made within a few days after the deed was given is not

questioned. He testified that he then made a written demand for

return of the property, and that testimony was not denied. The

reference was made in those minutes to any other transactions and

transactions. It was not until later that it developed that he owed

for other matters. The minutes then harmonize with the testimony.

That no other matter or transaction was mentioned or alluded to as

the conference than the specific one so referred, and with the

theory that the deed was intended to secure the loan was stated.

Out of that single transaction only.

Much of the testimony before the master related to other

items of indebtedness from Janowski to defendant and appear to

have been subsequently discovered. The master's findings that the

deed was also intended to secure as well this additional indebted-

ness, which as far as the record shows does not appear to have been

known or even suggested at the time the deed was executed, was

followed by the master but is not supported by the evidence.

We think it is almost too clear for discussion that the

deed was given solely to secure Janowski's repayment of what he

had collected of defendant's loan on said Northwestern Avenue

property, and that it having been repaid, Mrs. Janowski was entitled

to a reconveyance of her property without any condition other than

payment of whatever defendant has paid out for taxes on the property

or installments of mortgage interest. Some such payments appear to

have been made.



In this view of the case we are not concerned with the subject of any additional indebtedness of Jankowski to defendant. Nor need we discuss the granting of affirmative relief to defendant on its answer, which it is elementary cannot be done except on a cross bill.

Appellee calls attention to alleged variances between the original and amended bills, as indicating a change of position on the question of fact in controversy. What is so regarded should be considered with reference to the changed relief sought by the amendments.

The original bill alleged that the deed was given to secure "a certain unsettled claim." The first amended bill alleged that on April 24, 1928, John Jankowski was indebted to defendant "in a certain amount, the exact amount of said indebtedness being then undetermined," and that the deed was given to secure "the payment of unsettled indebtedness." The second amended bill stated the amount was \$8,600, and that the deed was given to secure that single indebtedness only and it had been paid.

The original bill sought an injunction to restrain forcible entry and detainer proceedings begun in the Municipal court and to prevent defendant from selling, charging or conveying the property. The first amended bill asked to have the deed construed as a mortgage, and that an account be taken, offering to pay anything that be found remaining due "in respect to said transaction." The second amended bill was filed after defendant's answer alleging that at the time of the execution of the deed Jankowski was indebted to defendant in certain sums of money not then fully determined and ascertained, which defendant then demanded and insisted he should return else it would institute necessary proceedings for the recovery thereof, and thereupon the deed was given as partial security.



on the agency, which is in elementary cannot be more weight on a  
 Not need we discuss the in which of efficiency failed to be  
 subject of any additional investigation of January 10, 1941.  
 In this view of the case we are concerned with the

be considered with reference to the changed relief brought by the  
the decision of 1901 in controversy. But as no regard should  
original and amended bills, as indicating a change of position on  
police relief attention to alleged violations of the

[illegible]

The original bill sought an injunction for certain forcible entry and detainer proceedings begun in the bankruptcy court and to prevent removal from Illinois, claiming to occupy the property. The first amended bill asked to have the deed converted to a mortgage, and that an account be taken, stating to pay nothing and to fund remaining two "in respect to said transaction." The second amended bill was filed after defendant's answer alleging that at the time of the execution of the deed defendant was indebted to defendant in certain sums of money and that fully determined and accounted. This bill was then amended and included to show defendant also it will institute necessary proceedings for the recovery thereof, and requested the court to grant an order accordingly.

The amended bill alleged that it was expressly agreed and understood that said deed was to be held simply as security for payment of the indebtedness of \$8,600 and interest, that it was paid, that a reconveyance was requested and refused, and asked for an injunction against defendant's disposing or encumbering the property and from prosecuting said forcible detainer suit, and that defendant should convey the property to "your oratrix."

It is contended by appellee that in the second amended bill complainants take a position squarely at variance with the other two sworn bills as to what the deed was given to secure, and that they in effect admit defendant's theory that the deed was given for an undetermined indebtedness and so must have included the other indebtedness that was subsequently found to exist.

We do not think the allegations sufficiently certain to imply such an admission. Nor does it appear from the testimony that at the conference had the precise amount due on the only transaction discussed was then ascertained or determined. Complainants owed something paid for taxes and mortgage installments that had been kept up by defendant. As to an accounting and offer to pay what may be found due on the transaction, it would necessarily include whatever defendant had paid out on the property by way of taxes and installments. The testimony is not out of harmony with the allegations in that respect.

The decree, therefore, will be reversed and the cause remanded with directions to enter a decree directing a reconveyance of the property to Mrs. Jankowski, as prayed for, on payment within a reasonable time of whatever defendant has paid out, according to proof, by way of taxes or installments on mortgages, or that on failure to pay the same the bill be dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Gridley, J., concur.



The amended bill alleged that it was improperly issued and understood that said bill was to be held subject to security for payment of the indebtedness of \$3,000 and interest, that it was paid, that a conveyance was requested and refused, and asked for an injunction against defendant's disposing or encumbering the property and from procuring any further execution sale, and that defendant should convey the property as "your estate."

It is contended by appellee that in the second amended bill complainant took a position opposite to that taken with the other two bills as to what the debt was given for, and that they in effect admit defendant's theory that the debt was given for an undetermined indebtedness and no more have incurred the other indebtedness that was subsequently found to exist.

We do not think the allegations sufficiently certain to imply such an admission. Nor does it appear from the statement that at the conference had the precise amount due on the only transaction discussed was then ascertained or determined. Complainant used something paid for taxes and mortgage interest but had been kept up by defendant, as to an unascertained and after to pay what may be found due on the transaction, it would naturally include whatever defendant had paid out on the property by way of taxes and installments. The testimony is not out of harmony with the allegations in that respect.

The decree, therefore, will be reversed and the cause remanded with directions to enter a decree directing a conveyance of the property to Mrs. Janowski, as prayed for, on payment within a reasonable time of whatever defendant has paid out, according to proof, by way of taxes on installments on mortgages, or that on failure to pay the same the bill be dismissed.

REVEREND JUDGE OF THE SUPREME COURT,  
Seaside, N. J., and Grizzly, N. J., concur.



34252

KATHERINE S. KEMPF,  
Appellee.

v.

EDWARD LEVIN, doing  
business, etc.,  
Appellant.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

259 I.A. 632<sup>2</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action in assumpsit based on an alleged breach of an oral agreement by defendant, a pawn broker, to keep "in a safety deposit vault down town in the loop in the City of Chicago," certain described jewelry pledged by plaintiff for a loan of \$2,000.

On a plea of general issue the trial resulted in a verdict in plaintiff's favor for \$5,000. On a remittitur judgment was entered for \$3,106. This appeal followed.

At the time of procuring the loan the parties (the defendant under the name of North Star Loan Bank) signed the following instrument:

"\*North Star Loan Bank\*

No. 198287

Phone Dearborn 4506  
Chicago, Ill. Mar. 19, 1924.

Property 1 Dia. Ring 1 Dia LaValleire and  
Dia. Pendant .....  
Value Amount Loaned \$2000.00/100 and interest 3%  
Payable Monthly, Due 30 Days.

It is expressly understood and agreed by the under-  
signed, that should default be made in the payment  
of interest for a period of .....days, North  
Star Loan Bank may sell the above described property  
without notice, at either public or private sale.  
North Star Loan Bank  
By Edw. Levin

Name Selma Kempf  
Address 5062 Sheridan Road.  
Pledgor."

24882

RECEIVED  
JAN 10 1933

RECEIVED  
JAN 10 1933

RECEIVED  
JAN 10 1933

THE UNITED STATES DEPARTMENT OF JUSTICE

THIS is an action in rem brought on an alleged breach of an oral agreement by defendant, a man known to keep "in a safe" against which some time in the year of 1932, certain described jewelry pledged by plaintiff for a loan of \$2,000. On a plea of denial made the trial resulted in a verdict in plaintiff's favor for \$2,000. On a motion for judgment entered for \$2,000. This appeal followed.

At the time of presenting the loan the parties (the defendant and under the name of North Star Loan Bank) signed the following instrument:

"North Star Loan Bank  
Chicago, Ill. Jan. 12, 1933  
I hereby agree to loan to the undersigned and  
to the undersigned the sum of \$2,000.00 and interest at  
the rate of 10% per annum.

It is expressly understood and agreed by the undersigned, that should default be made in the payment of interest for a period of 30 days, then the property of the undersigned may be sold and the proceeds thereof applied to the payment of the loan and interest thereon.

Witness my hand and seal of the North Star Loan Bank  
Chicago, Ill.  
Jan. 12, 1933

Witness my hand and seal of the North Star Loan Bank  
Chicago, Ill.  
Jan. 12, 1933

Preliminary thereto there was oral conversation pertaining to the value of the jewelry, the amount of the loan and time of payment. Plaintiff contends, and testified, that defendant also orally promised to keep the jewelry in a safety deposit vault. Defendant denied there was any such terms and agreement, and claimed that he kept all pledges of jewelry in a vault in his office, from which in February, 1925, plaintiff's jewelry was taken by burglars and it has not been recovered. Plaintiff introduced other testimony tending to corroborate her claim of such an oral agreement as to the place of keeping the jewelry, but as our opinion must turn on other alleged errors requiring a new trial we shall not discuss the weight of the evidence on that point.

Appellant urges that under the well known rule against receiving verbal evidence to contradict, change or vary written contracts, plaintiff's evidence as to the place of keeping the jewelry was inadmissible. It will be noted that no reference is made to that subject in the written contract. On that subject we are disposed to regard the law stated in Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 88, as applicable to the instrument in question. It was there said:

"A separate parol agreement as to any matter not inconsistent with the terms or legal effect of the written agreement, and on which it is silent, may be shown, where it appears that the written instrument was not intended to be a complete and final statement of the whole transaction between the parties."

This rule has been frequently followed or recognized, and there was evidence tending to establish a cause of action on the theory of such an oral promise.

But we think evidence on the subject was erroneously received, in allowing proof of unsuccessful negotiations for the substitution of merchandise for that so lost. There was no claim



1711 Many there are great errors in the

claiming to be the value of the jewelry. The amount of the loan and  
 time of payment. Plaintiff contends, and testified, that defendant  
 also orally promised to keep the jewelry in a safety deposit vault.  
 Defendant denied there was any such terms and agreement, and claimed  
 that he kept all pledges of jewelry in a vault in his office, from  
 which in February, 1935, plaintiff's jewelry was taken by burglars  
 and it has not been recovered. Plaintiff introduced other testimony  
 tending to corroborate her claim of such an oral agreement as to the  
 place of keeping the jewelry, and so our opinion must now on other  
 alleged errors requiring a new trial we shall not discuss the weight  
 of the evidence on that point.

\_\_\_\_\_

[illegible]

Question. It was said that

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its policy.

This rule has been previously followed of recognized, and there was evidence tending to establish a course of action on the theory of such an oral promise.

substitution of merchandise for that so lost. There was no claim received, in allowing proof of merchandise substituted for the missing articles. We think evidence on this subject was unnecessarily

of negligence or pretense of defendant's liability otherwise than on the basis of such oral promise. The admission of incompetent testimony relating to subsequent efforts at adjustment, received as an admission tending to support such promise, was wholly prejudicial.

From the testimony of plaintiff it appears that the burglary took place in her absence from this country and that she subsequently on her return had negotiations with defendant with reference to a substitution of other diamonds. Rebutting plaintiff's testimony on the subject, hereinafter referred to, defendant testified that they were long time acquaintances and friendly. She had never paid or, so far as appears, tendered her indebtedness to defendant (the amount of which the court required to be remitted from the sum of the jury's verdict.) Defendant claimed that it was solely because of his personal interest in and friendship for plaintiff, and not because of any liability that he made her the offer of substitution, as he was able to get stones for much less than she could. On objection to her testimony that "he wanted to substitute some diamonds for the lost ones" and make a settlement with her, that testimony was properly stricken. She afterwards, however, testified that defendant 'phoned her to come in and when she did produced two stones, diamonds, and said: "I am willing to give you these for the three pieces you lost." The court denied a motion to strike this answer and emphasized the error by asking her what was her answer. In reply she testified that she told him that they did not compare with the value of hers and that "the settlement was unfair."

We think the court erred in not granting said motion to strike and in allowing such evidence to stand. It <sup>was</sup> inadmissible to show an admission of liability. "No one can reasonably say that



of negligence or grossness of defendant's liability of negligence on the basis of such testimony. The admission of inconsistent testimony relating to subsequent efforts at adjustment, received as an admission tending to support such testimony, was wholly prejudicial.

From the testimony of plaintiff it appears that the plaintiff took place in her absence from this country and that the defendant on her return had negotiated with defendant with reference to a substitution of other diamonds. Plaintiff's testimony on the subject, however, referred to, defendant testified that they were long time acquaintances and friends. The defendant said he, as far as appears, tendered her independence to defendant (the amount of which the court refused to be restricted from the sum of the jury's verdict). Defendant claimed that it was solely because of his personal interest in and friendship for plaintiff, and not because of any liability that he owed her the offer of substitution, as he was able to not secure for much less than she could. On objection to her testimony that "he wanted to substitute some diamonds for the lost ones" and make a settlement, with her, that testimony was properly excluded. The afterwards, however, testified that defendant "gave her to some in and when she did produce two stones, diamonds, and said: 'I am willing to give you those for the three pieces you lost.' The court excluded a motion to strike this answer and emphasized the error by asking her what was her answer. In reply she testified that she told him that they did not compare with the value of hers and that "the settlement was unfair."

To claim the court erred in not excluding said motion to strike and in allowing such evidence to stand, the defendant is to show an admission of liability. "No one can reasonably say that



a party who offers to pay a sum to avoid litigation, intends to admit that sum to be due." (Paulin v. Houser, 63 Ill. 312; Barker v. Bushnell, 75 Ill. 220, 222; Graff v. Fox, 204 Ill. App. 598, 603.)

That such evidence had the effect on the jury's mind to admit liability on the only theory on which plaintiff's claim rested, namely, a breach of an oral promise to keep the jewelry elsewhere than in defendant's shop or office where it was lost, can hardly be doubted.

In this view of the case, necessitating reversal of the judgment and a new trial, we hardly need discuss other points, namely, the alleged incompetency of the testimony of plaintiff's witness Reiman, as an expert on the value of the jewelry lost, and alleged error in instructions. There is considerable ground for both contentions. But such error as there may be in either is hardly liable to be repeated on the second trial.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.

a party who offers to pay a sum to avoid litigation, because so  
much time and so much money is involved. (See Smith v. Smith, 111  
Mass. 200, 201; Smith v. Smith, 111  
110, 111, 112.)

That such evidence and the effect on the jury's mind  
to admit liability on the only theory on which plaintiff's claim  
rested, namely, a breach of an oral promise to keep the jewelry  
separate from the defendant's shop on which there is no fact,  
can hardly be doubted.

In this view of the case, necessitating reversal of  
the judgment and a new trial, we hardly need discuss other points.  
Namely, the alleged inconsistency of the testimony of plaintiff's  
witness, Brown, as an expert on the value of the jewelry lost, and  
evidence given in testimony. There is considerable ground for  
both contentions. But each error as to the other is  
hardly liable to be repeated on the second trial.

Smith v. Smith, 111 Mass. 200, 201.

34262

FIRE PROTECTION SECURITIES  
COMPANY, a corporation,  
Appellee.

v.

FIRE PROTECTION COMPANY,  
a corporation,  
Appellant.

31 A  
APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

259 I.A. 632<sup>1</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal has been consolidated for hearing with that in case No. 34263 between the same parties. Each is an action brought to recover royalties claimed by plaintiff under a license agreement for royalties for use of certain patents, the two suits covering different periods of time. As to the only question involved the pleadings in each case are practically the same.

Demurrers to the declaration having been overruled and a plea of general issue filed, defendant's affidavit of merits (amended in the instant case) having been stricken in each case, defendant was adjudged to be in default and judgment was entered in the instant case for \$2,745 and in the other case for \$3,669, thus presenting as the only question in each case the sufficiency of the affidavit of merits.

The declaration sets out a written contract, dated February 28, 1913, between plaintiff and a corporation (whose name was subsequently changed to that of defendant) granting an exclusive license to use a fusible link and a dry pipe valve for the life of the patents applied for by two certain individuals whose interests were assigned to plaintiff, the licensee to pay a royalty of two cents for every sprinkler head and of five cents for every dry pipe



1212

THE NATIONAL ASSOCIATION  
OF REALTORS  
INCORPORATED

THE NATIONAL ASSOCIATION  
OF REALTORS  
INCORPORATED

THE NATIONAL ASSOCIATION OF REALTORS

This appeal has been submitted for filing with the  
 in case No. 1212 between the two parties. It is an action  
 brought to recover damages claimed by plaintiff under a license  
 agreement for exclusive use and of certain premises, the two sides  
 covering different periods of time. In the only question  
 involved the plaintiff in such case was specifically the same.  
 reference to the decision having been overruled and  
 a plea of general issue filed, defendant's attempt to make  
 himself in the instant case having been refused in such case.  
 defendant was required to be in default and judgment was entered  
 in the instant case for \$1,000 and in the other case for \$1,000.  
 that provision as the only question in such case the defendant  
 at the attorney of record.

The decision was not a matter of record, and  
 February 28, 1912, between plaintiff and a corporation (whose name  
 was subsequently changed to that of defendant) growing out of  
 license to use a certain line and a copy was made for the use of  
 the parties applying for the certain business whose interests  
 were assigned to plaintiff, the license to use a copy of two  
 copies for every application made and of two copies for every

valve manufactured and sold by the licensee, payable at certain times, for each preceding quarter, and providing that "in each year the licensee shall pay a royalty of not less than Thirty-six Hundred Dollars (\$3,600) payable quarterly \* \* \* ."

Paragraph 14 of the contract provided that if royalties shall be in arrears for one month after due the grantor by specified notice "may revoke this license which shall thereupon become void, without prejudice to any right or remedy of the grantor for the recovery of money due hereunder or in respect of any breach of any agreement herein contained."

Paragraph 15 provided that "if the licensee shall discontinue the manufacture of the sprinklers and valves under this license or shall not manufacture at least 150,000 sprinkler heads and 100 dry pipe valves in the first year commencing at the date hereof, and in each subsequent year, and if required by the grantor at least 300,000 sprinkler heads and 200 dry pipe valves in each subsequent year during the term of this agreement," then by notice as aforesaid the grantor may terminate the license and the license shall become void without prejudice to the same rights and remedies as provided in paragraph 14.

The declaration further alleges that subsequently there were two supplemental agreements amending the original agreement, one April 22, 1913, (unnecessary to consider) and the other February 28, 1913, (after defendant changed its name) which provided for a change of royalty from two cents to five cents for every sprinkler head and gave the grantor the option to terminate the license if at least 100 dry pipe valves should not be manufactured in the first year commencing March 1, 1919, and in each subsequent year, and if

valve manufactured and sold by the licensee, payable at certain times, for each preceding quarter, and providing that "in each year the licensee shall pay a royalty of not less than thirty-six percent of the net sales of the licensee's valve manufactured and sold by the licensee, payable quarterly \* \* \*".

Paragraph 14 of the contract provides that in violation shall be in breach for one month after the grantor by specified notice may revoke this license which shall thereupon become void, without prejudice to any right or remedy of the grantor for the recovery of money due hereunder or in respect of any breach of any agreement herein contained."

Paragraph 15 provided that "if the licensee shall discontinue the manufacture of the sprinklers and valves under this license or shall not manufacture at least 100,000 sprinkler heads and 100 six pipe valves in the first year commencing on the date hereof, and in each subsequent year, and if required by the grantor at least 200,000 sprinkler heads and 200 six pipe valves in each subsequent year, then by notice the grantor may terminate the license and the licensee shall thereupon cease to have any right or remedy and termination as provided in paragraph 14."

The condition further alleged that subsequently there were two supplemental agreements amending the original agreement, one April 22, 1918, (unnecessarily so considered) and the other February 22, 1919, (after defendant changed its name) which provided for a change of royalty from two cents to five cents for every sprinkler head and gave the grantor the option to terminate the license if it failed to manufacture at least 100 six pipe valves in the first year commencing April 1, 1919, and in each subsequent year, and if



required by the grantor at least 300,000 sprinkler heads and 200 dry pipe valves in each subsequent year.

The provision for payment of a royalty of not less than Thirty-six Hundred Dollars (\$3,600) quarterly remained unchanged.

The declaration further alleges that on or about March 28, 1923, plaintiff notified defendant that because of its default to manufacture dry pipe valves as provided by the agreement as amended, it revoked the license to manufacture said dry pipe valves. The declaration further alleges that said revocation did not apply to the license to manufacture sprinkler heads and that during the year of 1923, and thereafter, defendant did not manufacture any dry pipe valves "but did continue to manufacture sprinkler heads under said license agreement, and continued to pay to the plaintiff the minimum royalty provided to be paid by said agreement, of Three Thousand, Six Hundred Dollars (\$3,600) per year for the years 1924, 1925, 1926 and 1927," and sets forth the number of sprinkler heads manufactured in 1923, and the amount due under the terms of the contract as aforesaid.

The affidavit of merits in each case is practically the same. It sets forth that letters patent for the articles in question were secured by the Associated Factory Mutual Fire Insurance Companies, that they organized plaintiff's company and secured the patents to it; that at the dates mentioned in the declaration "they" owned the capital stock and controlled it; that defendant and its predecessors were manufacturers of sprinkler equipment; that "the Mutual Insurance Companies" had a large number of members and subscribers in connection with a mutual insurance business operated by "it," and in that connection operated laboratories for the testing of fire extinguishing appliances, certain of which "it" recommended to "its" members for use. The affidavit then sets forth that defendant was advised by said Mutual Insurance Companies <sup>to</sup> the effect that it designed and

regulated by the number of lines 200,000 subscriber lines and 200  
 city pipe valves in each subsequent year.

The provision for payment of a penalty of not less than  
 \$100.00 for each day of delay in the completion of the work.

The decision further states that on or about 1933  
 the city council passed an ordinance that provided for the payment of  
 to maintain city pipe valves as provided by the ordinance as  
 enacted. It covered the license to manufacture and city pipe valves.  
 The decision further states that such provision was not applied  
 to the license to manufacture subscriber lines and that during the  
 year of 1933, and thereafter, defendant did not manufacture any city  
 pipe valves but did continue to manufacture subscriber lines and  
 said license agreement, and defendant began to pay to the city the  
 minimum royalty provided to be paid by said agreement, at three  
 thousand, six hundred dollars (\$3,600) per year for the years 1933,  
 1934, 1935 and 1936, and also for the number of subscriber lines  
 manufactured in 1933, and the amount was under the terms of the  
 contract as stated.

The plaintiff of course in this case is entitled to the  
 same. It was held that defendant's failure to pay the royalty in question  
 was covered by the amended Federal Trade Commission Commission.  
 that they organized plaintiff's company and secured the patent to  
 it; that of the facts mentioned in the decision "they" used the  
 capital stock and controlled it; that defendant and his associates  
 were employees of plaintiff's company; that "the Federal Trade  
 Commission" had a large number of members and subscribers in connection  
 with a mutual insurance business operated by "it" and in that  
 connection operated defendant for the benefit of the said  
 applicant, certain of whom "it" recommended to "the" members for  
 use. The affidavit then sets forth that defendant was advised by  
 said Mutual Insurance Company that the effect that it desired and



procured the patents for the devices in question, and would recommend the same to its members and none others, and procure agreements from them to use no others, and organize a corporation for the purpose of executing a license agreement covering said patents if defendant would make possible the distribution of such devices among its members throughout the United States. It then states that it accepted the offer and the "Mutual Insurance Companies" thereupon made promises in accordance with such offer and organized plaintiff company, with which defendant entered in the agreement in the declaration mentioned; that said Mutual Insurance Companies failed to recommend the devices to its members and approved and recommended, and still recommends, other head and valve devices to its members.

The affidavit then states that the dry pipe valve was unreliable and impracticable and so conceded to be <sup>by</sup> the Mutual Insurance Companies, and accordingly said license on said dry pipe valve was cancelled by plaintiff "and then and there said minimum royalty in said contracts mentioned was duly cancelled" - a mere conclusion and that therefore the consideration and the inducement for the execution by defendant of said agreement has wholly failed.

The affidavit contains no additional material facts but in effect incorporates the defendant's overruled demurrer therein.

It will thus be seen that defendant's affidavit of merits, so far as it attempts to state facts, predicates the defense entirely on a breach of an independent agreement made not with plaintiff but with a third party, a distinct entity, "the Mutual Insurance Companies." It is so manifest that the alleged facts constitute no defense to the agreement with plaintiff as not to require analysis. As even appellant's counsel has not seen fit to discuss their sufficiency it is hardly necessary for us to do so. Whether the so-called Mutual Insurance Companies constituted one or more corporations or associations is not made apparent from the affidavit. But whatever its or their character,



presented the petition for the device in question, and would recommend the name of the members and more others, and present agreements from them to use the device, and organize a corporation for the purpose of executing a license agreement covering said device if it should be made possible the distribution of such device among the members of the corporation. It is then stated that it is suggested that the "National Insurance Companies" be organized with permission of the members with each other and organized jointly, and in accordance with the agreement in the petition mentioned; that said National Insurance Companies failed to recommend the device to the members and approved and recommended, and still recommended, other such and other devices to the members.

The affidavit then states that the day value was unreliable and impracticable and so concluded to be the National Insurance Companies, and accordingly said day value was cancelled by plaintiff and then and there said minimum weekly in said contracts mentioned was daily cancelled - a mere cancellation and that there was consultation and the indictment for the conspiracy by defendant of said agreement was daily failed.

The affidavit contains no additional material facts but in effect recites the defendant's several several attempts. It will thus be seen that defendant's affidavit of facts, as far as it attempts to state facts, contradicts the facts entirely on a branch of an independent agreement made not with plaintiff but with a third party, a distinct entity, "the National Insurance Companies". It is no material fact that the alleged facts constitute no defense to the agreement with plaintiff as not to require analysis. As even appellants' counsel has not seen fit to discuss their testimony it is hardly necessary for us to do so. Whether the so-called National Insurance Companies constituted one or more corporations or associations is not made apparent from the affidavit. But whatever its or their character,

the relation to plaintiff purports to be that of a stockholder or stockholders. In that capacity, of course, the so-called Mutual Insurance Companies have not the right to act for the corporation, or as the corporation independently of the directors. (Sellers v. Greer, 172 Ill. 549; 14 C. J. 58, 56.)

Nor could the Mutual Insurance Companies as promoters of plaintiff bind the latter by contract. (Seeberger v. McCormick, 178 Ill. 404; Park v. Modern Woodmen of America, 181 id. 214; Cook on Corps. (8th Ed.) Vol. 1, sec. 6, p. 38.) The contract sued on purports to be by plaintiff corporation and duly executed by it as such.

We think it sufficient ground for disposal of the appeal that defendant by paying the minimum royalty required by the contract of \$3,600 annually for the four successive years after plaintiff revoked the license to manufacture dry pipe valves and by accepting the benefits under the contract, elected to keep the same alive and effectively waived any defense it might have had. The principle is too well established to need discussion. It is expressed in Page on Contracts (2d Ed.), Vol. 6, Sec. 3060, p. 5400, and in Williston on Contracts, Vol. 2, Sec. 688, p. 1329, and ably discussed by the New York Court of Appeals in Rosenthal Paper Co. v. National, etc. Co., 123 N. Y. 766, being also a suit to recover royalties for use of a patent under a license agreement. In that case the licensor had breached the contract without the licensee's knowledge, but the latter had continued to keep it alive by enjoying its benefits. The court said: "A contract thus kept alive exists for the benefit of both parties. The party who refuses to regard it as terminated by the breach remains liable to all his obligations and liabilities under it," citing many cases, among them L. E. & M. S. Ry. Co. v. Richards, 152 Ill. 59. See also American S. & G. Co.



the relation to plaintiff purports to be that of a shareholder or stockholder. In that capacity, of course, the so-called Mutual Insurance Companies have not the right to sue for the corporation, or as the corporation independently of the directors. (Bellevue v. Green, 178 Ill. 343; 140 N.E. 2d 30.)

But could the Mutual Insurance Companies as shareholders of plaintiff sue the latter by contract. (Bellevue v. Green, 178 Ill. 343; 140 N.E. 2d 30.) The contract sued on purports to be by plaintiff corporation and duly executed by it as such.

We think it sufficient ground for disposal of the appeal that defendant by paying the minimum royalty required by the contract of \$2,400 annually for the four consecutive years after plaintiff revoked the license to sell films and give values and by receiving the benefits under the contract, elected to keep the same alive and effectively waived any defense it might have had. The principle in so well established in case of assignment. It is expressed in Wells on Contracts (2d Ed.), Vol. 2, Sec. 2000, p. 2400, and in Williston on Contracts, Vol. 2, Sec. 2000, p. 1110, and also discussed by the New York Court of Appeals in Baranovich v. Baranovich, 178 N.Y. 201, 100 N.E. 2d 760, being also a well known precedent for what is at present under a license agreement. In that case the license was purchased the contract without the license's knowledge, but the latter was continued to keep it alive by payment of the benefits. The court said: "A contract thus kept alive exists for the benefit of both parties. The party who wishes to revoke it is precluded by the contract from doing so until his obligation and liabilities under it" being many cases, among them 2d Ed. Williston on Contracts, Vol. 2, Sec. 2000, p. 1110.



v. Chi. G. Co., 184 Ill. App. 309, and Hibernian Bank Ass'n. v. Eckhart & Swan Mill. Co., 140 Ill. App. 479.

But appellant argues that the minimum royalty was not by the terms of the contract apportioned between the two license devices, and payment thereof cannot be enforced. But if there be any doubt as to the interpretation of the contract on this point we think the practical construction put upon it by the parties so many years justifies the court in adopting it. (McLean Coal Co. v. City of Bloomington, 234 Ill. 90; Chicago Title & T. Co. v. Merchants Loan & T. Co., 244 Ill. App. 302; Chicago v. Chi. City Ry. Co., 245 id. 473; Launtz v. Russek Furn. Co., 247 id. 289.) Presumably this point was so decided in overruling defendant's demurrer, and cannot be raised on the ruling construing the affidavit for an insufficient statement of facts on which to predicate a legal defense.

The judgment will be affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.



34263

32 A  
FIRE PROTECTION SECURITIES  
COMPANY, a corporation,  
Appellee,

v.

FIRE PROTECTION COMPANY,  
a corporation,  
Appellant.

APPEAL FROM CIRCUIT  
COURT, COCK COUNTY.

259 I.A. 632<sup>4</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

All the points raised on this appeal have been considered adversely to appellant in case No. 34262, between the same parties, based on the same contract, and consolidated herewith for hearing.

For the reasons stated in the opinion filed this day in case No. 34262 the judgment herein is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.



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3432

THE NATIONAL ASSOCIATION  
OF THE AMERICAN PEOPLE  
OFFICE

v.

THE NATIONAL ASSOCIATION  
OF THE AMERICAN PEOPLE  
OFFICE

AMERICAN ASSOCIATION

OFFICE

3432

THE NATIONAL ASSOCIATION OF THE AMERICAN PEOPLE

THE NATIONAL ASSOCIATION OF THE AMERICAN PEOPLE

THE NATIONAL ASSOCIATION OF THE AMERICAN PEOPLE  
OFFICE

THE NATIONAL ASSOCIATION OF THE AMERICAN PEOPLE

THE NATIONAL ASSOCIATION OF THE AMERICAN PEOPLE

OFFICE

THE NATIONAL ASSOCIATION OF THE AMERICAN PEOPLE

34274

MINNIE BASHLER,  
Appellee.

v.

FEDERAL LIFE INSURANCE  
COMPANY,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 632

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action on a life insurance policy, heard without a jury, in which there was a finding in plaintiff's favor for \$1,047. From the judgment entered thereon an appeal was taken.

The main and controlling defense is that the deceased was not in good health when the policy was delivered to and received by him. It was agreed in his application, made a part of the contract, that the policy "shall not take effect until delivered to and received by him during his life time and while in good health," in which condition he represented himself to be.

The policy is what is termed a "Non-medical Policy," that is, one issued without a prior medical examination and wholly upon the representation of the applicant with respect to his state of health.

The application was signed on July 8, 1929; the policy was issued July 10, 1929, and delivered to the insured July 11, 1929. Four days later the insured went to his physician, complaining that he did not feel well and had not been feeling well for three or four days, as testified to by said physician, called by defendant as its witness. The precise length of time the applicant stated to the physician appeared from the latter's testimony more or less indefinite, he stating on cross-examination it might have been

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO

25 JUL 1933

RE. JAMES EARL RAYMOND THE CHIEF OF POLICE

This is an action on a life insurance policy, known  
without a jury, in which there was a finding in plaintiff's favor  
for \$1,047. From the judgment entered thereon an appeal was  
taken.

The main and controlling defense is that the deceased  
was not in good health when the policy was delivered to and re-  
ceived by him. It was argued in the application, was a part of  
the contract, that the policy "shall not take effect until delivered  
to and received by him during his life and while in good  
health," in which condition he represented himself to be.  
The policy is that it formed a "Non-medical Policy,"  
that is, one issued without a prior medical examination and wholly  
upon the representation of the applicant with respect to his  
state of health.

The application was signed on July 8, 1929; the policy  
was issued July 10, 1929, and delivered to the insured July 11,  
1929. Four days later the insured went to his physician, complaining  
that he did not feel well and had not been feeling well for three  
or four days, as testified to by said physician, called by defendant  
as its witness. The precise month of time the applicant stated  
to the physician appeared from the latter's testimony more or less  
indefinite, he stating an approximate examination it might have been



two or three days, "something like that, within a week anyway."

But whether the insured had reason to believe he was not in good health when he received the policy, and whether it did not take effect because of a further provision that the policy was granted "conditional on there having been no intentional or fraudulent misrepresentation or suppression of fact" by the applicant, need not be considered if plaintiff failed to establish by a preponderance of evidence that at the time of receiving the policy the insured was in good health, as that term is generally understood. For it has been repeatedly decided by our courts that the provision first referred to that the applicant be in sound health, is a condition precedent to right of recovery on the policy, and that the burden of proving it rests on the person suing on the policy. (Daniels Motor Sales Co. v. N. Y. Life Ins. Co., 220 Ill. App. 83; Laughlin v. North Am. Benefit Corp., 244 id. 391, 402; Kunickas v. John Hancock Mut. Life Ins. Co., 253 id. 617.

In fact, while in the instant case the trial court so held as a proposition of law it seems to have decided the case mainly on the ground that the applicant's representation that he was in good health was made "in good faith." As we construe the provision in question, which makes good health of the applicant at the time he receives the policy a condition precedent to the right of recovery, the question of good faith in his representations in regard thereto is not involved. For there can be no recovery on the policy if, as a matter of fact, he was not in good health, even though he thought he was. This was practically the construction given in Coolley v. Met. Life Ins. Co., 150 S. E. (S. C.) 793, to a like contract where there was a like condition precedent that the

two or three days, "something like that, within a week anyway."

But whether the insured had reason to believe he was

not in good health when he received the policy, and whether it

did not take effect because of a further provision that the policy

was granted "conditional on there having been no intentional or

fraudulent misrepresentation or suppression of facts" by the applicant,

need not be considered if plaintiff failed to establish by a pre-

ponderance of evidence that at the time of receiving the policy the

insured was in good health, as that fact is generally understood.

For it has been repeatedly decided by our courts that the provision

inserted in the policy to the effect that the applicant is a non-

alien precedent to the right of recovery on the policy, and that the

burden of proving it rests on the person suing on the policy. Donahoe

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In fact, while in the instant case the trial court so

held as a proposition of law it seems to have decided the case

mainly on the ground that the applicant's representation that he

was in good health was made "in good faith." As we understand the

provision in question, which makes good health of the applicant

at the time he receives the policy a condition precedent to the

right of recovery, the question of good faith in his representation

in regard thereto is not involved. For there can be no recovery on

the policy if, on a matter of fact, he was not in good health, even

though he thought he was. This was precisely the conclusion

given in Harmon vs. Mutual Life Ins. Co., 111 Ill. App. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523,



insured be in good health, and where there was no medical examination and the insured was in fact afflicted with cancer without knowledge thereof by her or the company. Holding that under the terms of the contract sound health was a condition precedent to the company's liability the court, applying the same rule of interpretation as applies in every form of contract, held the company not having waived the condition was entitled to the security it expressly provided. And we can see no room for a different construction. (See 1 Joyce Ins. (2d. Ed.) § 97a, and cases cited.)

What was the fact as to the applicant's good health at the time he received the policy?

Plaintiff rested her case on proof of the policy, payment of premiums, and a stipulation as to the date of application, and the date of the policy and that of its delivery. Whether, in view of the burden cast on plaintiff to show that the insured on those days was in good health, such proof made out a prima facie case, defendant assumed the burden of establishing its defense to the contrary, and called as witnesses on the subject the physician to whom the applicant complained of not feeling well, as aforesaid, and another physician as an expert on the ailments and conditions found as existing on examination of the applicant by the former at the time of such complaint. As a result of the examination (as stated in a letter of the physician written November 21, 1929, after the death of the insured) the physician found that he had an anemic look, felt very tired, was suffering from secondary anemia, a slight heart murmur, and found that his urine contained a small amount of albumen, and that he had a bad case of pyorrhea. From these facts and findings he made a diagnosis of acute nephritis (Bright's disease), with a probable origin of pyorrhea of the mouth, and myocarditis, probably due to the



insured be in good health, and where there was no medical examination and the insured was in fact afflicted with cancer without knowledge thereof by her or the company. Holding that under the terms of the contract sound health was a condition precedent to the company's liability for the sum, and that the rule of interpretation as applied in every form of contract, held the company not having waived the condition was entitled to the recovery it expressly provided. And we can see no room for a different conclusion. (See 1 upon this.)

(24. Mo. 2 372, and cases cited.)

What was the fact as to the applicant's good health at the

time he received the policy?

Plaintiff rested her case on proof of the policy, payment of premiums, and a stipulation as to the date of application, and the date of the policy and date of its delivery. Defendant, in view of the burden cast on plaintiff to show that she insured on these days was in good health, and that she was not a prima facie case, defendant assumed the burden of establishing the contrary to the contrary, and called as witnesses on the subject the physician to whom the applicant complained of not feeling well, an attorney, and another physician as an expert on the ailments and conditions found as existing on examination of the applicant by the former at the time of such complaint. As a result of the examination (as stated in a letter of the physician written November 21, 1930, after the death of the insured) the physician found that he had an enlarged liver, this very thing, was resulting from secondary anemia, a slight heart murmur, and found that his urine contained a small amount of albumen, and that he had a bad case of pyorrhea. From these facts and findings he made a diagnosis of acute nephritis (Bright's disease), with a probable origin of pyorrhea of the mouth, and pyorrhea, possibly due to the

same origin, which progressed rapidly to a fatal end. Asked his opinion as to the duration of a man's health found with such ailments and conditions, as was diagnosed on July 15, 1929, (the date of such complaint and examination) the other physician, who amply qualified as an expert, replied: "It positively could not occur only over a period of months;" that the pathology involved degeneration of heart muscles, of kidney muscles and of blood and would have to be some long continued process; that the pyorrhea alone would take years to develop to that extent and is a disease that develops so slowly we do not see evidences of it until about middle life, and that time is required to make changes in the blood resulting in secondary anemia, and considerable time for the degeneration of the heart muscle resulting in myocarditis. While he testified that a slight heart murmur and acute nephritis might appear more or less suddenly, he testified in effect that the other mentioned ailments would have been detected at a considerable time before July 15, 1929, in other words, that the evidences of these diseases would have been detected long prior to the date of the policy and of its delivery.

As against this unrefuted evidence tending to show that the deceased was not and could not be in good health on said dates, plaintiff, his widow, her brother, and a next door neighbor testified that prior to July 15, 1929, the insured "appeared" to be in good health and they never heard him complain or indicate that he was in ill health.

Whether such evidence be taken as rebuttal or a part of plaintiff's original case, it can be given but little weight against such medical testimony based on actual physical and laboratory examinations and well established pathological theories.



same origin, which progressed rapidly to a fatal end. When his opinion as to the duration of a man's health found with such elements and conditions, as was discussed on July 10, 1937, (the date of such complaint and examination) the other physician, who was qualified as an expert, replied: "It positively could not occur only over a period of months;" that the pathology involved degeneration of heart muscles, of kidney muscles and of liver and would have to be some long continued process; that the symptoms alone would take years to develop to that extent and in a disease that develops so slowly we do not see evidence of it until about middle life, and that time is required to make changes in the blood resulting in secondary anemia, and considerable time for the degeneration of the heart muscle resulting in myocarditis. While he testified that a slight heart murmur and aortic regurgitation might appear more or less suddenly, he testified in effect that the other mentioned ailments would have been detected at a considerable time before July 10, 1937, in other words, that the evidence of these diseases would have been detected long prior to the date of the policy and of the delivery.

As against this unrelated evidence tending to show that the deceased was not and could not be in good health on said date, plaintiff, his widow, her brother, and a next door neighbor testified that prior to July 10, 1937, the insured "appeared" to be in good health and they never heard him complain or indicate that he was in ill health.

Neither such evidence as taken as rebuttal or in proof of plaintiff's original case, it can be given but little weight against such medical testimony based on actual physical and laboratory examinations and well established pathological theories.

Gooley in his work on Insurance Ethics, Vol. 4, p. 3237,



says:

"The words 'good health' generally mean the absence of any vice in the constitution, and of any disease of a serious tendency nature that has a direct tendency to shorten life; that is, the absence of a condition of health that is commonly regarded as a disease in contradistinction to a temporary ailment or indisposition."

In Trafton v. Nat'l Council, Knights and Ladies Security, 193 Ill. App. 347, the words "good health" were held to mean "a reasonably good state of health and free from any disease or illness that tends seriously or permanently to weaken or impair the constitution, and such words do not refer to the appearance of good health."

Again it was said in Murphy v. Met. Life Ins. Co., 106 Minn. 112: "It is the fact of the sound health of the insured which determines the liability of the defendant, not his apparent health, or his or any one's opinion, or belief that he was in sound health."

We think, therefore, that the court's finding was against a clear preponderance of evidence that the insured was not in good health at the time the policy was delivered and received by him.

Accordingly the judgment will be reversed with such a finding of fact.

REVERSED WITH A FINDING OF FACT.

Scanlan, P. J., and Gridley, J., concur.



34274

FINDING OF FACT.

We find that the insured was not in good health at the time the policy of insurance in question was delivered to and received by him.



47. 4. 2017

the time the policy of investment in Russia was delivered to him received by him.

34283

UNIVERSAL ACCEPTANCE CORPORATION,  
Appellant,

v.

JOHN WACHOWSKI,

Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

259 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On September 29, 1929, judgment by confession under power of attorney was entered against defendant on his promissory note for \$120 and interest, dated June 7, 1929, made payable to Robert R. Anderson Company in monthly installments of \$10, the first on July 1, 1929, and \$10 on the first of the eleven successive months.

On a petition by defendant to vacate, filed November 25, 1929, the judgment was opened and defendant given leave to defend. A jury trial was had January 17, 1930. A verdict was returned finding the issues against plaintiff, and thereupon the prior judgment was vacated and a new judgment was entered on the verdict, from which the appeal was taken.

Defendant having admitted his signature, plaintiff introduced the note and rested. Thereupon defendant took the stand in his own behalf and testified, practically as set forth in the petition which stood as his affidavit of defense, that he received a bill from the payee of the note for paving a street intersecting the one on which his house was situated, to which he paid no attention, not having entered into any contract therefor; that later said company's agent called with the bill and said he would have to pay it, that it was for a special assessment against his property and if he did not sign the paper presented, the promissory note in question, the matter would be turned over to a lawyer. Thereupon

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

v.

JOHN J. HARRIS, JR.

Defendant.

STATE OF NEW YORK

County of New York

2791 A. 633

RE. JUDICIAL NOTICE TAKEN OF THE RECORD.

On September 25, 1933, judgment by confession was entered against defendant on his promissory note for \$100 and interest, dated June 7, 1933, made payable to Robert M. Anderson Company in monthly installments of \$12, the first on July 1, 1933, and \$10 on the first of the eleven successive months.

On a petition by defendant to vacate, filed November 25, 1933, the judgment was granted and defendant given leave to defend.

A jury trial was had January 17, 1934. Defendant was returned finding the issues against plaintiff, and thereupon the jury judgment was vacated and a new judgment was entered on the verdict, from which the appeal was taken.

Defendant having admitted his signature, plaintiff introduced the note and testified. Thereupon defendant took the stand in his own behalf and testified, practically as set forth in the petition which stood as his affidavit of defense, that he received a bill from the payee of the note for paying a check introduced the one on which his name was attached, at which he paid no attention, not having entered into any contract therewith; that later said company's agent called with the bill and said he would have to pay it, that it was for a special assessment against his property and if he did not sign the paper presented, the promissory note in question, the matter would be turned over to a lawyer. Thereupon



he signed but did not read the note. He could read it, and he paid \$10 on it.

Defendant also called the said agent of the payee company who testified that the paving was done in the previous May under contract. In rebuttal the said agent denied saying the bill was for a special assessment against the property and that defendant would have to pay it or would have to pay the city for it. He knew there was no contract with defendant and that defendant was under no obligation to pay the bill. Probably the jury believed defendant's statement that the agent falsely represented that the note was for a special assessment against his property, and if the case turned on that fact we would not disturb the verdict.

But plaintiff is an endorsee and became a holder of the note before it was overdue. If it also took the note in good faith and for value and without notice of any infirmity in the instrument or defect in the title of the payee, it was, under the Negotiable Instrument Act (Sec. 73, Ch. 93, Cahill's Stats.) a holder in due course and so entitled to recover from the maker, notwithstanding the jury believed he was induced to sign the note on misrepresentation and without any consideration therefor. Introduction of the note indorsed in blank by the payee, made out a prima facie case for plaintiff and supported the presumption that it acquired the same in good faith, for value, in the usual course of business, without notice of defenses. The burden was on defendant to show the contrary. He neither introduced any proof tending to negative any one of these conditions under which one becomes a holder in due course, nor in fact alleged anything in his affidavit of

he signed but did not read the note. He could read it, and he paid \$10 on it.

Defendant also called the said agent of the paper company who testified that the paper was done in the previous day under contract. In substance the said agent testified that the bill was for a special measurement against the property and that defendant would have to pay it or would have to pay the city for it. He knew there was no contract with defendant and that defendant was under no obligation to pay the bill. Therefore the jury believes defendant's statement that the agent falsely represented that the note was for a special measurement against the property, and if the same turned out to be false he would not return the verdict.

That plaintiff is an employer and became a holder of the note before it was overdue. It is also fact the note is good which and for value and without notice of any infirmity in the instrument or defect in the title of the paper, it was, under the Negotiable Instrument Act (Sec. 78, Ch. 93, Civil's Stat.) a holder in due course and an entitled to recover from the maker, notwithstanding the jury believes he was induced to sign the note on misrepresentation

and without any consideration therefor. Introduction of the note introduced in blank by the paper, made out a blank note for plaintiff and suggested the presumption that it carried the same in good faith, for value, in the usual course of business, without notice of defenses. The burden was on defendant to show the contrary. He neither introduced any proof tending to negative any one of these conditions under which one becomes a holder in due course, nor in fact alleged anything in his affidavit of

merits having such a tendency. His sole defense was one that might be made against the payee, but not a holder in due course. The burden was on defendant, having made proof of fraud and no consideration, to show that plaintiff took the note in bad faith with notice thereof. There was no attempt to make such proof. Hence the judgment cannot stand. (Kellogg v. Hale, 190 Ill. App. 17.)

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.



merits having such a tendency. His sole defense was one that might be made against the paper, but not a holder in due course. The burden was on defendant, having made proof of funds and no consideration, so that plaintiff took the note in bad faith with notice thereof. There was no attempt to make such proof. Hence the judgment cannot stand. Johnson v. White, 111 Mo. 400.

17.)

NOTES AND INTEREST.

Johnson v. White, 111 Mo. 400.

34303

A. J. HARVEY, Receiver of  
the First National Bank  
of Marysville, Kansas,  
Appellee.

v.

L. L. SMITH,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 633<sup>2</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The statement of claim herein alleges (1) that plaintiff was appointed receiver of the First National Bank of Marysville, Kansas, by the Comptroller of the Currency prior to August 12, 1924; (2) that at that time defendant was the owner of four shares of the capital stock of said bank at the par value of \$100 per share; (3) that there was an assessment upon said share holders on said date by the Comptroller of the Currency; (4) that on August 20, 1924, plaintiff mailed to defendant a notice of said assessment, and (5) defendant has failed to pay any part thereof.

Defendant took no issue on the first and fourth averments, and hence is in no position to question either the proof offered as to the appointment of the receiver or that the bank was duly chartered as a national bank or that the notice was not sent.

In his affidavit of defense defendant alleges that the certificate for four shares of said stock was made out in his name without his knowledge or consent by the administratrix of his deceased father's estate, as part of his share thereof, and entered on the books in his name; that he had sought to sell and dispose of the same but had been unable to do so. He denies therein that there was an assessment upon the stock holders by the Comptroller

24303

A. J. HAYES, Receiver of  
the First National Bank  
of Kentucky, Louisville,  
Appellee.

L. L. WILKINSON,  
Appellant.

STATE OF KENTUCKY,  
County of Jefferson.

2521 A. 688

IN SENATE, JANUARY 18, 1904.

The record of said bank shows (1) that plaintiff was appointed receiver of the First National Bank of Louisville, Kentucky, by the Comptroller of the Currency prior to January 11, 1904; (2) that at that time defendant was the owner of four shares of the capital stock of said bank of the par value of \$100 per share; (3) that there was an assessment upon said shares held by the Comptroller of the Currency; (4) that on August 20, 1904, plaintiff mailed to defendant a notice of said assessment, and (5) defendant has failed to pay any part thereof.

Defendant took no issue on the first and fourth averments, and moved in his position to question either the proof offered as to the appointment of the receiver or that the bank was duly chartered as a national bank or that the notice was not sent.

In his affidavit of defense defendant alleges that the certificate for four shares of said stock was made out in his name without his knowledge or consent by the administrator of his deceased father's estate, as part of his share thereof, and that on the books in his name; that he had sought to sell and dispose of the same but had been unable to do so. He denies therein that there was an assessment upon the stock holders by the Comptroller



of the Currency, and that plaintiff has any right to bring the suit, and avers that the court is without jurisdiction, without stating any facts upon which to base such conclusions.

This affidavit was amended at the trial by inserting "that defendant prior to the insolvency of said bank and appointment of the receiver" sold said stock to the president of the bank and ceased to be the owner thereof, thereby changing the issue from the denial of ownership of the stock to an admission that he owned it at one time but subsequently sold it.

The amended affidavit omitted the allegation in the original as to his attempt to sell the stock, which, however, was inconsistent with the claim that he did not own it.

The proof, however, showed that defendant became owner of the stock and received dividends thereon for many years prior to August 12, 1924, and that he transmitted the certificate thereof to the president of said bank to sell. But there was no proof of an actual sale. As far as the record shows he was still the owner of the stock on August 12, 1924.

In effect his affidavit of defense admits the bank's insolvency and the appointment of "the receiver", but took issue on only two facts, namely, his ownership of the stock and an assessment by the Comptroller of the Currency. Proof of the latter being sufficient and the proof offered to rebut it incompetent, the court was correct in remarking that the question of ownership was the only question before the jury. As the issue was properly narrowed down to that question most of appellant's points are without merit.

Proof of the assessment as alleged was made by a certified copy thereof, signed by one Awalt as "Acting Comptroller," a

of the company, and that plaintiff has no right to bring the suit, and every time the court is without jurisdiction, without stating any facts upon which to base such conclusions.

This plaintiff was shocked at the trial by knowing

"that defendant prior to the insolvency of said bank had appointed of the receiver" said stock to the president of the bank and caused to be the owner thereof, thereby changing the name from one denial of ownership of the stock to an admission that he owned it at one time but subsequently sold it.

The amended affidavit omits the allegation in the original

as to his attempt to sell the stock, which, however, was inconsistent with the claim that he did not own it.

The proof, however, showed that defendant became owner

of the stock and received dividends thereon for many years prior to August 12, 1922, and that he transmitted the certificate thereof to the president of said bank as well. But there was no proof of an actual sale. As far as the record shows he was still the owner of the stock on August 12, 1922.

In effect his affidavit of defense admits the bank's

insolvency and the appointment of "the receiver", but took issue on only two facts, namely, his ownership of the stock and an assessment by the Comptroller of the Currency. None of the latter being sufficient and the proof offered to rebut it incompetent. The court was correct in reasoning that the question of ownership was the only question before the jury. As the issue was properly narrowed down to that question none of

plaintiff's points are without merit.

Proof of the assessment on which was made by a certified

copy thereof, signed by one who is an "acting Comptroller," a



mere ministerial act which the Acting Comptroller was presumed to possess in the absence of any statutory specific requirement to the contrary. (Garden City Band Co. v. Miller, 157 Ill. 225.) The assessment was also signed by one McIntosh as "Acting Comptroller of the Currency." Defendant objected to the competency and relevancy of the documents because the assessment was not made by the Comptroller. Courts will take judicial notice of the Federal offices filled by appointment of the President, such as Comptroller and Deputy Comptroller, and of their official functions, and that the latter may act for the former in his absence. (Sullivan v. Algren, 157 Ill. App. 123; Garden City Band Co. v. Miller, 157 Ill. 225.)

Defendant offered proof in the form of letters from the Comptroller's office that at the time of the assessment Henry M. Dawes occupied the position of Comptroller of the Currency and there was no vacancy in the office. But this did not prove that he was at no time absent from his official duties and that McIntosh did not properly officiate as Acting Comptroller in making the assessment. However, mere letters, though bearing the seal of the office, were in no event competent proof on that subject.

While admission in evidence of defendant's two affidavits of merits was not proper to show their inconsistency as to his claim of non-ownership of the stock, yet as there was no legal proof of his non-ownership it did no harm.

While no question of veracity was raised there was no error in giving the instruction as to the jury's right to determine the credibility of witnesses, even though defendant was the only one who testified, especially as no fact he testified to was brought in question.

In view of the restricted issues of fact and character of proof much of appellant's argument and many of his authorities are irrelevant.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.



were ministerial and which the Acting Comptroller was presumed to

possess in the absence of any contrary specific statement to

the contrary. (Exhibit A, p. 111, 112, 113.) The

management was also signed by one Belmont as "Acting Comptroller of

the Currency." Defendant objected to the competency and relevancy

of the documents because the management was not made by the Comptroller.

Court will take judicial notice of the federal offices filled by

appointments of the President, such as Comptroller and Deputy Comptroller,

and of their official functions, and that the latter was not for the

former in his absence. (Exhibit A, p. 111, 112, 113.)

(Exhibit A, p. 111, 112, 113.)

Defendant offered proof in the form of letters from the

Comptroller's office that at the time of the management Henry M.

Lewis occupied the position of Comptroller of the Currency and there

was no vacancy in the office. This fact did not prove that he was

at the time absent from his official duties and that Belmont did not

properly officiate as Acting Comptroller in making the assessment.

However, more letters, showing bearing the seal of the office, were

in no event competent proof on that subject.

This question is evidence of defendant's lack of knowledge

of facts was not proper to show their incompetency as to the status

of non-ownership of the assets, yet as there was no legal proof of his

non-ownership it did not harm.

While no question of competency was raised there was no

error in giving the instruction as to the jury's right to determine

the credibility of witnesses, even though defendant was the only one

who testified, especially as he had no testimony to be weighed in

question.

In view of the restricted nature of fact and character of

proof such as defendant's argument and many of his witnesses are

irrelevant.

REVEREND

34305

JAMES COAL COMPANY,  
a Corporation,  
Appellee,

vs.

LUCY C. CATHERWOOD,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 633<sup>3</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment rendered upon the verdict of the jury for \$1527.94 in plaintiff's favor, in a suit to recover upon an oral contract for the price of coal sold by plaintiff to defendant and delivered to her at her five apartment buildings in the year 1917. Defendant, claiming a breach of contract, filed a set-off for damages for the full amount of the claim.

No controversy arises as to the pleadings, or the quantity of coal delivered, or the places or dates of deliveries. The only questions of fact in controversy were as to the quantity of coal contracted for, the time of payments therefor, and the quality and value of the coal delivered.

Reversal is sought on alleged errors in (1) rulings on the admission of evidence; (2) improper and prejudicial conduct and remarks by plaintiff's counsel; (3) an alleged talk by one of plaintiff's attorneys to a member of the jury during the trial; and (4) the refusal of offered instructions by defendant.

A like judgment in this case was reversed by this court in an opinion rendered November 8, 1922. One of the grounds of reversal was admission in evidence of certain tickets for delivery of coal to defendant, receipted for by her janitors, to show the kind and quality of the coal delivered. It is complained as one of the errors in admitting evidence at the second trial

24308

JAMES EARL RAY,  
a Corporation,  
Appellee.

vs.  
UNITED STATES OF AMERICA,  
Appellant.

259 I.A. 633

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

This appeal is from a judgment rendered after the verdict of the jury for defendant's acquittal, in a case to recover upon an oral contract for the price of coal sold by plaintiff to defendant and delivered in New York City. Plaintiff is the party in the year 1957. Defendant, claiming a breach of contract, filed a motion for judgment for the full amount of the claim.

An affidavit sworn to by the plaintiff, at the time of oral delivery, on the basis of sales of defendant. The only question of fact is whether or not the quantity of coal delivered was, the time of payment, and the quality and value of the coal delivered.

Plaintiff is seeking an alleged amount in its complaint on the admission of evidence; (1) payment and production of evidence and receipt by defendant's counsel; (2) an alleged bill of sale of plaintiff's attorney as a member of the jury during the trial; and (3) the return of which is alleged to be false.

A like finding in this case was reversed by this court in an opinion rendered November 4, 1958. One of the reasons of reversal was admitted in evidence of certain items for delivery of coal to defendant, requested for by her lawyers, to show the kind and quality of the coal delivered. It is contended as one of the errors in admitting evidence at the second trial



that these same tickets were shown to plaintiff's witnesses for the purpose of refreshing their memory, and that defendant's counsel was not permitted to inspect the delivery slips. While there may have been some irregularities in the course of examining said witnesses with respect to their memory of the deliveries without inspecting the delivery slips, and whether they could testify independently of them after their memory had been refreshed thereby, yet we are not disposed to regard the record as containing reversible error upon that point. Nor does the record support the claim that defendant's counsel was refused the right to inspect the same. We are unable to find reversible error in the admission of evidence, or in the record as to the claim that one of plaintiff's witnesses talked to a member of the jury. And while there may be some ground for holding that the court improperly refused instructions presenting defendant's theory of the case, yet we will not discuss the same, it being necessary, in our opinion, to reverse the judgment and remand the cause for a new trial on the second ground relied upon for reversal.

In the course of the direct examination of Robert Catherwood, defendant's husband, by her attorney the witness was testifying as to the "difficulty" in getting coal in the buildings, owing to the demand of the United States Navy therefor at that particular period. Plaintiff's counsel objected to the question and said: "It will be our contention that the difficulty of this man had been that he had not paid John Dunn & Company for coal that he had used the year before. And there is another coal company; I think it was the Southern Coal Company, that he had not paid for his coal the year before, and that was the difficulty of Bob Catherwood getting coal at that time, and the only difficulty." While the court granted the motion to strike out these remarks and

that these same things were known to Plaintiff's witnesses for the purpose of retelling their memory, and that Defendant's counsel was not permitted to suggest the delivery slips. While there may have been some irregularities in the course of examining said witnesses with respect to their memory of the delivery slips, inspecting the delivery slips, and whether they could testify independently of them after their memory had been refreshed thereby, yet we are not disposed to regard the record as containing reversible error upon that point. Nor does the record support the claim that Defendant's counsel was refused the right to inspect the same. We are unable to find reversible error in the admission of evidence, or in the record as to the claim that one of Plaintiff's witnesses failed to answer a question of the jury, and while there may be some ground for holding that the court improperly refused instructions prescribing Plaintiff's theory of the case, yet we will not discuss the same, it being necessary, in our opinion, to reverse the judgment and remand the cause for a new trial on the second ground relied upon for reversal.

In the course of the direct examination of Robert Gatherwood, Defendant's husband, by his attorney the witness was testifying as to the "difficulty" in getting coal in the fall of 1914, owing to the demand of the United States Navy therefor at that particular period. Plaintiff's counsel objected to the question and said: "It will be our contention that the difficulty of this man had been that he had not paid John Dunn & Company for coal that he had used the year before. And there is another coal company; I think it was the Southern Coal Company, that he had not paid for his coal the year before, and that was the difficulty of not Gatherwood getting coal at that time, and the only difficulty." While the court granted the motion to strike out these remarks and



directed the jury to disregard them, that did not cure their prejudicial effect. The witness was defendant's agent in making the contract. The remark conveyed the idea to the jury, and was so intended, that defendant habitually failed to pay or disputed her coal bills, and went directly to the question of <sup>the</sup> good faith of her defense. While the court properly struck the remarks from the record it went on to say it thought there was some proper foundation for the objection made by plaintiff's counsel, thus leaving a confused impression of the relevancy of the matter in the minds of the jury.

Again in the course of the direct examination when the witness' attention was directed to a conversation had with plaintiff's president, and a slip of paper handed to the latter, he was asked: "Did you see him do anything with it?" plaintiff's counsel objected and said: "We were over that yesterday, and I held the record on this witness' testimony at the former trial, and his testimony was different yesterday, and he is trying to correct and cure the ill." If this was so the proper way to show it was by evidence and not by such a statement. Objection to the remark was overruled, and on defendant's counsel asking a further question about the conversation plaintiff's counsel again objected, saying: "I held the record on this fellow on the former trial, and his testimony is just 60 days different now, yesterday, than what it was on the former trial." When that was objected to, plaintiff's counsel continued: "And they have undoubtedly read the record last night and are trying to correct what he said." At this point counsel for defendant asked that a juror be withdrawn on account of such unfairness. The court mildly instructed the jury to disregard the statement.

If counsel wished to attack the integrity of the witness it should have been done by evidence, and the time and



directed the jury to disregard them, that his act was entirely gratuitous effect. The witness was defendant's agent in making the contract. The witness conveyed the idea to the jury, and was as interested, and not at all honestly, in the question of the trial. Her own bias, and was directly in the question of the trial of her interest. While the court properly stated the witness's testimony, the record is not as to say it though there was some error in the testimony. The witness was by defendant's counsel, and leaving a confused impression of the testimony of the witness in the minds of the jury.

Again in the course of the direct examination when the witness' attention was directed to a conversation had with defendant's president, and a copy of paper handed to the witness, he was asked: "Did you see him do anything with it?" defendant's counsel objected and said: "We were over that yesterday, and I told the record on this witness' testimony at the former trial, and his testimony was different yesterday, and he is saying in court and says the all." It was as the proper way to show it was by evidence and not by mere statement. Objection to the remark was overruled, and on defendant's counsel making a further question about the conversation defendant's counsel again objected, saying: "I told the record on this fellow on the former trial, and his testimony is just as different now, yesterday, then what it was on the former trial." When that was objected to, defendant's counsel continued: "and they have undoubtedly read the record last night and are trying to correct what he said." At this point counsel for defendant asked that a letter be written on account of such matters. The court mildly instructed the jury to disregard the statement.

It cannot be said to attack the integrity of the record if it might have been done by evidence, and the time was

place to comment on it was in his argument to the jury at the close of the evidence and not by such reflections in the course of the trial that might be given the force of evidence or be extremely prejudicial in effect.

These are not the only improper remarks and conduct on the part of plaintiff's counsel as disclosed in the record. In an endeavor to justify the remarks above complained of he recites in his brief equally prejudicial colloquies that took place between him and opposing counsel, in which he invited the latter to a physical combat. We find nothing in them in the way of his justification. On the contrary, the colloquies were most undignified and called for the stern rebuke of the court. The remarks of defendant's counsel seem, however, to have been provoked by a course of conduct and language of plaintiff's counsel that should not be tolerated and cannot be condoned in a court room. They were in the nature of an attempt to "bully" or "bulldoze" the defense, tactics that should be suppressed by the court at their very beginning in a manner that would insure their not being repeated. Counsel cannot complain if the benefit of a judgment is lost by his resort to such unfair and reprehensible methods. The case has been pending a long time and it is regrettable that it should be sent back for a new trial mainly because of such unfair and prejudicial conduct and remarks.

REVERSED AND REMANDED.

Scanlan, F. J., and Gridley, J., concur.

place to account for it was in his argument in the case of the  
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There are two other important reasons for the

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There are two other important reasons for the

on the part of judicial's account of evidence in the case.

In an evidence he found the evidence was contained in an

article in his case which he found contained the same

name before the and against evidence, in which he found the



34401

ROBERT P. GUST COMPANY, Inc.,  
a Corporation,

Appellant,

vs.

KIP CORPORATION, a Corporation,  
et al.,

Appellees.

APPEAL FROM THE CIRCUIT  
COURT OF COOK COUNTY.

259 I.A. 633<sup>4</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a bill for injunction to restrain the cancellation and violation of an exclusive sales contract. The court, correctly, we think, sustained a general demurrer to the bill, dissolved the temporary injunction and dismissed the bill.

The bill alleges that complainant, on January 11, 1929, entered into a written contract (set out in the bill) with the Kip Corporation, by which complainant was made its sales manager with exclusive right of sale of its products, pyrex or anti-pyrex, in certain territory on a commission basis. Complainant was to represent no competitor and was to employ for six months at its own expense three certain men in developing the territory and promoting the sale of such products.

In the contract the Kip Corporation is referred to as the "manufacturer" and complainant as the "sales manager." Section 10 thereof provided as follows:

"The manufacturer agrees to set an advertising appropriation based on not less than 25% of manufacturer's wholesale list price on stated products during the term of this agreement unless by written agreement between the manufacturer and the sales manager it is decided that stated appropriation shall be either increased or decreased, and in the event that the initial distribution does not create sufficient sales volume to allow an adequate initial advertising campaign based on the advertising allowance of list price, the manufacturer will pay for advertising sufficient in its sole discretion to carry on the initial advertising expenditures and this amount will be credited to the manufacturer from manufacturer's advertising fund created by percentage of wholesale list price as set forth by the manufacturer over a period of three years."

Section 13 provided:

[illegible]

7

3231.A.633

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

This is a bill for information to restrain the Senate.

...and the fact that the ...

COVERING, WE THINK, A MAJOR PART OF THE HISTORY OF THE AREA.

...and because the material was not yet tested

THESE ARE THE RESULTS OF THE INVESTIGATION.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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of, Diner-Jones to George, affecting all or some of said evidence

certains for liberty on a small scale. Complicated was to keep

There is no doubt that the above information is true and correct.

[illegible]

What is the name of the person who is the author of the book "The Great Gatsby"?

SA of Bureau of Investigation via our jurisdiction and of

The "unofficial" and "unpublished" history

Of Forest Products of the United States:

[illegible]

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"Anything herein to the contrary notwithstanding, if the minimum sales at list price by the sales manager shall not be \$400,000 for the first year or \$500,000 for the second year or \$750,000 for the third year, this contract may be cancelled by the manufacturer on written notice of 30 days whenever the amount of sales falls below said quota."

Section 17 provided:

"Anything herein to the contrary notwithstanding the manufacturer shall have the right to cancel this contract at any time after one year from the date hereof upon 30 days written notice to the sales manager. In such event the actual expense of sales manager over income from the inception of the contract to date of cancellation plus \$25,000.00 shall be paid to the sales manager."

The term of the contract was to be three years from January 11, 1929, and thereafter until terminated by 90 days notice as therein provided.

The territory to be developed embraced a large part of this country including the Pacific coast. The bill alleged that to induce complainant to enter into the contract the Kip Corporation falsely represented to him that its sales of said products on the Pacific coast had been for the preceding year \$125,000, whereas they did not exceed one-half of that amount; that complainant relying on said representation entered into the contract and immediately attempted to perform the same, and that by reason of the wrongful acts of the Kip Corporation (subsequently mentioned in the bill and referred to herein) the sales of the products have not yet (December 30, 1929) amounted to \$400,000 but only to about \$125,397.50; that complainant arranged for the selling of said products by various dealers throughout the territory to sell the same at retail; that as a part of the advertising campaign to induce dealers to deal in said products, the Kip Corporation put out various advertisements stating therein that it had contracted for \$435,000 worth of advertising space in certain magazines of a character set forth in the bill; that such statement was false and untrue, and that all the advertising contracted for by said cor-





peration after the execution of said contract did not exceed \$175,000, part of which it did not pay for promptly, sometimes as long as six months after payments were due.

The bill then alleges that the Kip Corporation also prepared a large book or portfolio containing fac similies of numerous advertisements and also statements that it would publish various of said advertisements at various times during the year 1929 in various magazines and newspapers, and would spend hundreds of thousands of dollars in such advertising during the year 1929. The bill sets forth what appeared on certain pages of said portfolio and states that the greater part of the promises made with respect to advertising were not kept and little of such advertising was done after July 4, 1929. It does not appear from any allegations relating to said portfolio and its contents that they formed any part of the contract. If any representations were made with regard thereto prior to entry into the contract they merged into it. The allegations relating to the portfolio seem to be impertinent.

The bill alleges that if the various promises as to advertising - which should be confined to those actually contained in the writtin contract - had been carried out and performed by the Kip Corporation, and if orders for advertising had not been cancelled, complainant would have been able to sell in the territory specified during the first year a minimum amount of said products at list price of \$400,000, and that his failure to sell such amount is due to said acts of the Kip Corporation. This allegation is a clear expression of opinion or a conclusion not substantiated by sufficient allegations of fact.

In an argumentative way the bill proceeds to say that in order to sell a product successfully it is necessary to induce retail dealers to deal in the same, and that they will not deal



operation after the execution of said contract did not exceed \$175,000, part of which is due not yet received. Immediately on being so informed, the Board of Directors was duly notified.

The bill also alleges that the Corporation also

procured a large body of portfolio containing the names of

various of said shareholders at various times during the year 1930. It is further alleged that the Corporation, and said Board of Directors, of thousands of dollars in cash advertising during the year 1930.

The bill also alleges that certain pages of said portfolio were shown to the Corporation and its Board of Directors and that the Corporation and its Board of Directors were not kept and little of such advertising was done after July 4, 1930. It does not appear from any of the

allegations relating to said portfolio and its contents that they taken any part of the contract. It is also represented that the Corporation and its Board of Directors were not kept and little of such advertising was done after July 4, 1930. It does not appear from any of the

allegations.

The bill alleges that the various promises as to advertising - which would be included in these actually contained

in the written contract - had been carried out and performed by the Corporation, and it states that advertising had not been cancelled, and that the Corporation would have been able to sell in the first quarter of the year a minimum amount of said products at that price of \$100,000, and that the Corporation to sell

such amount as due to said sale of the Corporation. This allegation is a clear expression of opinion or a conclusion not substantiated by sufficient allegations of fact.

In an attempt to say the bill presents to say that in order to sell a product successfully it is necessary to induce retail dealers to deal in the same, and that they will not deal



in the same unless they can be assured that a public demand will be created by the advertising of the manufacturer. On entering into the contract complainant presumably took such matters into consideration and undertook to provide therefor. But it also took the chances of a failure on the part of defendant to keep its promises, and if it did not, complainant would have a remedy at law for breach of the contract. While defendant agreed to make a certain appropriation for advertising, yet the contract with regard to expenditures therefor is hedged about with some uncertainty, and under section 10 much appears to be left to the discretion of the manufacturer.

But regardless of the uncertainties of the contract and the latitude of discretion given to defendant, the bill merely sets forth a breach of the contract, for which complainant clearly had an adequate remedy at law, and outside of the prayer for an injunction the bill seeks only legal relief, namely, the compensation for cancellation of the contract provided for by section 17. There is no allegation of insolvency or inability of defendant to respond to an action for damages and no basis for injunctive relief, or any other form of equitable relief.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

1. The first question is whether the contract is enforceable. The contract is enforceable if it is a contract for the sale of goods, and if it is a contract for the sale of goods, it is enforceable. The contract is enforceable if it is a contract for the sale of goods, and if it is a contract for the sale of goods, it is enforceable.

34489

PAUL PERKOVIC,  
Appellee,

vs.

ALVIN BERNSTEIN and JOHN E.  
TRAERGER, Sheriff of Cook  
County, Illinois,  
Defendants.

On Appeal of ALVIN BERNSTEIN,  
Appellant.

INTERLOCUTORY APPEAL FROM  
SUPERIOR COURT OF COOK COUNTY.

259 I.A. 633

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order denying a motion to dissolve a temporary injunction entered in the cause. The order restrained the enforcement of four judgments entered on the common law side of the Superior court, in which defendant Bernstein is plaintiff, and complainant defendant, one in July, one in August, and two in September, 1928, each upon a promissory note in the principal sum of \$1000, payable to the order of one Pero Perich. One year later, in September, 1929, complainant filed a petition in each of said law cases to have the judgment entered therein by confession vacated. Each of said petitions was duly heard and denied September 30, 1929, from which order complainant prayed an appeal, whether perfected does not appear and is immaterial. On the same day he filed the bill of complaint in this cause setting up the obtaining of said judgments by confession on his promissory notes as aforesaid; that executions were issued thereon and placed in the hands of the sheriff; that the notes in the first three cases were executed by him "in blank" with only the amounts written therein and delivered to said Perich, complainant's brother-in-law, who endorsed the same and delivered them to defendant Bernstein, and that the last note was not executed by him and was void because it was materially altered; that he learned about the first two judgments August 26,



PAUL PERKINS  
Attorney

vs.

ALVIN KARPIS and EDWARD BREMER  
Defendants  
Chicago, Illinois  
Federal Court

On Appeal of said judgment  
Affirmed

RECEIVED

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2531A.033

RECEIVED

This is an affidavit made by me as a party to the case.

A motion to dissolve a temporary injunction entered in the case.

The order restricted the enforcement of four judgments entered on the common law side of the superior court, is dated August 1935.

Hernstein is plaintiff, and complaint defendant, one in July, one in August, and two in September, 1935, each with a preliminary note in the principal sum of \$1000, payable to the order of one Kate Perich. One year later, in September, 1936, complaint entered a petition in each of said law cases to have the judgments entered therein by complaint vacated. Each of said petitions was duly heard and dated September 30, 1936, from which order complaints moved an appeal, whether perfected does not appear and is immaterial. On the same day he filed the bill of complaint in this cause setting up the obtaining of said judgments by force and his preliminary notes as extorted; that executions were issued thereon and placed in the hands of the sheriff; that the notes in the first three cases were executed by him "in blank" with only the amount written therein and delivered to said Perich, complaint's brother-in-law, who endorsed the same and delivered them to defendant Hernstein, and that the last note was not executed by him and was void because it was materially altered; that he learned about the first two judgments August 20,

1928, and interviewed defendant Bernstein about them and whether they would affect his real estate, and that Bernstein said his signature was a mere formality, he "might rest easy", his real estate could not and would not be sold to satisfy judgments, and when the notes became due they would be extended for another year; that being "lulled into security" by such representations he "rested in such ease and security" until September, 1929, when he received notice from the sheriff that his real estate would be sold at public sale.

The bill further alleges that Perich and Bernstein conspired to defraud complainant out of the money they could obtain by securing notes or mortgages covering his property and that Bernstein almost immediately had judgment confessed upon them, and that "it was stated" to complainant that Perich would sign them on their face and transfer them to Bernstein and the proceeds would be used in the purchase of real estate that would be subdivided by Perich; that Perich would receive from Bernstein \$3,500 on the notes; that Perich did not sign them on their face but endorsed them on the back so that the transfer to Bernstein "would seem a sale instead of to secure a loan."

The bill then charges that all of said notes were secured by fraud in the execution and especially the third note which was executed by complainant relying upon the representations of Bernstein that his real estate could not and would not be sold for the payment of the loan, and that the same situation appertained to the last signed note should the court find the same to be a valid note; that all of the notes were executed relying upon the representations of Perich, which Bernstein knew to be false, to-wit, that the proceeds of the note would be invested by Perich in real estate as aforesaid, but that none of the moneys was so invested and Perich used them for his own benefit; that the complainant signed the notes



24400

PAUL F. BROWN, JR.  
Appellee.

vs.

ALVIN BROWN, JR. and FRED E.  
BROWN, Appellants.  
Circuit Court of Cook  
County, Illinois.  
Circuit Court of Cook  
County, Illinois.

On Appeal of ALVIN BROWN, JR.  
Appellant.

ILLINOIS SUPREME COURT

OFFICE OF THE CLERK

22917.033

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This is an introductory appeal from an order denying a writ to dissolve a temporary injunction entered in the cause. The order mentioned the enforcement of four judgments entered on the common law side of the Superior Court, in which defendant Bernstein is plaintiff, and complainant defendant, one in 1917, one in 1921, and two in September, 1922, each with a preliminary note in the principal sum of \$1000, payable to the order of one Kate Paxton. One year later, in September, 1923, complainant filed a petition in each of said law cases to have the judgments entered therein by confession vacated. Each of said petitions was duly heard and denied September 20, 1923, from which order complainant prayed an appeal, whether perfected does not appear and is immaterial. On the same day he filed the bill of complaint in this cause setting up the obtaining of said judgments by execution on his promissory notes as aforesaid; that executions were issued thereon and placed in the hands of the sheriff; that the notes in the first three cases were executed by him "in blank" with only the amount written therein and delivered to said Paxton, complainant's brother-in-law, who endorsed the same and delivered them to defendant Bernstein, and that the last note was not executed by him and was void because it was materially altered; that he learned about the first two judgments August 29,



1928, and interviewed defendant Bernstein about them and whether they would affect his real estate, and that Bernstein said his signature was a mere formality, he "might rest easy", his real estate could not and would not be sold to satisfy judgments, and when the notes became due they would be extended for another year; that being "lulled into security" by such representations he "rested in such ease and security" until September, 1929, when he received notice from the sheriff that his real estate would be sold at public sale.

The bill further alleges that Perich and Bernstein conspired to defraud complainant out of the money they could obtain by securing notes or mortgages covering his property and that Bernstein almost immediately had judgment confessed upon them, and that "it was stated" to complainant that Perich would sign them on their face and transfer them to Bernstein and the proceeds would be used in the purchase of real estate that would be subdivided by Perich; that Perich would receive from Bernstein \$3,500 on the notes; that Perich did not sign them on their face but endorsed them on the back so that the transfer to Bernstein "would seem a sale instead of to secure a loan."

The bill then charges that all of said notes were secured by fraud in the execution and especially the third note which was executed by complainant relying upon the representations of Bernstein that his real estate could not and would not be sold for the payment of the loan, and that the same situation appertained to the last signed note should the court find the same to be a valid note; that all of the notes were executed relying upon the representations of Perich, which Bernstein knew to be false, to-wit, that the proceeds of the note would be invested by Perich in real estate as aforesaid, but that none of the moneys was so invested and Perich used them for his own benefit; that the complainant signed the notes

1938, and interviewed defendant Bernstein about them and advised they would affect his real estate, and that Bernstein said his signature was a mere formality, he "might not even", his real estate would not and would not be sold as easily judgment, and when the notes became due they would be returned for another year; that being "filled into account" by the defendant's action he "acted in such case and account" until judgment, 1938, when he received notice from the sheriff that his real estate would be sold as public sale.

The Bill further alleges that before and after the sale of the real estate and of the money they would obtain by securing notes on mortgages covering his property and that Bernstein almost immediately had himself admitted a co-owner, and that "it was stated" to complainant that before would sign with their last and transfer them to Bernstein and the proceeds would be used in the purchase of real estate that would be sold by the Bill; that before would receive from Bernstein \$2,500 on the note; that before did not sign when on said time was entered there on the back of each the statement to Bernstein "which was a sale instead of a security a loan."

The Bill further alleges that all of said notes were secured by first in the mortgage and especially the first mortgage and was assigned by complainant to the defendant's action of Bernstein that his real estate could not and would not be sold for the payment of the loan, and that the said statement explained to the last signed note should the court find the same to be a valid note; that all of the notes were executed before the defendant's action of before, which Bernstein knew to be false; to-wit, that the proceeds of the sale would be received by before in full and as aforesaid, but that none of the money was so invested and before need them for his own benefit; that the complainant signed the notes



for the purpose of having Perich sign the notes "as the principal maker thereof" and delivering the same to Bernstein to secure loans thereon, and that Perich would be primarily liable therefor and complainant only as a surety; that the loans to Perich were usurious, and Bernstein knew that complainant was to sign said notes only as a surety; that Perich had a singular power over complainant which enabled him to control complainant against his will and to cause him to execute "the said four notes."

The bill alleges that complainant received no money on the notes and is not very familiar with the forms of business nor the English language; that the notes were procured from him as a result of a conspiracy to defraud. The bill also alleges that complainant had petitioned the Superior court to vacate said judgments or open them up and allow him a trial but that this relief had been refused; that certain of his defenses to said notes are not cognizable at law and complainant is relegated to chancery. The bill prays that defendants be enjoined, pending a final determination of the cause, from enforcing the judgments; that they be vacated and set aside, and that at a final hearing such injunction be made permanent.

On November 1, 1929, defendants entered their appearance and moved to dissolve the temporary injunction. The motion was continued from time to time and before it was heard defendant Bernstein on November 12, 1929, filed his answer to the bill. It stated substantially that he was a holder in due course of the notes in question for value and consideration; that complainant had admitted to him his signature thereto before he purchased them. The answer denied the alteration of the fourth note and <sup>alleged</sup> that plaintiff was estopped to complain that it had been altered by reason of his admission, as aforesaid. The answer denied that defendant made representations to complainant as set forth in the bill, or that



for the purpose of having certain bills the notes "as the principal maker thereof" and delivering the same to the person to whom the same were issued, and that certain would be primarily liable therefor and consequently only as a surety; that the person to whom the notes were issued, and defendant knew that complainant was to sign said notes only as a surety; that certain had a signature power over complainant which entitled him to control complainant against his will and to cause him to execute "the said bank notes."

The bill alleges that complainant received no money on the notes and is not very familiar with the terms of said notes and the bill alleges; that the notes were presented to him as a result of a conspiracy to defraud. The bill also alleges that complainant had petitioned the Superior Court to vacate said judgment and upon being taken up and after his trial that said bill had been returned; that certain of his defense to said notes are not cognizable as law and complainant is released as surety. The bill prays that defendant be enjoined, granting a final decree of the court, from entering the judgment; that the notes be vacated and set aside, and that at a final hearing upon the bill be made permanent.

On November 1, 1925, defendant entered their appearance and moved to dissolve the temporary injunction. The motion was denied. On November 12, 1925, filed his answer to the bill. It stated that defendant from time to time and before it was heard defendant's motion to dissolve the temporary injunction, that he was a holder in due course of the notes in question for value and consideration; that complainant had admitted to him his signature thereon before he purchased them. The answer denied the allegation of the fourth paragraph, <sup>alleged</sup> that it had been alleged by certain of his attorneys, as attorneys. The answer denied that defendant made representations to complainant as set forth in the bill, or that

he "lulled complainant into ease and security," or that complainant relied upon his representations.

The answer then stated that complainant had not been diligent and was barred by res adjudicata, and that a court of equity had no jurisdiction of the matters involved. The answer denied the charge of usury, procurement of the notes by fraud, or a conspiracy to defraud, or knowledge of any representations made to Perich, or the influence of the latter over complainant or that the defenses to said notes set forth in the bill are not cognizable in a court of law. It alleges that complainant has been guilty of laches, has had an adequate remedy at law, and that the denial of his motions in the law suit constitute res adjudicata of the matters involved herein.

The answer then sets up specifically the filing of a narr and cognovit in each of said law cases, the entry of judgment thereon, complainant's petition in each case to vacate the judgments, (a copy of each petition was made a part of defendants' answer) and that the denying of said petitions from which complainant Perkovic prayed an appeal was a final and conclusive determination of complainant's rights in the instant case.

The answer was amended, in respects unnecessary to mention, January 16, 1930. In the meantime several orders had been entered continuing the motion to dissolve the temporary injunction.

A general replication, in the usual form, to the amended answer was filed February 26, 1930.

The motion to dissolve was not heard until April 9, 1930, when it was denied.

The only contention made on the hearing of the motion was that the several orders denying the motion to vacate said judgments were res adjudicata, and in support of the motion the petitions to vacate said judgments that were filed and heard in the



no "filled complaint into case and number," or that complaint  
replied upon his representation.

The answer then stated that complaint was not made

alleged and was based on the affidavit, and that a court of

equity had no jurisdiction of the matters involved. The answer

denied the charge of fraud, suppression of the matter by law, or

a conspiracy to defraud, or knowledge of any representation made

to defraud, or the influence of the parties over maintenance of such

the defense as said matter set forth in the bill to not constitute

in a contract law. It alleged that complaint was made solely of

indeed, has had an adequate remedy at law, and that the filing of

his motion is the law with complaint was made solely of the matter

involved herein.

The answer then sets up specifically the filing of a

bill and complaint in each of said law cases, the entry of judgment

thereon, complaint's petition in each case is versus the joint

motion, (a copy of each petition was made a part of defendant's

answer) and that the filing of said petitions from which complaint

and Petreko's prayer an appeal was a final and conclusive defense.

motion of complaint's rights in the instant case.

The answer was amended, in proper conformity to

motion, January 16, 1930. In the memorandum of decision and been

entered containing the motion to dismiss the respective judgments.

A general replication, in the usual form, to the answer

answer was filed February 22, 1931.

The motion to dismiss was not made until April 2,

1931, when it was denied.

The only contention made on the hearing of the motion

was that the motion was made before the motion to vacate said judg-

ments were rendered, and in violation of the motion the peti-

tions to vacate said judgments had been filed and heard in the



several law suits, and the orders denying the petitions, were introduced in evidence and stand uncontroverted in the record. The chancellor, however, thought there was insufficient evidence before him to rule as a matter of law that they constituted res judicata, and that complainant was entitled to a hearing on the bill in chancery.

The question before us is not the sufficiency of the bill in this cause, which has been answered and put at issue. The real question is whether or not, as far as the right to a temporary injunction is concerned, the matters set up in the bill have already been adjudicated. A comparison of the bill with the petitions to vacate said judgments discloses no other ground for vacating or setting aside said judgments than what was presented in said petitions. Upon a motion to vacate a judgment and for leave to plead, if the judgment is confessed by authority, the question is not whether the judgment shall be set aside because of errors of law, but whether there exists any equitable reason for opening the judgment. (Keyes v. Schendorf, 236 Ill. 232; Mumford v. Tolman, 157 id. 253.) It is well settled law in this State that such a motion is addressed to the sound discretion and the equitable powers of the court, and no authorities need be cited to the doctrine that a former adjudication of a matter in controversy is conclusive as to matters actually determined and such other matters as might have been set up and litigated in the first suit. That the grounds for vacating the judgments, on which the bill is based, are such as were cognizable on a motion to vacate a judgment by confession and for leave to plead, is not and cannot be questioned. And that the same matters formed the grounds for the petition to vacate, or could have been set up therein, is not questioned. There is no other ground for the ultimate relief sought by the bill than what is in substance set

several law suits, and the courts holding the petitioners were law-  
ful in their action and should not be disturbed in the result. The  
character, however, showing there was substantial evidence be-  
hind him to take as a matter of law that they constituted the  
petitioners, and that complaint was entitled to a hearing on the  
bill in conformity.

The petitioners are in fact not petitioners at all.  
Bill in this sense, which has been answered and put at issue.  
The real question is whether or not, as far as the right to a  
temporary injunction is concerned, the petitioners set up in the bill  
have already been satisfied. A comparison of the bill with the  
petitioners is made and it is found that the petitioners are not ground for  
issuing or setting aside said judgments than what was presented  
in said petitioners. Upon a motion to vacate a judgment and for  
leave to amend, it is found that the petitioners are not entitled to  
vacate it and that the judgment shall be set aside because  
of error of law, but whether there exists any equitable reason  
for setting the judgment aside. (See Bill, 1911, 1912.)  
Henderson v. Tolson, 187 U.S. 130. It is well settled law in this  
State that when a motion is allowed on the ground of error and  
the equitable petition is set aside, and no other motion is made to  
set aside the judgment and a second judgment is entered, the motion is  
considered as having been set aside and the petitioners are not  
entitled to a new motion as might have been set up and allowed in  
the first case. This law applies to the petitioners and Tolson, as  
which the bill is passed, are shown as being cognizable on a motion  
to vacate a judgment by confession and for leave to amend, is not  
and cannot be presented. And that the same motion toward the  
petitioners for the petition to vacate, or would have been set up  
therein, is not presented. There is no other ground for the  
petitioners to set up by the bill than what is in substance set

up in each of said petitions, or which could have been set up therein. As the basis for injunctive relief, appellee points out no allegation of fact in the bill that could not have been availed of in said petitions. That being the case, it would appear from the unquestioned proof adduced on the motion to dissolve that the matters set up in the bill were adjudicated adversely to complainant on his motions to vacate the judgments, and that he had an adequate remedy at law under said motions. If the court was wrong in denying said petitions he still had his remedy by appeal.

The contention of appellee that the pleading of res adjudicata was new matter set up by way of confession and avoidance and cannot be availed of, is not well taken in this case. Complainant himself set up in his bill that his motions to vacate the judgments were denied. The fact that they were, and the grounds on which they were denied, were not denied or questioned. It being called to the attention of the court on the hearing of the motion to dissolve that the matters on which the bill rested had once been adjudicated, we think it was its duty to dissolve the injunction.

Accordingly the order denying such motion will be reversed and the cause remanded with directions to enter an order dissolving the temporary injunction.

REVERSED AND REMANDED  
WITH DIRECTIONS.

Scanlan, P. J., and Gridley, J., concur.



up in each of said portions, at which point the bill was  
presented. As the bill was introduced, the bill was  
not an objection at first in the bill which had been  
passed in said portions. That being the case, it would  
appear from the introduction of the bill in the matter of  
himself that the matter set up in the bill were  
adversely to complain in his matter to which the bill  
went, and that he had an adequate remedy at law under said  
motion. If the court was wrong in saying said portions  
he still had his remedy at law.

The introduction of the bill in the matter of  
the bill was not matter set up in way of confusion and  
was not intended to be avoided, it was well taken in this  
case. Complaint should be set up in the bill in the matter  
to which the bill was directed. The bill was not  
the bill in the matter of the bill, but was directed to  
the bill. It being called to the attention of the court  
the bill of the matter to which the bill was directed  
which the bill was directed and was been introduced, as said  
was its duty to dissolve the injunction.

Accordingly the order denying such motion will be  
reversed and the same remanded with directions to enter an  
order dissolving the injunction.

RECORDED AND INDEXED  
JULY 1911

W. L. J. and others, vs. J. L. J.

34496

259 10 6 34

THE PEOPLE OF THE STATE  
OF ILLINOIS.

Defendant in Error.

v.

JAMES FORSYTH,

Plaintiff in Error.

APPEAL TO MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE HARRIS DELIVERED THE OPINION OF THE COURT.

This case has been consolidated for hearing with case No. 34497, People v. Simon Gorman. Each plaintiff in error was charged by information with carrying a concealed weapon in violation of section 4 of the Act entitled, "An Act to Revise the Law in Relation to Deadly Weapons" (Laws of 1925, pp. 339, 340; Cahill's Stats. 1927, p. 332.)

The record discloses that when arraigned Forsyth pleaded guilty, and Gorman pleaded not guilty and waived trial by jury, and recites that when they were arraigned and at the times when and to which continuances were granted, and also when at a joint hearing evidence was heard on said pleas, the defendants were represented by counsel. Each was found guilty and sentenced to a term of imprisonment and fined.

A motion was entered to vacate the judgment and grant a new trial based on affidavits and oral evidence contradicting the recitals of the record stating that defendants were represented by counsel as aforesaid, that Forsyth had pleaded guilty, and Gorman had waived trial by jury. The motions were overruled and a writ of error in each case was sued out to the Supreme Court, on the theory that plaintiffs in error were denied the constitutional right





to be represented by counsel.

The Supreme Court held (339 Ill. 381) that as the records disclosing the facts as aforesaid, imports verity and must be accepted as it is made, the alleged ground for direct review upon that question was not presented by the writ of error, and the causes were transferred to this court.

Plaintiffs in error, however, stand in this court with respect to their assignments of error, so far as they contradict the record in the alleged denial of said several rights, in the same position they stood before the Supreme Court with respect to the claim that they were denied the right to be represented by counsel. Their contention as to each is based upon extraneous evidence that contradicts the record.

If the court's record was incorrect, as contended, defendant's remedy was to apply to have the same amended so as to speak the truth, and not by an attempt to impeach it by affidavit or oral evidence presented on a motion to vacate the judgments. While it appears from the so-called "certificate of evidence" (properly a bill of exceptions) showing the proceedings had at the trial that Foreyth asked that the record be corrected to show he pleaded "not guilty", and that no action was taken on the request, yet it does not appear that the request or motion, if it be so deemed, was supported by any affidavit or evidence or memorandum of the court or clerk, that would have authorized the court to entertain the request or motion. The court's attention being called to the contrary recitals of the record it accepted the record as it stood and so must we. In its condition plaintiffs in error had no standing in court on their motions to vacate, predicated as they were, on affidavits and evidence tending to impeach the record, as



was held by the Supreme Court, and hence the assignments of error bearing on said contentions are not supported by the record.

It is unnecessary, therefore, to discuss what was contained in said affidavits or evidence offered in support of said motions, even if properly preserved for consideration. The affidavits appear only in the transcript of the clerk stating that they were filed. Of course, to be considered, they should have appeared in the bill of exceptions or stenographic report of the proceedings had on the hearing of the motions to vacate. Reference is made to said proceedings on the hearing of the motions to vacate to show that the judge was prejudiced against the defendants at the trial. These proceedings had no tendency to show whether or not the court was prejudiced against them at the trial, and there is nothing in the record of the proceedings had at the trial from which to draw such an inference.

So far as the errors are predicated upon the proceedings had at the trial, they are argued only with reference to the question that has heretofore been presented to the Supreme Court, namely, whether the record shows that defendants were denied the constitutional guaranty of the right to appear by counsel, and also as to whether defendants' guilt was proven beyond a reasonable doubt.

It appears from the certificate of evidence showing the proceedings at the trial had June 4, 1929, that defendants then asked for a continuance because of the illness of their counsel, from which it would appear, contrary to the recital of the record, that their counsel was not present at that time. The court denied a continuance. Defendant Gorman asked for a continuance of one hour; that, also, was denied. The informations were filed and defendants were arraigned May 17, 1929. At that time the hearing





on the pleas entered as aforesaid, was continued to June 4. Defendants were chargeable with knowledge that the case would be called on the day set and if they desired counsel it was their duty to exercise due diligence to procure counsel for the trial. They had no right to assume that without such diligence the court would continue their case. So far as the record shows they required the court to accept their verbal statement that their counsel was ill, without any support thereof by affidavit or certificate. From what appears in the record, therefore, we are unable to say that the court abused its discretion in denying the continuance.

While the constitution guarantees the accused in a criminal case the right to appear and defend in person and by counsel, yet under the circumstances we cannot say there was an absolute denial of that right in this case. Many conditions exist in Cook County with the well known congested condition of the court dockets why criminal trials should not be delayed without a proper showing for a further continuance. If defendants' counsel was ill they apparently knew it before they came to court and should have been prepared to submit some evidence of it without requiring the court to accept their unsworn statement. Under the circumstances we cannot say that the court abused its discretion.

No error is claimed in the trial. The defendants testified and produced another witness to testify for them. Except for presence of counsel they appear to have been ready for trial. It does not appear that they had or could have presented any other evidence, and from the entire evidence we cannot say that the court's conclusion of their guilt as charged was not established beyond reasonable doubt.





While it might appear unreasonable that the court would not allow a continuance for one hour in which to procure counsel, yet it does not follow but that at the end of that time with other cases for trial it would have operated to continue the case, thus necessitating recalling the People's witnesses for another day. What was the precise situation before the court at that time does not appear from the record.

In view of what we have said it is unnecessary to consider the technical grounds raised by the People with respect to the condition of the record. We have disregarded these technicalities and having given plaintiffs in error the benefit of all that can be considered in their favor from the record before us, must, for the reasons stated, affirm the judgments.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.



34497

THE PEOPLE OF THE STATE  
OF ILLINOIS,

Defendant in Error,

v.

SIMON GOODMAN,

Plaintiff in Error.

251126317  
ERROR TO MUNICIPAL  
COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with case No. 34496, People, etc. v. James Forayth, in which we have this day filed an opinion affirming the judgment of conviction. What was there said is equally applicable to the controlling questions raised herein and is hereby referred to for our reasons in affirming the judgment in the instant case.

AFFIRMED.

Seanlan, P. J., and Gridley, J., concur.





33972

NICK STATHOPOULOS,  
Appellee,

v.

NICK KORSON and  
MYRTLE KORSON,  
Appellant.

417  
APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

259 I.A. 634<sup>3</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 3, 1925, complainant filed a bill in the Superior court of Cook county against defendants, husband and wife, seeking an accounting and a discovery. The litigation arose out of the purchase, operation and sale of a 99-year leasehold interest in certain real estate, improved by an apartment, etc., building at the corner of Fifty-fifth street and Blackstone avenue, Chicago. After a reference to a master to take proofs and report his conclusions of law and fact, there was a hearing before him at which considerable evidence, oral and documentary, was introduced by both parties. The master found that complainant was entitled to an accounting and, after making findings, recommended that a decree be entered in accordance with the prayer of the bill and his said findings. Such objections as were not sustained were overruled and were ordered to stand as exceptions before the chancellor. Finally, on December 19, 1928, the court, following the master's recommendations and overruling the exceptions, entered the decree appealed from.

The appeal was taken to the Supreme Court, but on October 19, 1929, the cause was transferred to this appellate court (Stathopoulos v. Korson, 336 Ill. 205) - the Supreme Court saying in

33073

WILLIAM T. HARRIS,  
Appellee,

v.

WILLIAM HARRIS and  
ETHEL HARRIS,  
Appellants.

33073

NO. 10000-10111-10112 THE COURT OF THE STATE.

On April 2, 1935, complaint filed a bill in the

Superior Court of Cook County against defendants, husband and

wife, seeking an accounting and a discovery. The litigation

arose out of the purchase, operation and sale of a 25-year

leasehold interest in certain real estate, improved by an

apartment, etc., building at the corner of Fifty-fifth Street

and Blackstone Avenue, Chicago. After a reference to a master

to take proofs and report his findings of fact and law,

there was a hearing before him at which considerable evidence

oral and documentary, was introduced by both parties. The master

found that complaint was entitled to an accounting and, after

making findings, recommended that a decree be entered in accordance

with the prayer of the bill and his said findings. Such objections

as were not sustained were overruled and the case was set for trial on

exceptions before the chancellor. Finally, on December 19, 1935,

the court, following the master's recommendations and overruling

the exceptions, entered the decree requested from.

The appeal was taken to the Supreme Court, but on October

12, 1937, the case was dismissed to this appellate court.

(HARRIS v. HARRIS, 350 Ill. 525) - The Supreme Court saying in



the opinion (p. 210):

"The chief contentions of appellants are that complainant has failed to establish his right to an accounting, that he is guilty of laches, and that if there was any conveyance in trust by complainant of his interest to Kerson it was an express trust and void under the Statute of Frauds.

This is not an action to enforce a contract for the sale of the leasehold interest or any part thereof. The leasehold originally controlled and owned by the parties hereto is no longer their property. An accounting of the proceeds therefrom is what is sought by this bill, and as we view it no freehold is involved and this court has no jurisdiction of the appeal. \* \* The only question is the right of complainant to an accounting."

The material facts of the case, as disclosed from the evidence, are contained in a statement in the opinion of the Supreme Court (pp. 206-210), and we refer to and adopt the same without re-statement.

The Superior court, in the decree of December 19, 1928, after making numerous findings, ordered and decreed:

"That from the amount of \$7,560, paid by Andrew C. Thompson to the defendant, Nick Kerson, evidenced by the note of said Thompson payable monthly in 24 payments of \$45 each, and 24 payments of \$270 each, commencing July 1, 1921, said defendant, Nick Kerson, pay to complainant one-half of said sum, amounting to \$3,780, less a credit of \$1,000, advanced to complainant by said defendant, and that complainant have and recover from said defendant the sum of \$2780, together with interest at the rate of 5 per cent per annum from July 1, 1921, and that execution issue therefor.

That said defendant, Nick Kerson, convey to complainant an undivided one-half of all the lands and the Seagraves note, received by said defendant from Andrew C. Thompson in the settlement made by said defendant with said Thompson and Derby, as specified in the proceedings herein, and described as follows:

A farm of over 400 acres in Oceana County, Michigan.

A farm of 40 acres in Southeast Michigan.

3000 acres of coal land in Johnson County, Kentucky.

207 acres of land in Tennessee.

Land in Wisconsin, and

A promissory note of about \$1,400, signed by a man by the name of Seagraves.

That said defendants, Nick and Myrtle Kerson, their servants, agents, attorneys and solicitors, are hereby forever enjoined and restrained from in any manner proceeding, or taking action in any way or form, with the case of Myrtle Kerson v. Nick Stathopoulos, pending in the Municipal court of Chicago, as Case No. 1,080,385.

That the Court retain jurisdiction of this matter for a further accounting and relief between the parties hereto."

One of the contentions of counsel for defendants is





that complainant failed by a preponderance of the evidence to establish his right to an accounting. After a review of the pleadings and the evidence we do not think that there is any merit in the contention. And we are of the opinion that the court was fully warranted in ordering that the defendant, Nick Korsen, pay to complainant the sum of money, with interest, mentioned in the decree, and also that he make the conveyances mentioned to complainant.

And we do not think that complainant was guilty of such laches as bars the relief as prayed for in the bill and as granted by the decree. Complainant left for a visit in Greece about October, 1920, was married while there, and he and his wife returned to Chicago during February, 1922. After his return he was advised of the settlement agreement, which Korsen (acting for himself and complainant) had made with Thompson (new lessee of the premises) and the Derbys (owners of the fee), and, upon demands for an accounting then made by him, he (complainant) received a payment of \$1,000 out of the joint account of the two defendants. Thereafter he made repeated demands for a further accounting and further payments, but was refused. Furthermore, when he filed the present bill (April 3, 1925) the settlement agreement which Korsen had made with Thompson and the Derbys had not fully been consummated. The last payment thereunder was not due until June 1, 1925.

And we think that counsel's further contention is lacking in merit, viz., that, if there was any conveyance "in trust" by complainant to Korsen of the former's interest in said leasehold estate, it was an express trust, and, not being in writing, is void under section 9 of our Act on "Frauds and Perjuries" (Cahill's Stat. 1929, p. 1399). The proviso of that section reads: "Provided, that resulting trust or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved



that complainant failed by a preponderance of the evidence to establish his right to an accounting. After a review of the pleadings and the evidence as set forth in the bill and the merits in the contention. And we are of the opinion that the court was fully warranted in holding that the defendant, Nick Larson, pay to complainant the sum of money, with interest, mentioned in the decree, and also that he make the conveyances mentioned in the bill and we do not think that complainant was guilty of such fraud as bars the relief he prayed for in the bill and as granted by the decree. Complainant left for a visit in Greece about October 1920, was married while there, and he and his wife returned to Chicago during February, 1922. After his return he was advised of the fraudulent agreement, which Larson (acting for himself and complainant) had made with Thompson (now known as the plaintiff) and the Bertha (owners of the fee), and, upon demand for an accounting then made by him, he (complainant) received a payment of \$1,000 and of the total amount of the two settlements. Thereafter he made two more payments for a further accounting and further payments, but was refused. Thereafter, when he filed the present bill (April 2, 1922) the settlement agreement which Larson had made with Thompson and the Bertha had not fully been consummated. The last payment thereunder was not due until June 1, 1922.

And we think that complainant's further contention in seeking in equity, viz., that it be made a permanent "in trust" by complainant to Larson of the money's interest in said household estate, is not an equitable trust, and, not being in writing, is void under section 9 of our Act on "Wills and Testaments" (Smith's Stat. 1922, p. 1123). The parties of that section reads: "Provided, that no trust shall be created by will, or by operation of law, which shall not be in writing, and the same may be proved

by parol." The present controversy does not concern said leasehold estate but concerns money, etc. received by defendant in the disposition of said leasehold estate and not accounted for. The evidence rather shows a "trust" created by construction, implication or operation of law, and the proviso of the section applies. In the somewhat similar case of Haton v. Graham, 104 Ill. App. 296, 302, the court, quoting from Browne on Stat. Frauds, sec. 261 G, said: "When the action is only for the agreed share of the profits of the sale of land, no agreement affecting the title to the land itself remaining executory, the statute (at least in this country) does not apply." And the court further said: "There is no agreement here affecting the title to the land. Even if the agreement can be said to affect the title, it has been executed. The land has been sold and the proceeds invested in other property." (See, also, Montgomery v. Kirkpatrick, 162 Ill. App. 59, 64; Roby v. Colehour, 135 Ill. 300, 340; People v. Tombaugh, 303 Ill. 591, 593; Bork v. Martin, 132 N. Y. 280, 284.)

Defendants' counsel here make for the first time the further contention that the decree should be reversed because Harry Rosenshiel, a "necessary" party, was not made a party to complainant's bill. It appears from the court's findings, sustained by the evidence, that prior to October, 1916, Rosenshiel, complainant and Nick Korson purchased the leasehold estate from one John Refakes and each became the owner of a one-third interest therein; that on October 10, 1916, Rosenshiel, in consideration of \$2,000 paid to him by Korson, assigned his one-third interest to Korson; that complainant thereafter paid Korson \$1,000 for a half of said Rosenshiel's one-third interest; and that thereby complainant and Korson each acquired and owned an undivided one-half interest in said leasehold estate. When the present bill was filed



by parcel." The present controversy does not concern said parcel held estate but different property, also involved by defendant in the disposition of said parcel estate and was accounted for. The evidence before the court is "clear" created by defendant, plaintiff's action or operation of law, and the parties at the estate sale. In the somewhat similar case of Smith v. Smith, 100 Ill. App. 300, 302, the court, quoting from Smith v. Smith, 100 Ill. App. 300, 302, said: "When the action is only for the return of the estate of the plaintiff of the sale of land, no agreement affecting the title to the land itself remaining outstanding, the estate is not lost in this country." The court further said: "There is no agreement not to sell." The court further said: "There is no agreement must have affecting the title to the land. Even if the agreement can be made to affect the title, it has been executed. The land has been sold and the proceeds invested in other property." (See also Smith v. Smith, 100 Ill. App. 300, 302, 303; Smith v. Smith, 100 Ill. App. 300, 302, 303; Smith v. Smith, 100 Ill. App. 300, 302, 303; Smith v. Smith, 100 Ill. App. 300, 302, 303.)

Defendants' counsel have said for the first time the further contention that the decree should be reversed because Henry, defendant, a "necessary" party, was not made a party to answer plaintiff's bill. It appears from the court's findings, however, by the evidence, that Henry is not a party, plaintiff, defendant, plaintiff and that Henry purchased the parcel estate from one John Smith and said Henry was owner of a one-third interest therein; that on October 15, 1911, defendant, in consideration of \$2,000 paid to him by Henry, assigned his one-third interest to Henry; that defendant retained said parcel estate for a full of said defendant's one-third interest and that Henry assigned to said defendant estate. When the present bill was filed and Henry was not a party and owned an undivided one-half interest



Rosenshield, having long prior thereto assigned his interest in the leasehold estate and it not appearing that he had any interest in the prayed for accounting between complainant and defendants, was not, in our opinion, a necessary party to the litigation. And it does not appear that he will be materially affected by the decree. Clearly the decree should not be reversed for the reason urged.

Other minor points are made by counsel as grounds for a reversal of the decree, which we deem unnecessary to discuss. We have considered them, and find them without merit.

The decree of the Superior court appealed from should be affirmed and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.

Consequently, having found that the interest in the beneficial estate and its management was not in the hands of the person for whom the property was conveyed, it was necessary to find that the person was not, in any opinion, a necessary party to the litigation and it does not appear that he will be materially affected by the decree. Accordingly the decree should not be reversed for the reasons stated.

Other cases which have been cited as authority for a reversal of the decree, which we deem unnecessary to discuss. We have considered them, and find them without merit. The decree of the superior court appears from the record to be affirmed and it is so ordered.

1911 W.L.

Condon, J., and Brown, J., concur.

34135

LEON J. KLEIN,  
Plaintiff in Error,

v.

JOHN M. MINNECCI,  
Defendant in Error.

ERROR TO COUNTY COURT,  
COOK COUNTY.

259 I.A. 634<sup>4</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On December 5, 1927, plaintiff recovered a judgment against defendant for \$300, rendered by a justice of the peace in Cook county. Defendant appealed to the county court and on November 22, 1929, there was a trial de novo before a jury, resulting in a verdict for defendant. On December 10, 1929, after plaintiff's motions for a new trial and in arrest of judgment had been overruled, the court entered judgment against plaintiff for costs, and subsequently he sued out the present writ of error. Defendant has neither entered an appearance nor filed a brief in this court.

It appears from the bill of exceptions that on the trial plaintiff testified in his own behalf and also introduced several instruments and writings. Defendant also testified, as did his brother, Chris Minnecci. Plaintiff sought to recover back \$200, which he had advanced to defendant on a written contract for the purchase of certain land in the State of Florida and which contract was not consummated, and also to recover for certain other disbursements, aggregating more than \$100, which he had made at defendant's request in connection with the proposed purchase. The contract (introduced in evidence) is signed by the parties and dated May 27, 1925. It states that

"John M. Minnecci, as agent for Gaetana Minnecci, hereby declares that he has authority to sell, and hereby does sell, to Leon J. Klein the following land (describing it) in Polk County, Florida, for the sum of \$1200, payable as follows:





\$100 upon the signing of this agreement, the receipt of which is hereby acknowledged, and the further sum of \$1100 when said Minnecci gives to said Klein a warranty deed, conveying said property and appurtenances free and clear of all encumbrances. \* \* Said Klein is to pay all costs and taxes pertaining to clearing of said title, \* \* . In the event that said title is not found perfect, said Minnecci will refund on demand the \$100, deposited as earnest money. This agreement to be in full force and effect for a period of 90 days from date, at which time the remainder is to be paid in cash, provided a good merchantable title is found on land."

The contract further provided that upon the happening of a certain contingency Klein was to deposit with Minnecci and ther \$100, also to apply on the purchase price, which other deposit Klein subsequently made.

It appears from Klein's uncontradicted testimony in substance that shortly after the making of the contract he went to Florida and examined the records as to the land; that he found that a deed from Gaetana to Chris (defendant's brother) had been recorded and that the property had been sold for taxes; that upon his return to Chicago he (Klein) advised defendant of these facts and both consulted an attorney; that at this interview defendant stated that Chris had no real interest in the property; that Klein stated that under existing conditions he was unwilling to go ahead with the deal; that defendant urged Klein to assist him in clearing the title, etc., promising to pay him (Klein) any money he had expended or might expend in so doing; that a written memorandum to that effect was signed at the time by defendant and delivered to Klein; that Klein was unsuccessful in his efforts, although he expended moneys to the extent of more than \$100; that contrary to defendant's statement Chris claimed an interest in the land; that defendant never was able to convey good title to the property to him/ (Klein); that the original contract of sale never was consummated; and that defendant, although often requested, has not repaid the \$200 advanced on the contract by Klein, or the moneys so expended by him. The memorandum referred to (introduced in evidence) is in the form of a letter, dated July 27, 1925, addressed to Klein and signed



1100 upon the signing of this agreement, the receipt of which  
is hereby acknowledged, and the further sum of \$1000 upon the  
signature of said \$1000, containing this  
property and appurtenances then and there of all appurtenances  
and this is to say all those and those pertaining to  
the estate of said \$1000. In the event that said \$1000  
is not found payable, said \$1000 will remain on deposit and  
said \$1000, deposited on deposit money. This agreement is to be in full  
force and effect for a period of 10 years from date, as when  
time has expired as to said \$1000, providing a good and  
satisfactory title is found on said \$1000.

The parties hereto provide that upon the happening of  
a certain contingency there was no deposit with \$1000 and that  
said \$1000, also to apply on the purchase price, which other details  
shall subsequently make.

It appears from \$1000's unrecorded statement in this

statement that nearly after the making of the contract he went to

Florida and remained there for some time; that he found that

a deed from George to \$1000's father's property was being recorded

and that the property was being sold for some time upon the \$1000

to \$1000 as \$1000's father's property of some time and that

concerned an interest in the property and that \$1000's father

that had no real interest in the property and that \$1000's father

under certain conditions he was willing to be shown with the \$1000

that defendant agreed \$1000 to assist him in clearing the title, after

promising to pay the \$1000, but money he had promised to \$1000's father

in so doing that a certain memorandum is that \$1000's father

the time by defendant and defendant in \$1000's father's name and \$1000's father

in his father, \$1000's father's property of the \$1000's father's

\$1000's father's property is \$1000's father's property and \$1000's father

in the \$1000's father's name was not in \$1000's father's name in the

property to \$1000's father's father's father's father's father's father's

concerned; and that defendant, \$1000's father's father's father's father's father's

the \$1000's father's father's father's father's father's father's father's

by him. The memorandum referred to is contained in \$1000's father's father's

page 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 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1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 20



by defendant, as follows:

"In accordance with our conversation, I agree to repay upon demand any money expended by you, in or about the redemption of property in Polk County, Florida, which I have contracted to sell to you, and I further agree to hold you harmless from all costs, charges and expenses suffered by you in and about endeavoring to make the title to said premises good in me."

After reviewing all the evidence we are of the opinion that the verdict and judgment in defendant's favor are manifestly against the weight of the evidence, as here contended by Klein's counsel, and that the judgment in question should be reversed and a new trial had. It is difficult to determine from the evidence in the present transcript the exact amount that is due from defendant to Klein, but we are satisfied that Klein is entitled to recover back the \$200 which he advanced on the contract and in part payment of the purchase price of the land, and also such additional sums as he properly expended under the subsequent agreement between the parties, as evidenced by said memorandum letter of July 27, 1925.

REVERSED AND REMANDED.

Scanlan, P. J., and Barnes, J., concur.



34234

GEORGE J. WILLIAMS,  
Appellee.

v.

SOL H. GOLDBERG,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 635<sup>1</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 6, 1929, a judgment by confession on a lease was entered in the Municipal court of Chicago against defendant for \$650, for rent claimed to be due for the months of April, May and June, 1929, at \$210 per month, and for \$20 attorney's fees. On July 5, 1929, on defendant's motion, the judgment was opened and he was given leave to defend, etc. He filed an amended affidavit of merits and subsequently there was a trial of the issues without a jury, at which evidence for both parties was introduced. The court found that there was due to plaintiff said sum of \$650, and, on January 15, 1930, adjudged that said judgment for \$650, so confessed against defendant on June 6, 1929, stand confirmed as of that date, etc. The present appeal followed.

By the lease, signed by the parties and dated March 24, 1926, plaintiff, as lessor, demised to defendant, as lessee, at a monthly rental of \$210, to be paid upon the first day of each and every month, "flat number three on the 3rd floor of the building known as 5048 Woodlawn avenue, in the City of Chicago," and it was further provided that said lessee was

"To have and to hold said premises, with the appurtenances \* \* from the first day of May, 1926, until the 30th day of April, 1928, provided sixty days' written notice is given lessor by lessee of lessee's intention to terminate this lease on said last mentioned date, otherwise this lease \* \* shall continue from year to year until terminated by like notice in some ensuing year. Lessor is entitled to terminate this lease upon like notice to lessee at like dates, by mailing said



34324

JOHN A. WILLIAMS,  
Appellant.  
v.  
JOHN A. WILLIAMS,  
Appellee.

STATE OF ILLINOIS,  
COUNT OF JEFFERSON.

3531A.683

THE JUDICIAL COUNCIL OF THE STATE OF ILLINOIS.

On June 8, 1934, a judgment of conviction on a charge was entered in the judicial court of Chicago against defendant for \$250.00, for each of the months of April, May and June, 1933, at \$100 per month, and for \$250 attorney's fees. On July 2, 1934, an attachment was issued, the judgment was entered and he was given leave to return, etc. He filed an amended affidavit of assets and subsequently there was a trial of the issues without a jury, at which evidence for both parties was introduced. The court found that there was due to plaintiff said sum of \$250.00, and, on January 12, 1935, judgment was entered for \$250.00, no costs against defendant on June 8, 1934, and continued as of that date, etc. The present appeal followed. By the leave, signed by the parties and dated March 12, 1935, plaintiff, as lessee, desired to return, as lessee, at a monthly rental of \$100.00, to be paid upon the first day of each and every month, this number being on the first of the building known as 3045 Madison Avenue, in the City of Chicago, and it was further provided that said lessee was

To have and to sell with promise, with the agreement to return to the first day of May, 1935, until the first day of April, 1936, plaintiff, as lessee, desired to return, as lessee, at a monthly rental of \$100.00, to be paid upon the first day of each and every month, this number being on the first of the building known as 3045 Madison Avenue, in the City of Chicago, and it was further provided that said lessee was

notice to the within mentioned premises, addressed to said lessee."

The evidence disclosed that defendant continuously occupied the premises until shortly before April 30, 1929, when he vacated them. At that time he owed plaintiff \$210 for the April, 1929, rent, and also \$5 on account of a refrigeration system which plaintiff had installed for the benefit of all the tenants in the building. On May 1, 1929, he mailed to plaintiff a check for \$215, in payment of said April rent, etc. Endorsed on the check is the following: "In full payment of all rents and claims of every nature against Sol H. Goldberg including all obligations under lease dated March 24, 1926." Plaintiff refused to accept the check because of the endorsement, and on the following day returned it to defendant in a letter, in which he stated in part: "This check is for April rent and you are now indebted for April and May rent. I want a check for both months without any endorsements, except payable to my order." Defendant did not thereafter pay to plaintiff the rent for April, 1929, or for any succeeding months.

Defendant did not give to plaintiff any written notice, sixty days prior to April 30, 1929, of his intention to terminate the lease on that date and vacate the premises, in accordance with the clause of the lease above mentioned. Similar clauses or covenants in leases have been held by this appellate court to be valid and binding upon the parties. (Williams v. Veeder, 195 Ill. App. 413, 414-5; Morris v. Taylor, 199 Ill. App. 583, 592.) When, on April 29, 1929, plaintiff learned that defendant was moving out, he wrote defendant a letter in which he asked what action defendant desired him to take relative to the premises "on which you hold a lease for another year," and further said: "Shall I lease them for you and if so on what terms? The renting season for the spring is



written to the first defendant, addressed to him as  
"James".

The evidence disclosed that defendant continuously

occupied the premises until about April 12, 1937, when

he vacated them. At that time he owed plaintiff \$200 for the

April, 1937, rent, and also \$5 on account of a telephone system

which plaintiff had installed for the benefit of all the tenants in

the building. On May 1, 1937, he failed to deposit a check for

\$210, in payment of said April rent, etc. Plaintiff on the check is

the following: "In full payment of all rents and claims of every

nature against said W. defendant including all telephone claims since

dated March 26, 1936". Plaintiff retained the check for

some of the endorsement, and on the following day returned it to

defendant in a letter, in which he stated as follows: "This check is

for April rent and you are now indebted for April and May rent. I

want a check for both months without any endorsement, except payable

to my order." Defendant did not thereafter pay to plaintiff the rent

for April, 1937, or for any succeeding months.

Plaintiff did not give to plaintiff any written notice,

sixty days prior to April 12, 1937, of his intention to terminate

the lease on that date and vacate the premises, in accordance with

the clauses of the lease, after expiration. Similar clauses of

agreements in leases have been held by this appellate court to be

valid and binding upon the parties. (Williams v. Williams, 120 Ill.

App. 115, 414-45; Williams v. Williams, 120 Ill. App. 425, 431.) And,

on April 27, 1937, plaintiff learned that defendant was moving out.

He wrote defendant a letter in which he asked what action defendant

desired him to take relative to the premises "on which you hold a

lease for another year," and further said: "Should I lease them for

you and it be on what terms? The rent has been for the spring 1937



about over unless liberal concessions are offered. Kindly leave the keys with the janitor." Defendant left the keys with the janitor of plaintiff's building but he did not reply to the letter. Subsequently, plaintiff rented the premises to another tenant who began paying rent in July, 1929. Plaintiff did not receive rent for the premises from defendant or anyone for the months of April, May and June, 1929, and on June 6, 1929, caused the judgment in question to be confessed.

The affirmative defense made to plaintiff's action by defendant, as shown by his amended affidavit of merits and on the trial, was in substance that more than sixty days prior to April 30, 1929, he verbally notified John Stewart, the "duly authorized" agent of plaintiff, that he intended to terminate the lease and vacate the premises on said date; that Stewart then "waived" the provision in the lease requiring a sixty days' written notice to plaintiff of such intention; and that thereby plaintiff is estopped to deny that due notice of defendant's said intention was not given. As to whether Stewart was a general agent of plaintiff and duly authorized to accept such a verbal notice from defendant, and to waive the provision in the lease requiring written notice, the burden was upon defendant to establish these facts by clear and specific evidence. (31 Cyc. 1644; Jackson Paper Co. v. Commercial Bank, 199 Ill. 151, 165; Proudfoot v. Wightman, 78 Ill. 553, 555; Cabiness v. Texas, etc. Co., 152 Ill. App. 406, 409.) After reviewing the evidence contained in the present transcript, we do not think defendant sustained the burden of establishing these facts. Furthermore, we do not think that it was shown by a preponderance of the evidence that defendant, more than sixty days prior to April 30, 1929, verbally notified Stewart of his intention to terminate the lease and vacate

about over which liberal concessions are offered. Kindly leave  
the keys with the janitor." Defendant left the keys with the  
janitor of Plaintiff's building but he did not verify to the latter.  
Independently, Plaintiff viewed the provision in another tenant and  
began paying rent in July, 1937. Plaintiff did not receive rent  
for the premises from defendant or anyone for the month of April,  
May and June, 1937, and on June 5, 1937, caused the judgment in  
question to be continued.

The affirmative defense made by Plaintiff's action is  
defendant, as shown by his answer of April 1, 1937, and on the  
trial, was in substance that more than sixty days prior to April  
30, 1937, he verbally notified tenant defendant, the "only authorized"  
agent of Plaintiff, that he intended to terminate the lease and  
vacate the premises on said date; that Plaintiff knew "well" the  
provision in the lease requiring a sixty days' written notice to  
Plaintiff of such intention; and that thereby Plaintiff is estopped  
to deny that the notice of defendant's said intention was not given.  
As to whether there was a general agent of Plaintiff and duly  
authorized to accept such a verbal notice from defendant, and to  
waive the provision in the lease requiring written notice, the burden  
was upon defendant to establish these facts by clear and specific  
evidence. (3) Q. 1444: Bankers Trust Co. v. Commercial Bank, 100  
Ill. App. 100; 100 Ill. App. 100; 100 Ill. App. 100; 100 Ill. App. 100. After reviewing the evi-  
dence contained in the present transcript, we do not think defendant  
sustained the burden of establishing these facts. Furthermore, we  
do not think that it was shown by a preponderance of the evidence that  
defendant, more than sixty days prior to April 30, 1937, verbally  
notified Plaintiff of his intention to terminate the lease and vacate

the premises on said date. And defendant does not claim that he ever gave any notice to plaintiff personally of such intention.

Our conclusion is that the judgment appealed from should be affirmed and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.





34246

PULASKI COAL COMPANY,  
a corporation, Appellant,

v.

JOSEPH KRAVITZ,  
Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

2-  
259 I.A. 635

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

During November, 1929, plaintiff commenced in the Municipal court of Chicago an action in replevin against Joseph Kravitz to recover the possession of forty seven and 39/40ths tons of Pocahontas mine run coal, of the value of \$347.81, which it alleged in its replevin affidavit said Kravitz, on October 25, 1929, wrongfully took and wrongfully detains. The bailiff took the said coal under the writ and delivered it to plaintiff, taking its receipt therefor. Kravitz entered his appearance in the action but did not file an affidavit of defense. On December 3, 1929, plaintiff's motion that he file such an affidavit was overruled by the court. There was a trial of the issues without a jury on January 28, 1930, during which only evidence of plaintiff was presented. The court found the right of property in Kravitz, and adjudged that he recover the possession of the coal and that a writ of retorno habende issue. From this judgment plaintiff has appealed.

It appears from plaintiff's evidence that during July, 1929, in pursuance of a conditional sale contract, to be signed by plaintiff and one Max Canon, the coal in question was delivered to premises owned by Canon at No. 3902 West 18th street, Chicago; that said contract, dated July 26, 1929, was signed by plaintiff by its agent, and also signed in Canon's name by another person for him at

agent, and also signed in Gann's name by another person for him as  
 said contract, dated July 28, 1930, was signed by plaintiff by the  
 premises owned by Gann at No. 3302 West 18th Street, Chicago; that  
 plaintiff and one Max Gann, the coal in question was delivered to  
 1930, in pursuance of a conditional sale contract, to be signed by

It appears from plaintiff's evidence that during July,  
 of retained habeas corpus. From this judgment plaintiff has appealed.  
 adjudged that he recover the possession of the coal and that a writ  
 presented. The court found the right of property in plaintiff, and  
 January 22, 1930, during which only evidence of plaintiff was  
 the court. There was a trial of the issues without a jury on  
 plaintiff's motion that he file such an affidavit was overruled by  
 but did not file an affidavit of defense. On December 3, 1929,  
 his receipt therefor. Plaintiff entered his appearance in the action  
 the said coal under the writ and delivered it to plaintiff, taking  
 1930, wrongfully took and wrongfully detained. The plaintiff took  
 alleged in its affidavit said plaintiff, on October 25,  
 of Pothman's mine two tons of the value of \$447.50, which is  
 Kravis to recover the possession of forty seven and 3/4 tons of  
 Municipal court of Chicago an action in replevin against Joseph  
 during November, 1929, plaintiff commenced in the

HE. JUDICIAL OFFICE WITHIN THE OFFICE OF THE COURT.

JOSEPH KRAVIS, Plaintiff,  
 vs.  
 JOSEPH KRAVIS, Defendant.

JOSEPH KRAVIS, Plaintiff,  
 vs.  
 JOSEPH KRAVIS, Defendant.

JOSEPH KRAVIS, Plaintiff,  
 vs.  
 JOSEPH KRAVIS, Defendant.



his request and in his presence, and was thereafter approved in writing by an executive officer of plaintiff; that Canon never paid for said coal so delivered, or any part thereof; and that on October 25, 1929, Canon deeded the premises to the defendant, Kravitz. During the trial plaintiff offered in evidence said contract, but, upon defendant's objection the court refused to admit it in evidence. The court also refused to allow plaintiff to show that, at the time the replevin suit was commenced, Kravitz was the owner and in possession of said premises and claimed ownership of and right to the possession of the coal in question.

In said contract (refused admission in evidence by the court) it is provided in part that plaintiff sells to Canon, and the latter purchases from plaintiff, the "approximate tonnage" of "100 tons or more of Pocahontas mine run coal," at the net price per ton of \$7.25, "to be delivered during the period beginning July 1, 1929, and ending April 30, 1930;" that the terms are "cash (or Chicago exchange) on or before the 10th day of each month for all coal delivered during the preceding month;" that "if the credit of the Buyer (Canon) shall at any time in the judgment of the Seller (plaintiff) become impaired, the Seller reserves the right to require payment in advance before making further deliveries," and that

"Delivery is made with the understanding that any and all coal delivered under this contract remains the property of the Seller until the Buyer has fully paid the Seller, notwithstanding the coal may be in the possession of the Buyer; if the coal has been partially consumed the title to the balance will remain in the Seller's name until the full purchase price is paid."

In sections 20 and 23 of the Uniform Sales Act, in force July 1, 1915, (Cahill's Stat. 1929, par. 23 and 26, pages 2303-4) it is provided:





"Sec. 20. (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession of property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

Sec. 23. Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

In the case of Sherer-Gillett Co. v. Long, 318 Ill. 432, our Supreme Court decided that a reservation of title by the seller is good against a bona fide purchaser from a buyer in possession under a contract of conditional sale, unless there are facts showing grounds of an estoppel as against the original seller. Referring to said sections of our statute the Court in its opinion said in part (p. 434):

"By section 20 of the act the validity of a contract of conditional sale is recognized. Section 23 declares the law of this State respecting the transfer of title to be that theretofore declared by the great majority of the courts of this country. \* \* It is a general, well-established principle that no one can transfer a better title than he has. \* \* Section 23 declares, in harmony with the settled law of estoppel, that the owner of the goods may by his conduct be precluded from denying the seller's authority to sell. In order to give rise to an estoppel, however, it is essential that the party estopped shall have made by act or word a representation, and that the person setting up the estoppel shall have acted on the faith of this representation in such a way that he cannot without damage withdraw from the transaction."

In view of the above decision and holdings, and such evidence as plaintiff was allowed to introduce, we think that the trial court erred in refusing to admit said contract of conditional sale in evidence. It was the foundation of plaintiff's right to replevy the coal. If any element of estoppel existed as against plaintiff's said right it was for defendant to show it. And it is well settled in this State that a party's signature, affixed to a contract by



"Sec. 11. Where there is a contract to sell specific goods, or where goods are specifically ascertained to the contract, the seller may, by the terms of the contract or otherwise, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other person for the purpose of transmission to the buyer."

"Sec. 12. Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them as a dealer or in the course of his business, the contract is subject to the rights of the owner, and the seller must defend the title to the goods, unless he proves that the title was defective in the goods."

In the case of Whitcomb v. McGregor, 111 Ill. 425, our Supreme Court decided that a reservation of title by the seller is good against a bona fide purchaser from a buyer in possession under a contract of conditional sale, unless there are facts showing fraud or an estoppel against the original seller. Following to this decision of our courts the Court in the opinion said:

"(p. 434): 'Any section 11 of the act the validity of a contract of conditional sale is determined. Section 12 states that the title to the goods is retained by the seller until the conditions of the contract are fulfilled. It is a general, well-established principle of law that one who transfers a better title than he has. Section 12, therefore, is in harmony with the general law of conditional sales. The owner of the goods may by his contract be prevented from conveying them to another. In order to give him no such power, the seller's liability is nullified. It is essential that the party who sells the goods, however, is a representative, and that the person who buys is not a representative, and that the person buying up the goods shall have no right to the title of the goods. The section is in a way that no contract is made with the goods from the transaction.'

In view of the above section and holding, and such other reasons as plaintiff was allowed to introduce, we think that the trial court erred in refusing to admit said contract of conditional sale in evidence. It was the foundation of plaintiff's right to recovery. The said. It was element of exception against plaintiff's said right it was for defendant to show it. And it is well settled in this State that a party's signature, written to a contract by

another with his consent and in his presence, is binding upon said party. (Handyside v. Cameron, 21 Ill. 588, 590; White Eagle Laundry Co. v. Slawek, 296 Id. 240, 243.)

Accordingly, the judgment appealed from is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Scanlan, P. J., and Barnes, J., concur.

The case is remanded for a new trial.

Very truly yours,

J. Edgar Hoover

Enclosure



34256

GEORGE THOMAS STROBEL  
and HELEN STROBEL,  
Appellees,

v.

CONCORDIA FIRE INSURANCE  
COMPANY OF MILWAUKEE, a  
corporation,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 635<sup>3</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a first class action, commenced in the Municipal court of Chicago on August 1, 1927, and based upon defendant's policy of windstorm insurance, there was a trial before a jury in December, 1929, resulting in a verdict in plaintiffs' favor in the sum of \$1480. Judgment on the verdict was entered against defendant, and the present appeal followed.

The policy, of a standard form, is dated and countersigned by the general agent of defendant company (H. Dalmar & Co.) at Chicago, Illinois, on May 10, 1927. It provides that, in consideration of the stipulations therein contained and of a premium of \$12.30, the company insures George Thomas Strobel and Helen Strobel for a term of 5 years "from May 9th, 1927, at noon (standard time) to May 9th, 1932," against all direct loss or damage by tornado, windstorm or cyclone, in an amount not exceeding \$2,000, to a certain described frame building, and certain fixtures and property contained therein, at No. 4306 Overhill avenue, Leyden Township, Illinois. It further provides that the loss or damage, if any, "shall be payable to Paul A. Wilde, Trustee, mortgagee (or trustee) or successor in trust, as his interest may appear." It further provides that the policy is made and accepted "subject to the following stipulations and conditions printed on back hereof,

2501A.685  
 COURT OF APPEALS  
 IN THE CITY OF CHICAGO  
 JAMES THOMAS LINDSEY  
 and  
 JAMES THOMAS LINDSEY  
 Appellants,  
 v.  
 CHICAGO TRUST COMPANY  
 Appellee.

2501A.685  
 COURT OF APPEALS  
 IN THE CITY OF CHICAGO  
 JAMES THOMAS LINDSEY  
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MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

In a first class action, commenced in the Municipal  
 Court of Chicago on August 1, 1937, and based upon defendant's  
 policy of windstorm insurance, there was a trial before a jury  
 in December, 1937, resulting in a verdict in plaintiff's favor  
 in the sum of \$1480. Judgment on the verdict was entered  
 against defendant, and the present appeal followed.

The policy, of a standard form, is dated and countersigned  
 by the general agent of defendant company (N. Palmer & Co.)  
 at Chicago, Illinois, on May 10, 1937. It provides that, in  
 consideration of the stipulations therein contained and of a  
 premium of \$12.50, the company insures James Thomas Lindsey and  
 Helen Lindsey for a term of 5 years "from May 10, 1937, at noon  
 (standard time) to May 10th, 1942," against all direct loss or damage  
 by explosion, windstorm or cyclone, in an amount not exceeding \$2,000.  
 To a certain described frame building, and certain fixtures and  
 property contained therein, at No. 4806 Overhill Avenue, Taylor  
 Township, Illinois. It further provides that the loss or damage,  
 if any, "shall be payable to Paul A. Lindsey, Trustee, Mortgagee (or  
 trustee) or successor in trust, as his interest may appear." It  
 further provides that the policy is made and accepted "subject to  
 the following stipulations and conditions printed on back hereof."



which are hereby specifically referred to and made a part of this policy, \* \* and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy," etc. Among such stipulations and conditions are:

"This Company shall not be liable \* \* for loss or damage to buildings (or their contents) in process of construction or reconstruction, unless same are entirely enclosed and under roof, with all outside doors and windows permanently in place."

"In the event of loss the insured \* \* shall within fifteen days give notice of such loss in writing to this Company, and, within sixty days after the date of the tornado, windstorm or cyclone, render a statement to this Company, signed and sworn to by the insured, stating the interest of the insured and all others in the property, \* \* and shall furnish an itemized statement of loss on and damage to \* \* any building, fixtures or machinery herein described."

In plaintiffs' amended statement of claim, filed August 23, 1927, they allege inter alia that there is due and owing to them by virtue of the policy the sum of \$1980.33; that the policy was executed and delivered to them by defendant, through H. Dalmar & Co., its duly authorized agent; that while the policy was in full force and effect they, "on the 9th day of May, 1927, between the hours of 5 and 8 p. m.," suffered a loss to their property covered by the policy as a direct result of a tornado, windstorm and cyclone, which damaged and destroyed said property; that the cost "to repair and replace" the property with material of like kind and quality is \$1980.33; that plaintiffs "have complied with all the conditions, provisions, covenants and agreements, of them required to be performed and contained in said contract of insurance;" that "on the 10th day of May, 1927," they "gave notice to defendant of the occurrence of said loss as required by said policy;" that, thereafter, on July 2, 1927, "they did render and deliver to defendant a complete inventory of all the damage so caused as aforesaid," etc.; and that defendant, on July 2, 1927, "received said inventory of damage and proof of loss and accepted the same as a satisfactory



which are hereby specifically referred to and made a part of this policy. \* \* and no officer, agent or other representative of this company shall have power to make any provision or condition of this policy," etc. among such stipulations and conditions are:

"This Company shall not be liable \* \* for loss or damage to buildings (or their contents) in process of construction or reconstruction, unless same are entirely enclosed and under roof, with all outside doors and windows permanently in place."

"In the event of loss the insured \* \* shall within fifteen days give notice of such loss in writing to this Company. and within thirty days after the date of the loss, forward a statement to this company, verified by the insured, stating the nature of the insured and all claims in the policy. \* \* and shall furnish an itemized statement of loss on and subject to any claim, stating as specifically as possible."

In the policy, amended statement of claims, dated January

22, 1927, they allege that there is due and owing to them by virtue of the policy the sum of \$1880.33; that the policy was executed and delivered to them by defendant, George H. Palmer & Co., its duly authorized agent; that while the policy was in full force and effect there, "on the 2nd day of May, 1927, between the hours of 8 and 9 p. m.", occurred a loss to their property covered by the policy as a result of a fire, which destroyed and damaged which damaged and destroyed said property; that the loss "to repair and replace" the property with material of like kind and quality is \$1880.33; that defendant "have conspired with all the said insurance companies, coverages and arrangements of their respective to be performed and contained in said contract of insurance" that "on the 1st day of May, 1927," they "have notice to defendant of the occurrence of said loss and that said loss was caused by defendant, on May 2, 1927." They did render and deliver to defendant a complete inventory of all the damage so caused as aforesaid, etc.; and that defendant, on May 2, 1927, "received said inventory of damage and paid of loss and covered the same as a satisfaction

proof of loss."

On November 4, 1927, defendant filed its affidavit of merits and on December 2, 1929, during the trial an amended affidavit of merits, in which it is alleged in substance that, at the time plaintiffs ordered and procured the issuance and delivery of the policy, they "then and there well knew that the building mentioned, and purporting to be insured in said policy, had prior thereto been destroyed by windstorm;" that the policy was so ordered and procured "with the fraudulent intent then and there to claim and recover indemnity under said policy for said prior loss and damage;" that neither at the time the policy was ordered, nor at the time it was delivered, did defendant have any knowledge of the damage, to or destruction of the building; and that at said times it relied upon plaintiffs' representation and warranty that said building was in fact in existence. And defendant denied that the cost to plaintiffs to repair and replace the property amounted to the sum of \$1980.33, and further denied that plaintiffs had complied with the terms and conditions of the policy and alleged that they did not give to defendant notice of the alleged loss and damage as required by the policy, or furnish satisfactory proofs of loss. And defendant alleged that because of said defenses it was not indebted to plaintiffs in any sum.

On the trial George Thomas Strobel was plaintiffs' principal witness, and they also called in rebuttal Edward H. Hopf, manager of P. A. Wilde & Co., mortgage bankers and insurance brokers in Chicago. For defendant five witnesses testified - Hugo Dalmar, owner of H. Dalmar & Co., general agent of defendant in Chicago; W. R. Englehart, office manager of the agency; Alfred M. Clary, a "counterman" in the office; and Frank and Ida Aubin.

The salient facts, as disclosed from the evidence,



proof of loss."

On December 22, 1937, defendant filed the affidavit of

notice and on December 23, 1937, during the trial an amended

affidavit of notice, in which it is alleged in substance that,

at the time plaintiff's vehicle was destroyed the defendant was

delivery of the policy, they "then and there well knew that the

plaintiff maintained, and expected to be insured in said policy,

had prior thereto been damaged by windstorm," that the policy

was so ordered and procured "with the fraudulent intent that and

there be claim and recover indemnity under said policy for loss

prior loss and damage," that neither at the time the policy was

ordered, nor at the time it was delivered, did defendant have any

knowledge of the damage, or of destruction of the building; and

that at this time it is alleged upon plaintiff's representation and

authority that said policy was in fact in existence. And defendant

demanded that the court so adjudge to wit and require the

property amounted to the sum of \$1000.00, and further demanded that

plaintiff's loss computed with the taxes and commission of the policy

and alleged that they did not give it defendant notice of the alleged

loss and damage as required by the policy, or thereof satisfactory

proof of loss. And defendant alleged that because of said defendant

it was not indebted to plaintiff in any sum.

On the trial George Thomas testified that plaintiff's

principal witness, and they also called in several others. Mr. Hays,

manager of P. A. White & Co., mortgage bankers and insurance brokers

in Chicago. For defendant two witnesses testified - George Palmer,

owner of P. A. White & Co., general agent of defendant in Chicago;

V. J. [unclear], office manager of the company; Alfred E. [unclear],

"[unclear]" in the office; and Frank and Ed [unclear].

The witness [unclear], as disclosed from the evidence,



are in substance as follows: On May 9, 1927, plaintiffs owned and had under construction a frame bungalow at the location mentioned. On that day the building was "sided," the roof was on, but all the windows were not permanently in place and no plastering had been done. It had been in the course of construction only about three weeks. Prior to May 9th plaintiffs had not attempted to procure any insurance thereon, but they had procured a building loan, secured by mortgage, from said P. A. Wilde & Co. No money had been paid out on the loan. George Thomas Strobel was a builder and plaintiffs were erecting the building for resale. During the afternoon of May 9th the incomplected structure was blown down by a severe wind-storm and greatly damaged. It was not thereafter reconstructed and no attempts were made by plaintiffs to repair the damage and complete the building. A weather report of the U. S. Government, introduced in evidence by plaintiffs, stated that, on May 9, 1927, "the maximum wind velocity (sustained for a period of five minutes) was 53 miles an hour from the southwest, beginning at 4:24 p. m., and that the extreme or instantaneous velocity was 65 miles an hour, and occurred between 4 and 5 p. m., with strong winds prevailing throughout the afternoon and evening." Strobel testified that he saw the building "around 5 o'clock p. m." at which time it "was standing," and that he next saw it "about 7:30 p. m.," the same evening, when it was "down completely." Frank Aubin, defendant's witness, testified that he as a contractor and builder, was engaged that afternoon in erecting another building on the opposite corner on Overhill avenue; that there were two severe windstorms that afternoon - one about 3 p. m. and the other between 4:30 and 5 p.m.; that after the first storm he noticed that plaintiffs' building "was about half down and was leaning way over on one side, about ready to fall;" and that after the second storm it "was a total wreck." Aubin's testimony was corroborated by that of his wife, Ida Aubin. Strobel

and in evidence as follows: On May 7, 1937, Plaintiff owned and had under construction a frame building at the location mentioned. On that day the building was "sited," the roof was on, but all the windows were not permanently in place and no plastering had been done. It had been in the course of construction only about three weeks. Prior to May 7th Plaintiff had not attempted to procure any insurance thereon, but they had procured a building loan, secured by mortgage, from said F. L. Williams & Co. The money had been paid out on the loan. George Thomas, General and Plaintiff's agent, was present at the building for weeks. During the afternoon of May 6th the instant plaintiff's building was about 100 ft. in height and was greatly damaged. It was not destroyed, however, and no attempts were made by Plaintiff to repair the damage and complete the building. A written report of the F. L. Williams & Co. dated May 7, 1937, stated that the building, as damaged, was estimated to be worth \$100,000.00 (the maximum wind velocity sustained for a period of five minutes) and that the extreme or instantaneous velocity was 60 miles an hour, and occurred between 4 and 5 P.M. with strong winds prevailing throughout the afternoon and evening. It was testified that the building was "blown down" at about 4 P.M. at which time it was standing. And that the next day it "stood 7:30 P.M." The same evening, when it was "blown down." From which, Plaintiff's witness, testified that he as a contractor and builder was engaged that afternoon in getting another building on the opposite corner on level ground. That there were two severe earthquakes that afternoon - one about 3 P.M. and the other between 4:30 and 5 P.M. That after the first quake he noticed that Plaintiff's building "was about half down and was leaning way over on one side, about nearly to fall," and that after the second quake it "was a total wreck." Plaintiff's testimony was corroborated by that of his wife, Mrs. Anna Thomas.



further testified that "it first occurred to me to get windstorm insurance, about noon of May 9th, when I was down town;" that prior to one o'clock p. m., on that day he called at the office of P. A. Wilde & Co., and directed Hopf, manager, to place \$2,000 in tornado insurance on said building with a company; and that afterwards he paid the premium on the policy to Wilde & Co.

Several men employed in the offices of H. Dalmar & Co. were there working on May 9, 1927, after 5 p. m., the usual closing time, but most of the staff had left the office. Shortly after 5 p. m. there was a windstorm, observed by those remaining in the office. About 5:45 p. m., Hopf, manager of Wilde & Co., and which firm, as brokers, frequently had ordered fire and windstorm insurance of Dalmar & Co., succeeded in getting into communication with Clary and by telephone placed the order with him for the issuance of the policy in question. On the following morning, May 10th, the policy was delivered to Wilde & Co. Subsequent to the time it had left Dalmar & Co.'s hands, and about 11 o'clock on the morning of May 10th, P. A. Wilde and Strobel called at Dalmar & Co.'s office, had an interview with Hugo Dalmar, and notified him verbally of the loss and damage to plaintiffs' building by the windstorm of the preceding afternoon. According to Dalmar's testimony, he stated to Wilde and Strobel that he would give the facts of the case to the company at Milwaukee and that it was for the company to decide whether or not it would acknowledge liability. According to Strobel's testimony, Dalmar at this interview stated that the Company "would not entertain the loss because the damage was done before the policy was placed." Plaintiffs did not within 15 days give to defendant any notice in writing of the loss. Subsequently, on July 1, 1927, within sixty days after the windstorm, Strobel called at the office of Dalmar & Co., and there delivered a statement, headed "inventory of damage" and itemized and signed by plaintiffs, claiming



Further testified that "it first occurred to me to get window insurance, about noon of May 11th, when I was down town" and prior to one o'clock p. m., on that day he called at the office of R. A. White & Co., and directed Hapt, manager, to place \$2,000 in term insurance on said building with a company and that afterwards he paid the premium on the policy to R. A. White & Co.

Several men employed in the office of R. Palmer & Co. were there working on May 9, 1927, after 5 p. m., the usual closing time, and most of the staff had left the office. Shortly after 5 p. m. there was a windstorm, observed by those remaining in the office. About 5:45 p. m., Hapt, manager of White & Co., and when time, as before, Hapt, manager had ordered five and window insurance of Palmer & Co., succeeded in getting into communication with White and by telephone placed the order with him for the issuance of the policy in question. On the following morning, May 11th, the policy was delivered to White & Co. Unbeknownst to the time it had left Palmer & Co.'s hands, and about 11 o'clock on the morning of May 11th, 1927, White and Strobel called at Palmer & Co.'s office, and an interview with Hapt, manager, and notified him of the loss and damage to plaintiffs' building by the windstorm of the preceding afternoon. According to Palmer's testimony, he stated to White and Strobel that he would give the facts of the case to the company at Milwaukee and that it was for the company to decide whether or not it would reimburse liability. According to Strobel's testimony, Palmer at this interview stated that the company "would not entertain the loss because the damage was due to the policy was placed." Plaintiffs did not return 15 days give to defendant any notice in writing of the loss. Subsequently, on July 1, 1927, within sixty days after the windstorm, Strobel called at the office of Palmer & Co., and there delivered a statement, headed "Inventory of damage" and examined and signed by plaintiffs, claiming

that said damage to the building amounted to the total sum of \$1980.33. But the statement so delivered was not sworn to by either of the plaintiffs. On the trial plaintiffs took the position that by reason of Balmar's said statement, made to Wilde and Strobel on May 10th, defendant had waived the provisions in the policy, requiring a notice in writing of the loss to be given within 15 days, and also requiring a sworn statement or proofs of loss to be rendered to the company within sixty days, and the trial court sustained that position.

On the issue of fraud, as stated in defendant's affidavit of merits, the additional evidence bearing thereon was conflicting. Inasmuch, however, as we have reached the conclusion that for other reasons the judgment cannot stand and a new trial may be had, we refrain from a discussion of said evidence.

Defendant's counsel contend that the judgment must in any event be reversed because plaintiffs cannot make one case by allegations in their statement of claim (viz, that they "have complied" with all the conditions, etc., required of them in the policy) and recover on a different case as made in their proof (viz, that certain of said conditions, etc. were waived. We think that there is merit in the contention. (Feder v. Midland Casualty Co., 316 Ill. 552, 559-60; Expanded Metal Fireproofing Co. v. Boyce, 233 Ill. 284, 289; Walsh v. North American Storage Co., 260 Ill. 322, 331; Dvorak v. Hartford Fire Ins. Co., 253 Ill. App. 76, 79; Walter Cabinet Co. v. Russell, 250 Ill. 416, 420.) In the present case the evidence clearly shows that plaintiffs did not comply with the provisions of the policy requiring them to give notice of the loss in writing to the company within 15 days thereafter, and also requiring them, within 60 days thereafter, to render a sworn statement to the company, stating their interest and that of all others in the property and also the



that said damage to the building amounted to the total sum of \$1500.00. But the statement as delivered was not sworn to by either of the plaintiffs. In the trial transcript taken and recorded that by reason of defendant's said statement, made to him and recorded on May 19th, defendant had waived the provisions in the policy, by giving a notice in writing of the loss to be given within 15 days, and also reporting a sworn statement or proof of loss to be reported to the company within sixty days, and the trial court awarded him the sum of \$1500.00.

In the issue of law, as raised in defendant's petition for a writ of habeas corpus, the plaintiff's evidence is that the defendant had waived the provisions in the policy by giving a notice in writing of the loss to be given within 15 days, and also reporting a sworn statement or proof of loss to be reported to the company within sixty days, and the trial court awarded him the sum of \$1500.00.

Defendant's counsel contend that the judgment must be reversed even though the plaintiff's evidence is that the defendant had waived the provisions in the policy by giving a notice in writing of the loss to be given within 15 days, and also reporting a sworn statement or proof of loss to be reported to the company within sixty days, and the trial court awarded him the sum of \$1500.00.

On a different case as made in this court (see case captioned as "The People v. ...") the court held that the defendant had waived the provisions in the policy by giving a notice in writing of the loss to be given within 15 days, and also reporting a sworn statement or proof of loss to be reported to the company within sixty days, and the trial court awarded him the sum of \$1500.00.

It is the contention of the plaintiff that the defendant had waived the provisions in the policy by giving a notice in writing of the loss to be given within 15 days, and also reporting a sworn statement or proof of loss to be reported to the company within sixty days, and the trial court awarded him the sum of \$1500.00.



loss and damage to the building. In the Feder case, supra (p. 560) it is said:

There can be no recovery on a contract against one party whose performance is dependent on some act to be done or forbore by the other party unless the condition precedent has been fully or substantially performed by the plaintiff or he has averred and proved a sufficient excuse for the non-performance. \* \* The true rule is stated thus in Hart v. Carlsby Manf. Co., 221 Ill. 444, 446: 'Though an excuse for not performing a condition is for some purposes equivalent to performance, yet it is not the same thing, and therefore in pleading, performance must never be averred by a party who relies upon an excuse for not performing, but he must state his excuse.'

Defendant's counsel also contend that the court erred in admitting certain testimony of plaintiffs' witness, Hopf, called in rebuttal. The court admitted this evidence, erroneously in our opinion, on the theory that Wilde & Co. (of which Hopf was manager) were agents of defendant. The evidence clearly shows that Wilde & Co. were insurance brokers (Arff v. Star Fire Ins. Co., 125 N. Y. 57, 63), and were acting as agents of plaintiffs in the procuring of the policy in question. Not being agents of defendant, their acts and knowledge were not binding on it. (Lycoming Fire Ins. Co. v. Rubin, 79 Ill. 402, 403-4; Ben Franklin Ins. Co. v. Weary, 4 Ill. App. 74, 78.)

Other points are urged by defendant's counsel as grounds for reversal, particularly as regards certain instructions given by the court and certain improper remarks made by plaintiffs' attorney in his argument to the jury. But it is unnecessary to discuss them, although they have merit.

For the reasons indicated the judgment appealed from is reversed and the cause is remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Barnes, J., concur.

loss and damage to the building. In the Robert case, supra (p. 500)

it is said:

"There can be no recovery on a contract against one party whose performance is dependent on some act to be done or forbore by the other party unless the condition precedent has been fully or substantially performed by the plaintiff. It is not enough that the plaintiff has done some act which is a condition precedent for the non-performance. The true rule is stated thus in Wright v. (1911) 101 N. D. 441, 442, 443. 'Though an act may be not performing a condition is for some purpose equivalent to performance, yet it is not the same thing, and therefore in plaintiff's performance must never be treated as a party's act unless it is an act for not performing, and no such state this means.'"

Holmes' dissent also contains the same error in

admitting certain testimony of plaintiff's witness, Wright, which

is rebutted. The court admitted this testimony, erroneously in our

opinion, on the theory that Wright & Co. (of which Wright was manager)

were agents of defendant. The witness said in effect that Wright &

Co. were insurance brokers (Wright v. Wright & Co., 101 N. D.

87, 88), and were acting as agents of plaintiff in the transaction

of the policy in question. We held agents of defendant, their

acts and knowledge were not binding on it. (Hypothetical question, p. 500.)

Wright v. Wright & Co., 101 N. D. 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

111. (p. 74, 75.)

Other points are cited by defendant's counsel as grounds

for reversal, particularly as regards certain instructions given by

the court and certain language used by plaintiff's witness.

In his argument to the jury, but it is unnecessary to discuss them.

Although they have not.

For the reasons indicated the judgment appealed from is

reversed and the case is remanded.

REVEREND AND HONORABLE

Benjamin, P. 1., and B. Jones, J., concur.

34265

J. M. BRAUDE,  
Appellant,

v.

COCHRAN & McCLUER CO.,  
a corporation,  
Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 635<sup>4</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On September 30, 1929, plaintiff commenced in the Municipal court a 4th class action in contract against defendant to recover the sum of \$356.93. Defendant admitted that it owed plaintiff \$132.13 and tendered that sum to him, which he refused to accept in satisfaction. On December 3, 1929, there was a trial of the issues without a jury resulting in a finding and judgment against defendant for \$132.13, and plaintiff has appealed. He here urges that this court reverse the judgment of \$132.13 and enter a judgment in his favor and against defendant for the sum of \$356.93.

Plaintiff alleged in his statement of claim that for a considerable time prior to September 25, 1929, defendant had been acting as his agent in the collection of rents from tenants in his building in Chicago; that defendant had collected for the month of September, 1929, the total sum of \$460, out of which it was entitled to retain, as a commission, 4 per cent, or \$18.40, and also \$84.67 for expenses incurred by it in its operation of the building for said month; and that there is due to plaintiff the net sum of \$356.93, which sum defendant, although often requested, has refused to pay.



34828

J. E. WILSON,  
Appellant.

v.

COMMON & NORTH CO.,  
a corporation,  
appellee.

STATE OF NEW YORK

COUNT OF NEW YORK

3501A-682

THE PEOPLE OF THE STATE OF NEW YORK, by and through the undersigned, the People's Attorney General, do hereby certify that the within and foregoing is a true and correct copy of the original thereof, as the same appears from the records of the County of New York.

On September 29, 1937, plaintiff commenced in the

County of New York a civil action in complaint against defendant

to recover the sum of \$350.00. Defendant admitted that it owed

plaintiff \$350.00 and removed the same to this court. Defendant

to accept in settlement. On September 2, 1937, there was a trial

of the issues and a jury returned a verdict in favor of plaintiff

against defendant for \$350.00, and plaintiff was awarded. The

date upon which this court reversed the judgment of \$350.00 and

enter a judgment in his favor and against defendant for the sum

of \$350.00.

Plaintiff alleged in his statement of claim that he

was a resident of the City of New York, and that he had been

employed as his agent in the collection of rents from tenants in

his building in Chicago; that defendant had collected for the month

of September, 1937, the total sum of \$450, one of which it was

entitled to retain, as a commission, 4 per cent, or \$18.00, and also

\$34.87 for expenses incurred by it in its operation of the building

for said month; and that there is due to plaintiff the net sum of

\$335.13, which was defendant. Although often requested, has refused

to pay.

Defendant in its affidavit of merits admitted that prior to September 25, 1929, it had acted as plaintiff's agent in operating the building and in the collection of rents, and that it had in its possession the net sum of \$356.93. And defendant alleged that out of said sum it was entitled to retain as additional compensation to it the further sum of \$224.80, "as commissions on the rents to accrue on the unexpired terms of certain leases," in accordance with a rule of the Chicago Real Estate Board, of which defendant, as a duly licensed real estate broker in Chicago, is a member; and that defendant is indebted to plaintiff only in the sum of \$132.13, which sum it is ready to pay to plaintiff at any time.

On the trial plaintiff was his only witness and Henry H. Hunt, secretary of the Chicago Real Estate Board, alone testified for defendant.

From plaintiff's testimony the following uncontradicted facts appear: In July, 1925, plaintiff, desiring to procure an agent to collect the rents from tenants in his building and to manage the building, called on one Chadwick, manager of defendant's rent department, and asked him what would be defendant's charges "for handling the property, including the collecting of rents, and seeing to it that the property was kept in good condition." Chadwick replied: "Three (3) per cent of the amount of rents collected," and requested plaintiff to sign a form of an agreement which was then exhibited. Plaintiff said he would rather not sign any written agreement, and further said: "You are to get for your services three (3) per cent of the amount collected, and this arrangement can be terminated at will." Chadwick replied: "Very well, we will go into it on that basis." Following this interview defendant, as plaintiff's agent, continued to manage the building and collect the rents, charging plaintiff 3 per cent of the amount of rents collected, until



Defendant in the affidavit of merits admitted that prior to September 28, 1935, it had acted as plaintiff's agent in operating the building and in the collection of rents, and that it had in its possession the net sum of \$285.25. and defendant alleged that out of said sum it was entitled to retain an additional compensation of \$100.00, and defendant alleged that it was entitled to retain the balance of \$185.25, in accordance with a rule of the Chicago Real Estate Board, of which defendant, as a duly licensed real estate broker in Chicago, is a member; and that defendant is entitled to plaintiff only in the sum of \$185.25, which sum it is ready to pay to plaintiff at any time.

On the trial plaintiff was the only witness and Henry H. Hunt, secretary of the Chicago Real Estate Board, whose testimony was taken by deposition, was called by plaintiff.

From plaintiff's testimony the following was ascertained:

That on or about July 1, 1935, plaintiff, desiring to procure an agent to collect the rents from tenants in its building and to manage the building, called on one Charles J. O'Connell, manager of defendant's real department, and asked him what would be defendant's charges for handling the property, including the collecting of rents, and O'Connell testified that the property was kept in good condition, and that the amount of rents collected, was \$185.25, and that he was willing to sign a term of an agreement with plaintiff for a term of one year, and that he would collect the rents and would not sign any other agreement, and further said: "You are to get for your services three per cent of the amount collected, and this arrangement can be terminated at will." O'Connell replied: "Very well, as will be done."

Following this interview defendant, as plaintiff's agent, continued to manage the building and collect the rents, until



some time in January, 1929, when at defendant's solicitation, its compensation for its services was, with plaintiff's consent, increased to 4 per cent of the amount of rents collected. Plaintiff further testified that at no time did he agree with defendant regarding any payment to it, as commissions, for the execution or renewal of any lease or leases, other than said per cent of the amount of rents collected; and that he had no knowledge of the rules of the Chicago Real Estate Board or that defendant was a member of said Board. During the latter part of September, 1929, plaintiff, being dissatisfied with the manner in which defendant had managed the building, etc., discharged it as his agent and demanded a final settlement, etc. Defendant offered said sum of \$132.13 in satisfaction, claiming it was entitled to said additional credit of \$224.80, which credit plaintiff refused to allow and commenced the present action.

Defendant's witness, Lunt, testified that defendant had been a member of said Chicago Real Estate Board for several years; that by a rule of the Board, relating to charges that may be made by real estate agents and members of the Board for commissions on unexpired leases on property withdrawn from their management, it is provided in substance that "such an agent is entitled to charge 3 per cent on the unexpired term that he may have on any lease;" that such rule has been in existence for more than 25 years; that it is also a custom in the Chicago real estate trade; but that "there is nothing in the rules of the Board that prevents a real estate broker or agent from changing said rules by an express contract."

It was stipulated on the trial that the leases in question, the terms of which had not expired when defendant was discharged, had been executed or renewed by defendant during the period it was acting as plaintiff's agent. The above was all the evidence received.





Under the pleadings and the evidence we are of the opinion that the court should have entered a finding and judgment against defendant for the sum of \$356.93. It appears from plaintiff's undisputed testimony that, when defendant became plaintiff's agent for the purposes mentioned, it, by an express verbal contract, agreed that it would perform all services and collect all rents for "3 per cent (afterwards increased to 4 per cent) of the amount of rents collected," and that the arrangement could be "terminated at will." In 2 Corpus Juris, sec. 413, p. 753, it is said: "Where the agent's employment is by special agreement, his right to compensation will, of course, be determined by the terms of the agreement, and the express terms of the agreement are not to be varied by the usages or customs of the trade, \* \*." (See Turner v. Osgood Colortype Co., 223 Ill. 629, 634; Gilbert & Co. v. McGinnis, 114 Ill. 28, 33.) In 2 C. J. sec. 419, p. 755, it is said: "And agents who manage realty are not entitled, on the termination of the agency, to retain commissions on rents to accrue in the future from leases made by them." (Citing Thomas v. Gwyn, 131 No. Car. 460, 462.) In 17 C. J. sec. 23, p. 463, it is said: "Particular usages among agents are not binding upon their principals, unless known or unless the facts are such as to raise a presumption of knowledge." (See Svern v. Churchill, 155 Ill. App. 505, 507.) Defendant's counsel cites the case of Carroll, Schendorf & Boenicks v. Simons, 245 Ill. App. 586, as an authority sustaining the judgment appealed from. We do not think it does so. It is there said (p. 588): "In the absence of any specific agreement the law will presume that the parties contracted with reference to the general custom and usage." In the present cause it appears there was a specific verbal agreement between the parties, as above stated.

For the reasons indicated the judgment appealed from is reversed and judgment will be entered here for \$356.93, in favor of



Under the provisions of the contract as to the payment

that the court should have entered a finding and judgment against defendant for the sum of \$333.33. It appears from Plaintiff's undisputed testimony that, when defendant became Plaintiff's agent for the purposes mentioned, it, by an express verbal contract, agreed that it would perform all services and collect all sums for it and remit (afterwards increased to a per cent) of the amount of sums collected, and that the agreement could be "terminated at will." In United Fruit, Inc. v. P. F. S., it is said: "Where the agreement is by special agreement, the right to terminate at will, of course, is determined by the terms of the agreement, and the express terms of the agreement are not to be varied by the usage or customs of the trade." (See United Fruit, Inc. v. P. F. S.)

233 Ill. 403, 96 Ill. 2d 111, 12, 13. In 2 C. I. 222, 119, 12, 13, it is said: "It appears that the parties really are not entitled, on the termination of the agency, to retain commissions on sums received in the future from issues made by them." (United Fruit, Inc. v. P. F. S., 119 Ill. 2d 111, 12, 13.)

200 Ill. 403, 96 Ill. 2d 111, 12, 13. It is said: "Defendant's agent should have been bound by his principal, unless known or aware of facts and such as to raise a presumption of knowledge." (See United Fruit, Inc. v. P. F. S.)

233 Ill. 403, 96 Ill. 2d 111, 12, 13, an authority maintaining the judgment appealed from. We do not think it does so. It is there said (p. 403): "In the absence of any specific agreement, the law will presume that the parties contracted with reference to the general custom and usage." In the present case it appears there was a specific verbal agreement between the parties, as above stated.

For the reasons indicated the judgment appealed from is reversed and judgment will be entered here for \$333.33, in favor of

plaintiff and against defendant, Cochran & McCluer Co., a corporation, together with interest thereon at the rate of 5 per cent per annum from September 30, 1929.

REVERSED AND JUDGMENT HERE FOR  
\$356.93, AND INTEREST AS STATED,  
AGAINST DEFENDANT.

Scanlan, P. J., and Barnes, J., concur.

34265

#### FINDING OF FACTS.

We find as facts that in July, 1925, the parties verbally agreed that defendant should act as plaintiff's agent in the management of his building and in the collection of rents from tenants therein, that defendants should receive as compensation for its services 3 per cent (afterwards increased to 4 per cent) of the amount of rents collected from said tenants, and that said agreement might be terminated at any time at the will of either party; that defendant performed services under the agreement for several years and received said compensation; that about September 25, 1929, plaintiff terminated the contract and discharged defendant as agent; and that at that date there was due and owing to plaintiff from defendant the sum of \$356.93.

plaintiff and against defendant, claiming a balance due of \$100.00, a sum of money, together with interest thereon at the rate of 6 per cent per annum from September 1, 1919.

RETURNED TO THE COURT FOR THE  
JURY, AND THE COURT HAS  
ORDERED THAT THE JURY  
SHALL BE RECALLED.

Witness, J. L. and H. L. and H. L. and H. L.

1920

### STATE OF TEXAS.

We find as facts that in 1919, 1920, the parties verbally

agreed that defendant should act as plaintiff's agent in the management of his business and in the collection of rents from tenants therein. That defendant should receive an compensation for his services 5 per cent (five per cent) of the amount of rents collected from said tenants, and that said agreement might be terminated at any time at the will of either party; that defendant performed services under the agreement for several years and received said compensation; that about September 1, 1919, plaintiff terminated the contract and discharged defendant as agent; and that at that time said defendant was owing to plaintiff the sum of \$100.00.



34277

HARRY JACOBSON,  
Appellee,

v.

ABRAHAM M. LIBLING,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 636<sup>1</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal court of Chicago, entered January 11, 1930, denying defendant's motion (made on December 27, 1929, and supported by his amended affidavit) to open a judgment by confession on a note, entered against him on December 9, 1929, and to allow him to plead and defend.

By the note, dated September 6, 1929, defendant promised to pay 90 days after date to the order of plaintiff \$6,000, with interest from date at the rate of 6 per cent per annum. There was a clause empowering any attorney of any court of record to appear for defendant at any time after the maturity of the note, and confess a judgment for the amount then due thereon, together with costs and reasonable attorney's fees. The amount of the judgment as confessed is \$6,480.15, made up of the principal sum of \$6,000, interest to December 9, 1929, of \$93, and attorney's fees of \$387.15.

The sole question is whether, on the allegations of the amended affidavit, the court should have opened the judgment and allowed defendant to plead, etc.

In said affidavit, sworn to on January 2, 1930, defendant states that he verily believes that he has a good defense to the whole of plaintiff's demand; that on September 5, 1929, (one day prior to the date of the note) he entered into a verbal agreement with plaintiff, whereby plaintiff gave to him \$6,000, with the

24277

KERRY LARSEN  
Appellant

v.

ABRAHAM M. LARSEN  
Appellee

STATE OF MINNESOTA

IN DISTRICT COURT

2521A.038

MR. JUSTICE KELLY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Municipal Court of Chicago, entered January 11, 1930, denying defendant's motion (made on December 24, 1929, and supported by his amended affidavit) to open a judgment by confession on a note, entered against him on December 9, 1929, and to allow him to plead and defend.

By the note, dated September 2, 1929, defendant promised to pay 50 days after date to the order of plaintiff \$1,000, with interest from date at the rate of 8 per cent per annum. There was a clause empowering any attorney of any court of record to appear for defendant at any time after the maturity of the note, and secure a judgment for the amount then due thereon, together with costs and reasonable attorney's fees. The amount of the judgment as entered is \$1,225.12, made up of the principal sum of \$1,000, interest to December 9, 1929, of \$121.12, and attorney's fees of \$104.00.

The sole question is whether, on the allegations of the amended affidavit, the court should have opened the judgment and allowed defendant to plead, etc.

In said affidavit, sworn to on January 2, 1930, defendant states that he verily believes that he has a good defense to the whole of plaintiff's demand; that on September 2, 1929, (one day prior to the date of the note) he entered into a verbal agreement with plaintiff, whereby plaintiff gave to him \$4,000, with the



understanding that he (defendant) would purchase therewith 200 shares of a certain named stock, then listed on the Chicago Stock Exchange; that it was agreed that the parties "would share equally in the profits from said stock and that in case there was a loss defendant would stand all of the loss;" that defendant purchased the 200 shares of stock, and the \$6,000, which plaintiff had given to him, was in turn given to a certain named firm of stock brokers; that it was further agreed that defendant would have the right to use his own judgment to sell said stock at any time and to replace the same with other stock, and that plaintiff would rely upon defendant's judgment in selling or replacing the stock originally purchased; that "plaintiff requested defendant to execute a note so that plaintiff could have the same discounted at his bank, and in that way none of his funds would be tied up in the transaction;" and that "said note was given only for the purpose of having plaintiff discount the same at a bank, and that as between the parties hereto it was never intended as an evidence of a debt or that plaintiff should ever confess judgment on the same."

In the affidavit defendant further states that during the "recent collapse" of the stock market, and when it became known to plaintiff that losses had been sustained in the purchase of the stock, plaintiff demanded that defendant repay to him the \$6,000; that defendant refused to do so, "claiming that the stock market would come back and there would be no losses and that, since no definite time was set when defendant was to indemnify or repay to plaintiff his money, plaintiff should wait a reasonable time until the market had a chance to come back;" that plaintiff "was dissatisfied" with defendant's suggestion, and thereupon the parties "agreed to arbitrate their differences, that is, the time in which defendant should repay said \$6,000;" that thereupon on December 6,



understanding that he (defendant) would purchase the same for  
himself of a certain named stock, then listed on the Chicago Stock  
Exchange; that it was agreed that the parties "would share equally  
in the profits from said stock and that in case there was a loss  
defendant would stand off of the loss;" that defendant purchased  
the 200 shares of stock, and the \$4,000, which plaintiff had given  
to him, was in turn given to a certain named firm of stock brokers;  
that it was further agreed that defendant would have the right to  
use his own judgment to sell said stock at any time and to replace  
the same with other stock, and that plaintiff would rely upon defendant's  
and's judgment in relation to replacing the stock originally pur-  
chased; that plaintiff requested defendant to execute a note so  
that plaintiff could have the same deposited at his bank, and in  
that way none of his funds would be tied up in the transaction;  
and that "said note was given only for the purpose of having plaintiff  
discount the same at a bank, and that no money was given to  
it was never intended as an evidence of a debt or that plaintiff should  
ever receive judgment on the same."

In the affidavit defendant further states that during  
the "recent collapse" of the stock market, and when it became known  
to plaintiff that losses had been sustained in the purchase of the  
stock, plaintiff demanded that defendant repay to him the \$4,000;  
that defendant refused to do so, claiming that the stock market  
would come back and there would be no losses and that, since no  
definite time was set when defendant was to indemnify or repay to  
plaintiff his money, plaintiff should wait a reasonable time until  
the market had a chance to come back; that plaintiff "was dis-  
satisfied" with defendant's suggestion, and thereupon the parties  
agreed to arbitrate their differences, that is, the time in which  
defendant should repay said \$4,000; that arbitration on November 6,

1929, the parties submitted their differences to one of the judges (naming him) of the circuit court of Cook county, and agreed to abide by his decision; that said judge, as arbitrator, after hearing the evidence of the parties, "decided that said note which plaintiff held should be returned to defendant, and that defendant should pay to plaintiff the sum of \$6,000, as follows: \$2,000 within 60 days after December 6, 1929; \$2,000 within 4 months after said date; and \$2,000 within 6 months after said date;" and that thereafter plaintiff, "in violation of the decision of said arbitrator," caused the said judgment by confession to be entered on said note.

We are of the opinion, in view of the allegations contained in defendant's affidavit, that the court erred in not opening up the confessed judgment on the note and allowing defendant to plead and have a trial upon the merits. It is alleged in the affidavit in substance that the parties were in a partnership venture upon certain stated terms as regards the purchase and sale of certain stock, then listed on the Chicago Stock Exchange, and that, at plaintiff's request and for the reasons expressed by him, the note in question, "was given only for the purpose of having plaintiff discount the same at a bank," and that "as between the parties hereto it was never intended as an evidence of a debt or that plaintiff should ever confess judgment on the note." The judgment confessed is in favor of plaintiff, the payee and original holder of the note. It had not been transferred to a third party for value. We think that the allegations of defendant's affidavit sufficient show, prima facie, that the note was an accommodation note, not warranting the entry of a judgment by confession thereon against the accommodating party. In 1 Daniel on Neg. Insts. (5th Ed.) sec. 189 it is said: "The mercantile credit of parties is frequently loaned to others by the signature of their names as drawer, acceptor, maker or



1920, the parties submitted their differences to one of the judges (naming him) of the circuit court of Cook county, and agreed to abide by his decision; that said judge, an auditor, after hearing the evidence of the parties, "decided that said note which plaintiff held should be returned to defendant, and that defendant should pay to plaintiff the sum of \$2,000, as follows: \$2,000 within 30 days after December 31, 1920; \$2,000 within 3 months after said date; and \$2,000 within 3 months after said date;" and that thereafter plaintiff, "in violation of the decision of said arbitrator," caused the said judgment by consent to be entered on said note.

It is the opinion, in view of the allegations contained in defendant's affidavit, that the court erred in not opening up the contested judgment on the note and allowing defendant to show and have a trial upon the matter. It is alleged in the affidavit in substance that the parties were in a partnership venture upon certain stock owned by defendant; that the purchase and sale of certain stock, then listed on the Chicago Stock Exchange, and that of plaintiff's request and for the reasons expressed by him, the note in question, "was given only for the purpose of having plaintiff acknowledge the name of a bank," and that "on between the parties hereto it was never intended as an evidence of a debt or liability should ever contest judgment on the note." The judgment entered in its favor of plaintiff, the payee and original holder of the note, it had not been transferred to a third party for value, so that the allegations of defendant's affidavit entitled show, prima facie, that the note was an accommodation note, and was given the entry of a judgment by consent thereon against the accommodation party. In a similar case (see 100 Ill. 2d 121) it is said: "The mercantile credit of parties is frequently loaned to others by the signature of their names as drawer, acceptor, maker or



indorser of a bill or note, used to raise money upon, or otherwise for their benefit. Such instruments are termed accommodation paper. An accommodation bill or note, then, is one to which the accommodating party has put his name, without consideration, for the purpose of accommodating some other party who is to use it and is expected to pay it. Between the accommodating and accommodated parties the consideration may be shown to be wanting. \* \* ." In Straus v. Citizen's State Bank, 254 Ill. 185, it is decided in substance that a note executed without consideration and received by the payee upon an agreement that the maker should never be called upon to pay the same is invalid in the hands of the payee and cannot be enforced by him against the maker. And the allegations in defendant's said affidavit, to the effect that there was a dispute between the parties as to when defendant's indebtedness to plaintiff under their partnership venture should mature and be payable, and that both parties agreed to submit to arbitration said dispute and it was submitted, lends color to defendant's position that said note was an accommodation note and not intended as evidence of a debt owing to plaintiff from defendant.

For the reasons indicated the order of the Municipal court, denying defendant's motion to open said confessed judgment, etc., is reversed and the cause is remanded with directions to said court to allow defendant to plead and have a trial upon the merits.

REVERSED AND REMANDED.

Scanlan, P. J., and Barnes, J., concur.



34286

ERNEST C. REMIFF,  
Appellee,

v.

RUSSELL S. CLARK,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 636<sup>2</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract to recover \$300 for certain attorney's services rendered by plaintiff for defendant, who is also an attorney, there was a trial without a jury, resulting in a finding and judgment, entered December 24, 1929, against defendant for \$200. Four days thereafter defendant moved that the judgment be vacated and the motion was continued. On January 11, 1930, the motion was denied, and defendant was allowed the present appeal and also time within which to file a bill of exceptions. On January 20th the appeal bond was presented, approved by the trial judge and filed. The bond discloses that the appeal was taken from the original judgment and not from the order denying defendant's motion to vacate it. On the same day (January 20th) defendant presented to the judge a so-called "statement of facts for review," not marked as having been approved by plaintiff, and the judge inadvertently signed it, and it was filed. On January 29th, on plaintiff's motion, the court struck said statement from the files, and, a bill of exceptions then being presented, the same was approved and signed by the trial judge and filed.

It is here urged by defendant's counsel that the finding and judgment are contrary to the law and the evidence. After reviewing the testimony of the parties and the other witnesses, as



34884

THE STATE OF NEW YORK,  
County of ...

v.

HUGO L. ...  
Appellant.

...  
...  
...

...

...

...

In a case where the defendant is charged with the crime of ...

... the defendant is charged with the crime of ...

... there was a trial without a jury, ...

... the defendant is charged with the crime of ...

... the defendant is charged with the crime of ...

... the defendant is charged with the crime of ...

... the defendant is charged with the crime of ...

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... the defendant is charged with the crime of ...

... the defendant is charged with the crime of ...

... the defendant is charged with the crime of ...

... the defendant is charged with the crime of ...

... and filed.

It is hereby ordered by the court that the defendant ...

... and judgment are contrary to the law and the evidence. After re-

viewing the testimony of the parties and the other witnesses, as

contained in said bill of exceptions, we do not think that there is any merit in the contention. No useful purpose will be served in outlining the testimony. Plaintiff's claim was for services rendered, as a trial attorney for defendant in a certain lawsuit in the Superior court of Cook county in which defendant was the party plaintiff, at the "agreed price of \$300." And it was shown by a preponderance of evidence that, for such services as plaintiff actually rendered at said trial, defendant agreed to pay him \$300, but never paid him any sum. The action of the court in awarding plaintiff a less sum than that which defendant agreed to pay is not a matter of which defendant can complain.

And we do not think that the trial court erred in striking from the files the "statement of facts for review" and in signing in lieu thereof said bill of exceptions, as is also contended by defendant's counsel.

Accordingly, the judgment against defendant of December 24, 1929, is affirmed.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.

contained in said bill of exceptions. We do not think that there  
is any merit in the contention. The useful purpose will be served  
in examining the testimony. It is not the duty of the court  
to appoint an attorney for defendant in a certain instance  
in the superior court of Cook county in which defendant was the  
party plaintiff, as the "agreed price of \$500." and it was shown  
by a preponderance of evidence that, for such services as plaintiff  
actually rendered at said trial, defendant agreed to pay him \$500,  
but never paid him any sum. The action of the court in awarding  
plaintiff a loss was then that which defendant agreed to pay is not  
a matter of which defendant can complain.

and we do not think that any civil court ever in violation  
from the time the "Statement of Facts for Review" and in violation  
in this respect said bill of exceptions, as is also contained by  
defendant's answer.

Accordingly, the judgment against defendant of \$500  
is affirmed.

WYLLIE.

WYLLIE, J., and BREWER, J., concur.



34296

JOSEPH POPIEL,  
Appellee.

v.

PULLMAN CAR & MFG. CO.,  
a corporation,  
Appellant,

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

BRONIS KULAK,  
Intervening Petitioner.

259 I.A. 636<sup>3</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Defendant, Pullman Car & Mfg. Co., a corporation, prosecutes this appeal from a judgment for \$81.15, rendered against it by the municipal court of Chicago on February 5, 1930, in a 4th class action in contract tried without a jury. The court also entered a finding and judgment against Bronis Kulak on her intervening petition, and she prayed and perfected a separate appeal. The two appeals have here been consolidated for hearing on one set of abstracts and briefs.

The action was commenced on January 11, 1930. In plaintiff's statement of claim he alleges that his claim is based upon a written assignment of wages (copy attached) signed by Bronis Kulak and her husband, Josef Kulak. He further alleges that by it Bronis Kulak, to secure the sum of \$79.15 and interest, assigned and transferred to plaintiff all salary, wages, commissions, etc. due or to become due from her employer, Pullman Car & Mfg. Co.; that on November 21, 1929, plaintiff served a statutory notice of assignment on said defendant, by which it was notified of said assignment and directed to hold all monies, wages, commissions, etc., due or to become due from it to her; that then Bronis Kulak was and still is an employee of defendant; that although often requested

34196

UNITED STATES  
COURT OF APPEALS

v.

WILLIAM C. & MARY, INC.,  
a corporation,  
Appellant.

ATTORNEY GENERAL

UNITED STATES

SEC. 1. A. 686

UNITED STATES  
INTERESTING POSITIONER.

UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS, WILLIAM C. & MARY, INC., a corporation,  
prosecutes this appeal from a judgment of the U.S. District Court  
against it by the municipal court of Chicago on January 1,  
1930, in a civil action in which it was a party.  
The court also entered a finding and judgment against Brownie  
Kulak on her intervening petition, and she prayed and obtained  
a separate appeal. The two appeals have been consolidated  
for hearing on one set of briefs and oral arguments.

The action was commenced on January 11, 1929. In  
plaintiff's statement of claim he alleges that his claim is based  
upon a written assignment of wages (copy attached) signed by  
Brownie Kulak and her husband, Josef Kulak. He further alleges  
that by it Brownie Kulak, to secure the sum of \$70.18 and interest,  
assigned and transferred to plaintiff all salary, wages, commissions,  
etc. due or to become due from her employer, William C. & Mary, Inc.,  
and that on November 21, 1929, plaintiff served a statutory notice  
of assignment on said defendant, by which it was notified of said  
assignment and directed to hold all monies, wages, commissions, etc.,  
due or to become due from it to pay to Brownie Kulak and  
still is an employee of defendant; that although often requested



defendant has failed and refused to pay said sum to plaintiff; and that there is now in defendant's possession wages due to her in excess of plaintiff's claim.

The instrument, dated August 20, 1928, is a combination of a judgment note and an assignment of wages. By it the Kulaks "jointly and severally" promise to pay to the order of Joseph Popiel on demand the sum of \$79.15, together with interest at the rate of 7 per cent per annum. Below the clause authorizing a judgment by confession, it is stated that "to further secure the payment of said amount, the undersigned hereby sells, assigns and sets over unto said -----, his successors and assigns, all salary, wages, commissions, and all compensation of every kind and nature, and all claims therefor, both earned at the date hereof and to be earned during a period of -----years thereafter, and all claims and demands, due or to become due the undersigned from the person, firm or corporation by whom the undersigned is employed at the date hereof, \* \* or from any other person, firm, corporation or official by whom the undersigned may hereafter be employed, or who may owe the undersigned money for any consideration or upon any demand whatsoever, \* \* ."

The defendant, Pullman Car & Mfg. Co., entered its appearance by an attorney on January 22, 1930, and obtained time to file its affidavit of merits.

On January 24, 1930, Bronis Kulak, having also entered her appearance by the same attorney, obtained leave of court to file, and filed, an intervening petition, in which she alleged that said assignment is "vague, incomplete and void;" that "it is executed by two persons as assignors, but only the wages of one of them, namely this petitioner, is sought to be reached by the present proceeding, - the other assignor, Josef Kulak, not being employed by defendant; that on October 26, 1928, petitioner filed her voluntary petition in



defendant has failed and refused to pay said sum to plaintiff; and that there is now in defendant's possession wages due to her in excess of plaintiff's claim.

The indictment, dated August 20, 1938, is a combination

of a judgment note and an assignment of wages. It is the Exhibit "Jointly and severally" promise to pay to the order of Joseph Fogel on demand the sum of \$73.15, together with interest at the rate of 7 per cent per annum. Below the clause authorizing a judgment by confession, it is stated that "to further secure the payment of said

amount, the undersigned hereby sells, assigns and sets over unto said -----, his successors and assigns, all salary, wages, commissions, and all compensation of every kind and nature, and all

claims therefor, both earned as the date hereof and to be earned during a period of ----- years thereafter, and all claims and

demands, due or to become due the undersigned from the present, then or hereafter by whom the undersigned is employed at the date hereof

of " " or from any other person, firm, corporation or official by whom the undersigned may hereafter be employed, or who may owe the undersigned money for any consideration or upon any demand whatsoever, " " "

The defendant, William G. A. W. G. G., entered the above-mentioned

and by an attorney on January 2, 1939, and obtained time to file the affidavit of merits.

On January 22, 1939, Brenda Kahan, having also entered her appearance by the same attorney, obtained leave of court to

file, and filed, an intervening petition, in which she alleged that said assignment is "void, incomplete and void;" that "it is executed

by two persons as co-signers, but only the wages of one of them, namely this petitioner, is sought to be retained by the present proceedings,

the other assignor, Joseph Kahan, not being employed by defendant; that on October 20, 1938, petitioner filed her voluntary petition in

bankruptcy, in the U. S. District Court for <sup>the</sup> northern district of Illinois, and on October 27, 1928, she was duly adjudicated a bankrupt; that plaintiff in the present suit was then a creditor of petitioner for merchandise sold and delivered and his said claim was duly scheduled in the bankruptcy proceedings; that in order to obtain such merchandise petitioner and her husband signed a paper, which now turns out to be said assignment of wages; that plaintiff's claim was a provable one in bankruptcy; that on February 4, 1929, petitioner was duly discharged as a bankrupt and thereby plaintiff's said claim "was in law paid and discharged;" that after said bankruptcy proceedings were instituted petitioner filed a petition in the bankruptcy court asking that Popiel (plaintiff), and other of her creditors, be enjoined from attempting to collect wages due to her from the Pullman Car & Mfg. Co., etc., and that on December 20, 1928, such an injunction was issued and it was never modified or dissolved.

On February 1, 1930, defendant filed its affidavit of merits in which it admitted that plaintiff had in his possession the assignment of wages as mentioned in his statement of claim and that it (defendant) was served with notice on November 21, 1929, of the assignment, but it denied that said assignment is a valid one of wages due from it to said Bronis Kulak.

On the trial plaintiff introduced in evidence the original note and assignment of wages, dated August 20, 1928. And plaintiff testified in substance that he then was and now is engaged in the retail grocery and meat business; that prior thereto he had sold to Bronis Kulak and her said husband groceries, for which they did not pay him; that after unsuccessful attempts were made to collect the money due, said note and assignment of wages was delivered to him; and that no part of the indebtedness, which now amounts to \$81.15, has ever been paid.

On behalf of the intervening petitioner certified copies



On behalf of the intervening petitioner certified copies  
has been paid.

and that no part of the indebtedness, which now amounts to \$11.15,  
money due, said note and assignment of wages was delivered to him;  
pay him; that after unnecessary attempts were made to collect the  
Bronic Kulak and her said husband groceries, for which they did not  
recall grocery and meat business; that prior thereto he had sold to  
testified in substance that he then was and now is engaged in the  
note and assignment of wages, dated August 30, 1933. and plaintiff  
On the trial plaintiff introduced in evidence the original  
one of wages due from it to said Bronic Kulak.

of the assignment, but it denied that said assignment is a valid  
that it (defendant) was served with notice on November 21, 1933,  
the assignment of wages as mentioned in his statement of claim and  
writ in which it admitted that plaintiff had in his possession  
on February 1, 1935. defendant filed its affidavit of  
such an injunction was issued and it was never modified or dissolved.  
from the Pullman Car & Mfg. Co., etc., and that on December 30, 1933,  
creditors, he enjoined from attempting to collect wages due to her  
bankruptcy court asking that Bronic (plaintiff), and other of her  
proceedings were instituted petitioner filed a petition in the  
said claim "was in law paid and discharged"; that after said bankruptcy  
petitioner was duly discharged as a bankrupt and thereby plaintiff's  
claim was a provable one in bankruptcy; that on February 4, 1935,  
which now turns out to be said assignment of wages; that plaintiff's  
obtain such merchandise petitioner and her husband signed a paper,  
was duly scheduled in the bankruptcy proceedings; that in order to  
petitioner for merchandise sold and delivered and his said claim  
trust that plaintiff in the present suit was then a creditor of  
Illinois, and on October 27, 1933, she was duly adjudicated a bank-  
bankruptcy, in the U. S. District Court for Northern District of  
the



of said bankruptcy proceedings, schedules, etc., including said injunctive order, as alleged in her petition, were introduced in evidence. In the order of discharge in bankruptcy, entered February 4, 1929, it is stated that Bronis Kulak, having previously been adjudicated a bankrupt, is "discharged from all debts and claims which are made provable against her estate, and which existed on October 26, 1928, on which day the petition for adjudication was filed by her, excepting such debts as are by law exempted from the operation of a discharge in bankruptcy."

The bill of exceptions also discloses that on the trial the defendant admitted having in its possession money belonging to Bronis Kulak "in sufficient amount to cover plaintiff's claim." And it was stipulated between all the parties that the issues in the cause should be submitted to the court "upon questions of law, as to whether the assignment of wages was valid, and, if so, whether it was discharged by the subsequent discharge in bankruptcy of the assignor, or whether said discharge was merely a personal release of the bankrupt, and did not discharge the lien of the assignment of wages as to future earned wages."

It is first contended that upon a "joint" assignment of wages made by two persons, no recovery can be had against an employer where it appears that one of the assignors never was in the employ of said employer. In support of the contention counsel cite the cases of Siegel, Cooper & Co. v. Schneek, 167 Ill. 522, and Baronski v. Shust, 218 Ill. App. 8. In the Schneek case there were garnishment proceedings, arising under the Garnishment Act as it existed prior to the amendment to section 1 thereof, in force July 1, 1923. In the Shust case there were supplementary proceedings under section 64 of the Municipal Court Act. The record showed that the money on deposit with the appellant bank belonged to one of two joint judgment debtors, and the first division of this

of said bankruptcy process. The defendant, who, including said  
involuntary order, was alleged to have received, was interested  
in the order of discharge in bankruptcy, and  
on May 4, 1937, as an assignee of the estate of the said  
bankrupt, in the order of discharge in bankruptcy, and the  
which was made previously against her estate, and which related to  
October 26, 1936, on which day the petition for adjudication was  
filed by her, accepting such order as it was accepted from the  
operation of a discharge in bankruptcy."

The bill of exceptions also discloses that on the trial  
the defendant admitted having in the possession money belonging to  
Helen Kline "in sufficient amount to cover plaintiff's claim."  
and it was stipulated between all the parties that the issue in  
the case should be submitted to the court "upon decision of law,  
and whether the assignment of wages was valid, and, if so, whether  
it was discharged by the subsequent discharge in bankruptcy of the  
assignor, or whether said discharge was merely a personal release  
of the bankrupt, and did not discharge the lien of the assignment of  
wages as it relates to said wages."

It is first contended that upon a "joint" assignment of  
wages made by two persons, no property can be held against an employ-  
er where it appears that one of the assignors never was in the  
employ of said employer. In support of the contention counsel  
cite the cases of Alford v. Alford, 200 Ky. 111, 235,  
and Barrett v. Barrett, 211 Ky. 111, 235. In the Alford case there  
were retention proceedings, arising under the Constitution and as  
it related prior to the enactment of section 1 of chapter 1, in 1935.  
July 1, 1935. In the Barrett case there were employment proceed-  
ings under section 64 of the Municipal Code Act. The record shows  
that the money on deposit with the appellant bank belonged to one  
of two joint tenants, and the first division of this



appellate court, opinion filed in 1920, held (p. 10) that money belonging to one of several joint debtors could not be reached in said supplementary proceedings, and based its opinion upon the rule in garnishment proceedings that the owner of a joint judgment could not reach a debt owed to one of the joint judgment debtors. Since the passage of said amendment to the garnishment act the same division of this court held in Boska v. Buchanicec, 245 Ill. App. 602, 604, that said amendment would permit a judgment creditor, who has a judgment against several defendants to garnish a person or corporation that is indebted to any one of the defendants. We think, therefore, that the cases cited by counsel are not now applicable and do not sustain his contention. Furthermore, we do not think that the particular assignment of wages in the present case is a "joint" one of Mrs. Kulak and her husband. We regard it, rather, as a several assignment by each of their respective wages as further security for an indebtedness incurred for the expenses of the family.

It is next contended that the judgment appealed from cannot be sustained because it does not affirmatively appear that plaintiff served a written notice, as required in section 18 of our Practice Act, on Mrs. Kulak, who made said assignment, notifying her of the pendency of plaintiff's suit against defendant, her employer, at least five days before the trial of said suit. A sufficient answer to this contention is that Mrs. Kulak had notice of the pendency of the suit, filed her intervening petition therein, and was represented by an attorney at said trial. The serving of such a notice was therefore unnecessary. Furthermore, the contention is here made in this court for the first time.

It is finally contended that the assignment of wages in question, so far as it concerns Mrs. Kulak, is no longer enforceable against her, because of her adjudication and discharge in bankruptcy as shown. Notwithstanding some decisions of some of the district



appeals court, opinion filed in 1900, said (p. 10) that money belonging to one of several joint debtors could not be reached in said supplementary proceedings, and based its opinion upon the rule in permanent proceedings that the assets of a joint debtor could not reach a debt owed to one of the joint judgment debtors. Thus the passage of said amendment to the garnishment and the same division of this case is held in Bank v. Bank, 245 Ill. 415, 401, 402, that said amendment would provide a permanent garnishment who has a judgment against several debtors is entitled to garnish a person or corporation that is indebted to any one of the debtors. It is, therefore, held the court cited by counsel was not an authority and does not sustain the contention. Furthermore, to the extent that the plaintiff's claimant of wages in the present case is a "joint" one of the joint debtors, it is held in Bank v. Bank, as a general assignment by each of their respective wives as garnishers for an indebtedness incurred for the support of the family. It is held concluded that the judgment awarded them cannot be executed because it is not an assignment of wages but is a garnishment of wages, as provided in section 12 of our revised laws, on this point, who made said assignment, receiving her of the proceeds of plaintiff's debt of said judgment, not plaintiff, as found five years before the trial of said case. A permanent garnishment is this contention is that Mrs. Bank had notice of the garnishment of the said, tried and intervening parties, and was represented by an attorney at said trial. The carrying of such a notice was not a mere formality, but the contention is that Mrs. Bank was not notified at the trial time.

It is finally concluded that the assignment of wages in question, as far as it concerns Mrs. Bank, is an invalid assignment against her, because of her adjudication and discharge in bankruptcy as above. The following case is cited in support of this conclusion:

courts of the United States, cited by counsel, we do not think this is the law of this State, or generally. In Monarch Discount Co. v. Chesapeake & Ohio Ry. Co., 295 Ill. 233, 239, it is said: "A discharge in bankruptcy does not render unenforceable a prior assignment of wages to be earned in the future, since the discharge in bankruptcy is only a personal release, which does not destroy such a lien created by the assignment." (See, also, Mallin v. Verham, 209 Ill. 252, 260; Citizen's Loan Ass'n v. Boston & Maine R. R., 196 Mass. 528, 532.)

For the reasons indicated the judgment of the Municipal court of February 5, 1930, is affirmed.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.





34306

JOSEPH POPIEL,  
Plaintiff and Appellee,

v.

PULLMAN CAR & MFG CO.,  
a corporation,  
Defendant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

On appeal of BRONIS KULAK,  
Intervening Petitioner.

259 I.A. 636<sup>4</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

The present appeal of Bronis Kulak is to be determined by the decision in case No. 34296, an opinion in which has this day been filed. For the reasons stated in that opinion the judgment of the Municipal court of Chicago, which is complained of and which was entered on February 5, 1930, is affirmed.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.

14100

JOHN PETER,  
Plaintiff and Appellant,

v.

EVILAK AND A TRUST CO.,  
a corporation,  
Defendant.

On appeal of JOHN PETER,  
intervening defendant.

MR. JUSTICE BRIDGES delivered the opinion of the court.

The present appeal of Evilak & Trust Co. is to be determined by the decision in case No. 24195, an opinion in which has this day been filed. For the reasons stated in that opinion the judgment of the Municipal Court of Chicago, which is complained of and which was entered on February 8, 1930, is affirmed.

Stanley, J. L., and Barnes, J., concur.

34307

FRED YARBROUGH,  
Appellee.

v.

GREAT NORTHERN CASUALTY  
COMPANY, a corporation,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 636<sup>5</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced July 2, 1929, and based upon defendant's policy of accident and health insurance, there was a trial without a jury in December, 1929, resulting in a finding and judgment of \$700 against defendant, and the present appeal followed.

In the policy, dated February 9, 1928, it is provided in part that the Company (defendant), in consideration of the first premium of eight (\$8) dollars, etc., does insure Fred Yarbrough, "whose occupation is Driving a Tractor, \* \* subject to all of the conditions and limitations hereinafter contained, from 12 o'clock noon \* \* on the day this policy is dated until 12 o'clock noon \* \* of the first day of March, 1928, and for such further periods \* \* as the monthly premium of \$8, paid by the Insured will maintain this policy, against:

1. Death and disability hereinafter named, resulting from bodily injuries (fatal or not fatal), effected solely through accidental means, \* \* hereinafter referred to as 'Such Injury,' and

2. Disability resulting from disease or illness as hereinafter provided, hereinafter referred to as 'Such Illness,' as follows:

Part One.

PRINCIPAL SUM ONE THOUSAND DOLLARS.

MONTHLY ACCIDENT INDEMNITY ONE HUNDRED DOLLARS.

MONTHLY ILLNESS INDEMNITY ONE HUNDRED DOLLARS. \* \*.

MONTHLY ACCIDENT INDEMNITY

Part Four.

(Total Disability). For the period of total loss of



34307

THAT THE COMPANY  
APPLIED

V.

THE COMPANY  
A CORPORATION  
INCORPORATED

ATTORNEY AT LAW

CHARTERED

2501 A. 836

IN THE COURT OF THE CITY OF NEW YORK

In a case action in contract, commenced July 2, 1930,  
and based upon defendant's policy of accident and health insurance,  
there was a trial without a jury in December, 1930, resulting in a  
finding and judgment of \$750 against defendant, and the present  
appeal followed.

In the policy, dated January 4, 1930, it is provided in  
part that the Company (defendant), in consideration of the first  
premium of eight (\$8) dollars, viz., four dollars first term,  
"whose occupation is driving a Truck," \* \* \* subject to all of the  
conditions and limitations hereinafter contained, from 12 o'clock  
noon \* \* \* on the day this policy is dated until 12 o'clock noon \* \*  
of the first day of March, 1931, and the term "first term" \* \*  
as the maturity period of 12, paid by the insured will maintain this

policy, against:

- 1. Death and disability benefits payable, resulting  
from bodily injury (local or not local), arising solely  
through accidental means, \* \* \* payable to or for the  
insured, \* \* \* and
- 2. Medical expenses incurred from disease or illness or  
bodily injury, provided, however, that no such illness,  
as follows:  
That the

INSURED HAS NOT BEEN INJURED  
BY HIS OWN NEGLIGENCE OR  
THE NEGLIGENCE OF ANY OTHER PERSON

WHICH MAY BE THE CAUSE OF HIS DEATH

That Term. (Total benefit). For the period of total loss of

time commencing on the date of the accident, during which 'such injury' alone shall continuously and wholly disable and prevent the Insured from performing any and every duty pertaining to any business or occupation, the Company will pay the monthly accident indemnity at the rate per month specified in Part One, provided, that indemnity under this Part Four shall not be paid for a longer period than five consecutive years, \* \* .

#### MONTHLY ILLNESS INDEMNITY

##### Part Ten.

(a) (House Confining Illness--Full Indemnity). In the event the Insured shall be necessarily and continuously confined within the house and therein regularly visited by a legally qualified physician or surgeon \* \* solely by reason of 'such illness', which is contracted and disability from which begins after this policy has been maintained in continuous force for 30 days, which shall, independently of all other causes, wholly disable and prevent the Insured from performing any and every duty pertaining to any business or occupation, the company will pay for the period of such disability, at the rate of the monthly illness indemnity mentioned in Part One. \*\*. Provided, that indemnity under this Part Ten shall not be paid for a period of more than twelve consecutive months."

In Part Fourteen of the policy, under the heading "Standard Provisions," are, among others, the following:

"4. Written notice of injury or of sickness, on which claim may be based, must be given to the company within twenty days after the date of the accident causing such injury, or within ten days after the commencement of disability from such sickness.

5. Such notice given by or in behalf of the Insured, as the case may be, to the Company, \* \* with particulars sufficient to identify the Insured, shall be deemed notice to the Company. Failure to give notice within the time provided in this policy shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

6. The Company upon receipt of such notice will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. \* \* .

7. Affirmative proof of loss must be furnished to the Company, in case of claim for loss of time from disability, within ninety days after the termination of the period for which the Company is liable. \* \* ."

In Part Fifteen of the policy, among other "General Provisions," is the following:

"(2). If the Insured be disabled by injury or illness for more than thirty days, he or his representatives shall furnish the Company every thirty days with a report from the attending physician or surgeon, fully stating the condition of the Insured and the probable duration of the disability."

In plaintiff's statement of claim he alleged in substance that he paid all premiums and "performed all conditions by him to be



the Commission on the basis of the evidence, during which 'other' delay, after all, was not a delay in the sense of the law. The Commission on the basis of the evidence, during which 'other' delay, after all, was not a delay in the sense of the law. The Commission on the basis of the evidence, during which 'other' delay, after all, was not a delay in the sense of the law.

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made under the terms of the policy" until May 1, 1929, when he made a tender to defendant of the monthly premium due, but defendant refused to accept the same, as well as a statement of his then condition; that on January 4, 1929, while employed with the Illinois Central R. Co., driving a tractor, he received an injury to his right arm, which disabled him; that by reason thereof and under the terms of the policy there is now due to him from defendant the sum of \$100 per month from thence hitherto; and that he has demanded of defendant payment of the monthly benefits, but such demand has wholly been refused.

In defendant's amended affidavit of merits, after denying seriatim practically all of plaintiff's allegations, it alleged that plaintiff did not cause "any notice of accident" to be given.

Defendant's counsel here contends, as was contended in the trial court, that plaintiff is not entitled to recover anything on the policy upon the sole grounds (1) that no notice of any accident or injury (as distinguished from disease or illness) was given to defendant as required by the policy, and (2) that no waiver by defendant of such notice, and no legal excuse for plaintiff's failure to give such notice, was either pleaded or proved by plaintiff. (Citing Feder v. Midland Casualty Co., 316 Ill. 552.)

On the trial plaintiff was a witness in his own behalf and he introduced in evidence the policy and a so-called "Premium Receipt Book." This book discloses that the monthly premiums of \$5 per month were paid, and accepted and receipted for by defendant, at its home office in Chicago, each month, from and including the month of March, 1928, to and including the month of April, 1929. The premium for February, 1929, was paid on February 2nd, and the premiums for March and April, 1929, were both paid on March 4th. When these three premiums were accepted by defendant, the evidence shows that it had received two written notices, on blanks previously furnished





by it upon request, from plaintiff's attending physician as hereinafter mentioned.

Plaintiff's testimony was undisputed. He testified in substance that on January 4, 1929, as an employee of the Illinois Central R. Co., he was the driver of a tractor machine; that, in cranking it, it "backfired" and his right hand and wrist were injured; that he advised his foreman of the occurrence and, as it did not then appear that the injury was serious, he was given other work not requiring the use of his right hand; that about January 12th, his foreman sent him to the hospital, where he remained for a period of over three months; that while in the hospital he suffered from other causes and that there was something "bothering me inside;" that he cannot read or write; that while in the hospital physicians in charge wrote, signed and mailed for him certain statements to defendant; that he first left the hospital on April 22, 1929, that his hand and wrist were then, have been continuously and still are in a splint; that about April 26th he called at defendant's office and talked with Elmer L. Baldus, the manager of its claim department; that he went there for the purpose of paying the premium on the policy for May, 1929, and demanding payment of the benefits under the policy; that Baldus sent him to defendant's physician, Dr. Scott, who treated his hand and arm; that about April 30th he again called on Baldus, who refused to accept the May, 1929, premium on the policy, and also refused to pay him any benefits on the policy, saying that then he (plaintiff) was "too late" in making his claim; and that afterwards he consulted an attorney.

While being cross-examined plaintiff identified certain papers, which were statements either signed in his name, for him, or by his attending physicians, while he was in the hospital. These papers were afterwards introduced in evidence by defendant as "defendant's Exhibits 2, 3 4 and 5," when Baldus (defendant's only



by it upon request, from plaintiff's attending physician as a  
 medical certificate, that he was unable to work on January 4, 1937, as an employee of the Illinois  
 Central R. Co., he was the driver of a tractor machine; that, in  
 evidence of, is "testimony" and his right hand and wrist were so  
 injured that he suffered his removal from the work on January 4, 1937,  
 and that upon request that the injury was serious, he was given a  
 not returning the use of his right hand; that about January 11,  
 his removal from the hospital, there he remained for a period  
 of over three months; that while in the hospital he suffered from  
 other causes and that there was something "bothering" him  
 that he cannot read or write; that while in the hospital physician  
 in Chicago, Ill., and called for his medical certificate in  
 defendant; that he first left the hospital on April 22, 1937, and  
 his hand and wrist were then, have been considerably and still are  
 in a splint; that about April 25th he called at defendant's office  
 and talked with James L. Bell, the manager of the sales department;  
 that he was asked for the purpose of paying the premium on the policy  
 for May, 1937, and receiving payment of the benefits under the policy;  
 that Bell told him to defendant's physician, Dr. Bell, who treated  
 his hand and arm; that about April 25th he again called on Bell,  
 who refused to accept the May, 1937, premium on the policy, and also  
 refused to pay him any benefits on the policy, saying that when he  
 (plaintiff) was "too late" in making his claim; and that afterwards  
 he consulted an attorney.  
 This sales department physician identified certain  
 papers, which were statements signed in his name, as his,  
 or by his attending physician, while he was in the hospital; that  
 papers were statements prepared in evidence by defendant as  
 "defendant's Exhibit 2, 3 & 4 and 5," when James Bell was called.

witness) was on the stand. Baldus testified that the same "are the proof blanks that were submitted by Fred Yarbrough (plaintiff), in which he claimed compensation under his policy." All are filled out on blanks furnished by defendant upon request. Exhibit 2 is dated January 17, 1929 (five days after plaintiff entered the hospital) and is signed by E. M. Brooks, a hospital physician. The number of the policy, the name of the insured (plaintiff), his usual occupation and his address are given. In answer to the question in the blank "name the disease causing the disability," it is stated "Pleurisy with effusion". It is also stated in the appropriate blanks that plaintiff was first treated in the "I. C. Hospital" on January 12, 1929; that the illness is "not acute" but has existed "during the last four weeks," and that the patient would be confined to his bed for an "indefinite" time. The statement is marked by a stamp as having been received by defendant on January 19, 1929.

Defendant's exhibit 3, consists of two attached statements filled out on blanks furnished by defendant - one signed in plaintiff's name for him and the other by said Dr. Brooks. Both are dated February 21, 1929, and are marked as having been received by defendant on February 23rd. The evidence does not disclose that defendant, from whom blanks were requested, forwarded any "accident" blanks, as distinguished by defendant from "illness" blanks, as testified to by Baldus. One of these statements, signed in plaintiff's name for him, is headed "Claimant's preliminary notice of sickness," gives plaintiff's name, address and occupation and the name of his employer, states when the last premium was paid (February 2nd) and that his disease is "pleurisy". It is also stated that plaintiff had steady employment when taken ill, and that his average wages were \$4.00 per day." The other statement is headed "Physician's preliminary report of sickness," and Dr. Brooks' statements therein are similar to those in his former statement, that the patient's



witness) was on the stand. Witness testified that the name "Joe" the great blank was furnished by the defendant (plaintiff), in which he claimed compensation under his policy. All was filled out on blanks furnished by defendant upon request. Witness is dated January 17, 1932 (five days after plaintiff entered the hospital) and is signed by A. W. Brown, a medical physician. The number of the policy, the name of the insured (plaintiff), his usual occupation and his address are given. In answer to the question in the blank "name the disease causing the disability," it is stated "pleurisy with effusion". It is also stated in the appropriate blank "pleurisy with effusion". It was first treated in the "U. S. Hospital" on January 12, 1932; that the illness is "not acute" but has existed "during the last four weeks," and that the patient would be confined to his bed for an "indefinite" time. The statement is signed by a stamp as having been received by defendant on January 12, 1932.

Defendant's exhibit 2, consists of two signed statements filled out on blanks furnished by defendant - one signed in plaintiff's name for him and the other by said Dr. Brown. Both are dated February 11, 1932, and are signed as having been received by defendant on February 11, 1932. The statements both are identical that defendant, from whom blanks were requested, forwarded any "accident" blanks, as distinguished by defendant from "illness" blanks, as testified to by witness. As to these statements, signed in plaintiff's name for him, as known "plaintiff's preliminary notice of sickness", gives plaintiff's name, address and occupation and the name of his employer, stated when the last premium was paid (February 1931) and that his disease is "pleurisy". It is also stated that plaintiff had steady employment when taken ill, and that his average wages were \$12.00 per day. The other statement is signed "Dr. Brown" and contains report of sickness, and Dr. Brown's statement that the plaintiff is stated in his former statement, that the plaintiff's



disease is "pleurisy with effusion," and that he has been treated in said hospital "from Jan. 12, to February 21, 1929."

Defendant's exhibit 4 consists of two attached statements filled out on similar blanks - one signed in plaintiff's name for him and the other by Dr. F. F. Chesley, another hospital physician also in charge of the patient. Both are dated March 21, 1929, and are marked as having been received by defendant on March 23rd. In the physician's statement it is stated that the disease causing disability is "septic arthritis" as well as "pleurisy with effusion," and that the patient has been receiving from a physician "daily" visits in said hospital.

Defendant's exhibit 5, consists of two attached statements filled out on similar blanks - one signed in plaintiff's name for him and the other by said Dr. Brooks. Both are dated April 13, 1929, and are marked as having been received by defendant on April 16th. Among plaintiff's statements are that the name of his disease is "Arthritis," that he had steady employment when taken ill and that his average wages were "\$25 per week." In the physician's statement it is stated that the patient has been treated in the hospital from January 15 to April 13, 1929, and that he is confined in bed. In answer to the question in the blank "Name the disease causing the disability" is the following: "Arthritis of right wrist; patient entered hospital with pleurisy; wrist sprang up 2 weeks later."

Baldus further testified that he had one or more conversations at defendant's office with plaintiff about April 30, 1929; that on one occasion plaintiff, accompanied by his wife, came to pay the May, 1929, premium; that "on the strength of the proofs that had been filed, I rejected the premium;" that "I just arbitrarily rejected it;" that they also asked me for "another

diagnosis is "epilepsy with abscess," and that he has been treated

in said hospital "from March 10, 1907, to May 1, 1907."

Defendant's exhibits a certificate of two attended states-

ments filled out on similar blanks - one signed in Plaintiff's name

for him and the other by Dr. J. J. [unclear], assistant physician

physician also in charge of the hospital. Both are dated March 21,

1907, and are similar to those now retained by defendant as shown

above. In the physician's statement it is stated that the diagnosis

concerning epilepsy is "epilepsy with abscess," and that the

abscess," and that the patient was being treated from a hospital

"daily" visits in said hospital.

Defendant's exhibits a certificate of two attended states-

ments filled out on similar blanks - one signed in Plaintiff's name

for him and the other by said Dr. [unclear]. Both are dated April 11,

1907, and are similar to those now retained by defendant as shown

above. In the physician's statement it is stated that the diagnosis

is "epilepsy," and that the patient was being treated from a hospital

and that the patient was being treated from a hospital

statement it is stated that the patient was being treated from a

hospital from January 10 to April 10, 1907, and that he is confined

in bed. In answer to the question in the blank "What the disease

concerning the epilepsy" is the following: "epilepsy of right

brain." Defendant exhibits a certificate of two attended states-

ments filled out.

Defendant exhibits a certificate of two attended states-

ments filled out on similar blanks - one signed in Plaintiff's name

for him and the other by said Dr. [unclear]. Both are dated April 11,

1907, and are similar to those now retained by defendant as shown

above. In the physician's statement it is stated that the diagnosis

concerning epilepsy is "epilepsy with abscess," and that the

abscess," and that the patient was being treated from a hospital

illness proof blank, but I refused the request because they asked for an illness proof blank;" that defendant had furnished plaintiff with the blanks that had previously been filed with defendant; that "different forms of blanks are furnished for accident cases and for illness cases, and only upon request;" that he has been employed by defendant, as manager of its claim department, only since the early part of April, 1929; that he does not know what blanks were requested of defendant in January, February and March, or what blanks were sent out; that in June, 1929, he had a conversation with plaintiff's attorney regarding plaintiff's claim, at which time there was "no discussion of an injury," but only the "condition of plaintiff's arm," and that the witness "knew nothing of an injury until this suit was filed" (July 2, 1929); and yet he stated that defendant received a letter, dated June 12th, from plaintiff's attorney, to the effect that plaintiff "was injured" on January 4th, while working for the Illinois Central R. Co., which had resulted in a disability and a loss to plaintiff, that plaintiff's requests of defendant for payments under the policy, had been refused, and that he hoped the matter could be settled without litigation.

In view of the oral and documentary evidence contained in the present transcript, the provisions of the policy, the receipt by defendant of three monthly renewal premiums after it had received written notices that plaintiff was confined in the hospital and was under disability, we do not think there is any substantial merit in defendant's counsel's contentions, above mentioned. It is true that in the successive notices which defendant received in January, February, March and April, no mention is made that plaintiff's disability was the result of an "accident", yet it does not appear that any "accident" blanks, as distinguished from "illness" blanks,





were furnished by defendant on which the notices were to be written. Furthermore, the first written notice of plaintiff's disability, and of his confinement in bed in a hospital, was given to defendant within the time required by the policy. And it is provided in clause 5 of Part Fourteen of the policy that such notice (i.e., of injury or sickness) "given \* \* in behalf of the Insured, \* \* with particulars sufficient to identify the Insured, shall be deemed notice to the Company," and that "failure to give notice within the time provided shall not invalidate any claim, if it shall be shown not to have been reasonably possible to give such notice." Furthermore, the policy provides that the monthly indemnity to be paid, provided the insured continues to pay the monthly premium (which he did until it was refused), is the same, whether the disability is the result of an accident or of disease or illness. It is for the "loss of time" in either case that the insured is to be indemnified. And we are further of the opinion, in view of the provisions of the policy and the facts disclosed, that the holdings in the Feder case, supra, and other similar cases, should not bar plaintiff from a recovery on the policy.

It may be, inasmuch as plaintiff's disability commenced early in January, 1929, and the present suit was begun on July 2, 1929, that the court's finding of \$700 (i.e., seven months at \$100 per month) is excessive, but no error by defendant is assigned thereon or mention made thereof, and the error, if any, must be deemed to have been waived.

Accordingly, the judgment of the municipal court is affirmed.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.





Filed alone October 23, 1930.

34546

EDWARD J. MARTINY,  
Appellant,

vs.

HATTIE MARTINY,  
Appellee.

INTERLOCUTORY APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

259 I.A. 637<sup>1</sup>

MR. JUSTICE McSUAELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by complainant from an interlocutory order temporarily restraining him from disposing of certain property until the rights of the respective parties therein may be determined.

Complainant filed his bill seeking a divorce and defendant filed a cross-bill. After hearing, on June 17, 1930, the chancellor entered a decree in favor of the complainant and dismissed the cross-bill for want of equity. The decree provided that defendant should have the custody of a minor son except on Saturdays from 1:00 to 6:00 p. m., when the complainant would have such custody "without prejudice to the complainant's right to the full custody of said child." It was further ordered that the questions of alimony, solicitors' fees and financial and property rights be referred to Master in Chancery William A. Doyle "to hear evidence and report his findings to this court."

Defendant in her cross-bill alleged that the complainant owned personal property consisting of first mortgages and bonds of the probable value of \$5700, and that she possessed no property, either real or personal, and had no means with which to support herself and her child and to defray the expenses of the proceeding and asked for an injunction restraining the complainant from disposing of his property. She also asked for a temporary injunction and temporary alimony and for permanent alimony for herself and for the support of the child. Complainant answering the cross-bill



alleged that he owned one first mortgage of the face value of \$4,000.

June 26th defendant filed her petition, averring that by the terms of the decree the financial and property rights of the respective parties had been referred to a master in chancery and were now pending before him; that she was the joint owner of a mortgage for \$4,000, which had been pledged by complainant to the Foreman Trust & Savings Bank on a \$900 loan; that she feared that complainant would dispose of the \$4,000 mortgage unless restrained by injunction of the court, and alleging that she would be irreparably damaged unless said injunction was issued without bond. The chancellor thereupon entered an order that, upon the petition being filed and due notice given the complainant and the Foreman Trust & Savings Bank be restrained from disposing of said mortgage or notes "owned by the parties hereto or either of them or held for their use," the said injunction to issue without bond for good cause shown.

The complainant appealing presents the matter as if there had been a final order upon the merits. We do not understand the order to be of this nature. It simply was intended to maintain the status quo of the property until the rights of the parties therein might be examined by the master and determined by the chancellor. It is purely temporary in its character. An interlocutory appeal presents a preliminary question and one not ultimately decisive of a cause. People v. Standidge, 333 Ill. 361. While the language of the decree does not contain a recital expressly reserving jurisdiction of the matter, yet this is the only inference that can be drawn from that portion of the decree referring the question of the property rights to a master with instructions to take evidence and report his findings. By this order the court reserved this question for further determination and the temporary injunction



stated that he would not have any of the same value of \$4,000.

There were persons living in the vicinity, including those

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respective parties had been returned to a master in honesty and

were now being held in custody; that was the first view of a

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was obviously simply to preserve the situation until this matter was finally adjudicated.

Complaint is made because the order granting the injunction was without bond. We think, under the peculiar circumstances of the controversy between husband and wife, where the matter remaining to be determined relates to alimony and provisions for the support of the minor child, that there was no impropriety in entering the restraining order without bond.

The temporary injunctive order is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

was obviously doing to preserve the situation until this matter was finally adjusted.

Concluded is with regard to the granting the immediate was offered bond. We think, under the present circumstances of the controversy between husband and wife, some further reasoning is to be considered relative to alimony and provision for the support of the other child, and that we accordingly in making the decision with regard to it.

The property interests given to children.

McIntosh, J. L., and Mcintosh, J. L., et al.



33859

SUPERIOR MANUFACTURING COMPANY,  
a Corporation,

Appellee,

v.

GRIGSBY-GRUNOW COMPANY,  
a Corporation,

Appellant.

Appeal from

MUNICIPAL COURT

259 I.A. 637<sup>2</sup>

OF CHICAGO.

Opinion filed Oct. 29, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion  
of the court.

In a trial before the court without a jury there  
was a finding in favor of plaintiff and a judgment on such  
finding for \$7,550 against defendant, which brings the record  
to this court for review by appeal.

The action is based upon a certain order of  
defendant dated September 29, 1928, to the plaintiff for certain  
work and merchandise, in the following words:

"25,000 #72 Cabinet carvings six pieces,  
(per set) - - - - - 47¢ each  
25,000 #71 Cabinet centers - - - - - 15¢ each  
5801 W. Dickens Ave.  
500 sets for #72 cabinet and 500 centers for  
#71 cabinet to be delivered daily to the  
above address."

which order was accepted by plaintiff, under which plaintiff  
manufactured the entire quantity of said carvings and centers  
so ordered, and delivered 12,500 each, for which deliveries  
defendant paid plaintiff the contract price. About the 7th day  
of December, 1928, plaintiff offered to deliver the balance of  
said order to the defendant, which defendant refused to receive.

The judgment appealed from is for the contract price  
of

12,500 #72 Cabinet Ornaments	
(6 pieces per set) @ .47 each - - -	\$5875.00
12,500 #71 Center Ornaments @ .15 each - -	1875.00

U.S. A. 687



Opinion filed Oct. 11, 1900

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

IN A CASE WHEREIN THE UNITED STATES OF AMERICA

PLAINTIFFS, VS. THE DISTRICT OF COLUMBIA

AND THE DISTRICT OF COLUMBIA, DEFENDANTS.

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

DOES HEREBY CERTIFY THAT THE FOLLOWING

IS A TRUE AND CORRECT COPY OF THE OPINION

OF THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

IN THE CASE OF THE UNITED STATES OF AMERICA

PLAINTIFFS, VS. THE DISTRICT OF COLUMBIA

AND THE DISTRICT OF COLUMBIA, DEFENDANTS.

THIS CERTIFICATE IS GIVEN UNDER THE SEAL OF THE

COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

THIS 11TH DAY OF OCTOBER, 1900.

ATTEST: CLERK OF THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

BY: [Signature]

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL

AT THE CITY OF WASHINGTON, THIS 11TH DAY OF OCTOBER, 1900.

CLERK OF THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

THE JUDGES OF THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA

11

U.S. A. 687

with the deduction from the scheduled price made by the trial judge of \$400.

The wood from which the carvings were made under the order was walnut.

On October 27, 1928, plaintiff made its first delivery of 3500 sets of design #71 and 3500 sets of design #72; on October 29, 1928, the second delivery was made on the contract of 1000 sets design #71 and 1000 sets design #72; on October 31, 1928 plaintiff made a third delivery under the contract of 1000 sets design #71 and 1000 sets design #72, totalling 11,000 sets of carvings out of a total of 50,000, the amount called for by the order. These were all received and paid for by defendant without any objection. After the third delivery, between November 2, and November 26, 1928, plaintiff delivered, and defendant accepted, 14,000 additional sets of carvings and paid for the same, the last payment being made on December 7, 1928, two days after defendant attempted to cancel his contract with plaintiff. The total number of carvings delivered and paid for was 25,000 sets.

On December 5, 1928, defendant sent to plaintiff its notice of cancellation of the contract, alleging as a reason for such cancellation that "the quality of your work has been inferior". On December 7, 1928, two days after defendant attempted to cancel the contract, it paid plaintiff the balance due for all carvings delivered, amounting to \$1240.

It is not in dispute that 25,000 sets of carvings, which defendant refused to accept, were on December 5, 1928, completed with the exception of sandpapering and some band sawing, and that the cost to plaintiff for these operations would be \$400. The learned trial judge gave credit to defendant on plaintiff's claim for this amount, and gave judgment to plaintiff for the balance.



with the following from the cancelled letter sent by the State  
Judge at St. Louis.

The same time being the following were made under the  
order of the State.

On January 17, 1892, the following were made under the order of the State:

At St. Louis, Mo. the following were made under the order of the State:

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At St. Louis, Mo.

The trial was before the court and its finding will be given the same effect as if tried before a jury. The court saw and observed the witnesses and from such observation was able to determine as to their credibility or otherwise, and unless on review it can be said that the finding and judgment are contrary to the probative force of the evidence, this court is not permitted to reverse such judgment. A scrutiny of the evidence convinces us that the finding of the court has ample support in the record before us, and it will be presumed on a trial before the court that in reaching its conclusion, the court took into consideration only admissible evidence.

Defendant in accepting and paying for one-half of the order for such carvings, without objection, there being no credible evidence that the rejected carvings, the remaining half of the order, were constructed differently or were unlike those which had been accepted and paid for, is precluded from the right to cancel the remaining part of the contract. In the light of the fact, without dispute, that defendant accepted and paid for one-half of the carvings and used a substantial portion thereof, before its attempt to cancel the contract, it is immaterial whether the sale was a sale by sample or by description. Defendant sought to escape liability upon the ground that the carvings were inferior in workmanship. This was an affirmative defense which required defendant to maintain by a preponderance or greater weight of the evidence. Goodlatte v. Acme Sales Corp., 328 Ill. App. 610. This defendant did not succeed in doing. As said in case, supra, "in this state of the pleadings, it is obvious that the burden of proving the goods were not up to the sample was upon the defendant." Waukesha Canning Co. v. Horner & Co., 138 ibid. 564.





The contract was an entire contract for 50,000 sets of carvings, at an agreed price, and therefore the contract was not divisible. Morris v. Fibaux, 159 Ill. 687; Hullard v. Lamer, 106 N. E. 584. This latter case involved a contract for the manufacture of 1,000 sets of controllers, etc. for the sum of \$2,500, which contract was held to be an entire contract, although the deliveries were to be made in installments.

Moreover defendant could not rescind part of the contract. If he was entitled to rescind at all, he must rescind in toto. In Eureka Waist Co. v. Herrick Bros. & Co., 286 Ill. App. 316, there was involved a sale by sample of ladies' waists, the buyer retaining some of the waists and attempting to return what was left, claiming inferior workmanship, but the court said:

"In the case of Wolf v. Dietzsch, 75 Ill. 205, it was held that a contract of sale could not be affirmed in part and rescinded in part, but that if rescinded at all, the rescission must be in toto. The court there said, (p. 210): 'The doctrine repeatedly announced by this court is, that a party cannot affirm a contract in part, and rescind it as to the residue, If he rescinds he must do so in toto.' "

And the court said in McMuller Coal Co. v. Champion Coated Paper Co., 138 S. E. 755:

"If the coal from plaintiff's mine was of sufficient quality to warrant acceptance under the contract when the market price of coal was high, why did it become unsuitable at the same time the market price became so low? The rescission of the contract and the market price of \$1.50 a ton bears such a close relation that the reason for the cancellation advanced by the defendant is patently specious.

In Ellison, Son & Co. v. Flat Top Grocery Co., 69 W. Va. 385, "a situation was presented where after a large part of a contract for hay had been executed, the purchaser rescinded on the ground that some of the hay which he had accepted was defective. It was there held that the purchaser could not cancel the contract because of the inferior hay, but must 'look to damages.' I find only two cases not reviewed in that decision which appear to be contrary thereto: King Philip Mills v. Slater, 12 R. I. 82,

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34 Am. Rep. 603, and Morrison v. Leiser, 73 Mo. App. 95. Both of those cases involved first deliveries. They may be differentiated for that reason as Morrington v. Wright, 115 U. S. 188, 8 S. Ct. 18, 29 L. Ed. 386, was differentiated in the Ellison opinion \* \*. It is now settled law that, when a buyer has knowingly accepted defective installments on a contract, he cannot rescind the contract because of the inferior quality of those installments. In addition to the authorities reviewed in the Ellison case, see 24 R.C.L. 'Sales' Par. 564; 35 Cyc. 'Sales', p. 222 (VIII); Mechem on Sales, Par. 1399; Page, Contracts, Par. 3018; annotation 29 A. L. R. 1517, and the many cases there cited."

In Halloran v. Quaker Oats Co., 171 N. W. 139, the court said:

"It is a well settled rule that upon sales by sample where the contract is entire, the buyer cannot accept the benefit of the contract in part and rescind it in part, and this is especially true where the alleged inferiority to sample, is visible to or discoverable by the purchaser when the first delivery is made.

\* \* \* \* \*

A mere verbal declaration of dissatisfaction with the quality of the thing delivered is of no avail if the delivery is in fact accepted. If there be an exception to this rule where the quality of the article is not visible upon a casual inspection, or where the purchaser has not had reasonable opportunity to ascertain the quality, it cannot affect the result in this case, for it appears without dispute that the defendant did examine the corn, and did ascertain its quality and grade before it received the first delivery. It was then its duty to exercise its option to accept and pay for the corn according to contract, or to refuse the offered delivery. \* \* \* A different result would be possible if there was any showing that the corn tendered for the second delivery was in any way inferior to that which had already been accepted by the defendant."

We find no errors in procedure nor in holdings of propositions of law.

Finding no reversible error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

HEBEL, J. CONCURS.  
FRIEND, J. NOT PARTICIPATING.



of the fact that the Government has been unable to obtain the necessary information to enable it to make a proper assessment of the situation in the various parts of the country. It is therefore suggested that the Government should make a more thorough investigation of the situation in the various parts of the country, and should also make a more thorough investigation of the situation in the various parts of the country.

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33992

CHARLES E. DWYER,

(Plaintiff) Defendant in Error,

v.

FIRST TRUST AND SAVINGS BANK,  
a corporation,

(Defendant) Plaintiff in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

259 I.A. 637<sup>3</sup>

Opinion filed Oct. 29, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion  
of the court.

The plaintiff, Charles E. Dwyer, filed his action in the Circuit Court against the defendant, First Trust & Savings Bank, a corporation, for money had and received. The declaration consisted of the common counts, together with an affidavit as to the amount due. The defendant filed a plea of the general issue, together with an affidavit of merits. This affidavit stated that the defendant had paid Dwyer, or his order, all sums it may at any time have owed to him. On motion of defendant an order was entered on plaintiff to file a bill of particulars, which was done. From this bill of particulars it appears that on December 28, 1925, the defendant issued to the plaintiff a cashier's check for the sum of \$1173.00. This check was endorsed by the plaintiff to the order of G. Frank Croissant, and was subsequently paid by the Southern Bank & Trust Company of Miami, Florida, on the endorsement of "Croissant & Co., Frank E. Reilly, General Manager." This check was again endorsed by the Southern Bank & Trust Company and paid by the defendant, First Trust & Savings Bank, on or about January 15, 1926. There is no allegation in the pleadings or the bill of particulars that the cashier's check in question was in the possession





of the plaintiff at the time the action was brought nor since that time.

From the record it appears that on motion of plaintiff, the affidavit of merits filed by the defendant was stricken from the files and exception taken and judgment entered for the plaintiff. From this judgment an appeal was prayed and allowed to this court. It is argued by counsel for the plaintiff in extenso that the affidavit of merits did not answer the bill of particulars, but the bill of particulars is not part of the pleadings and only serves to limit plaintiff's claim. Fowler v. Gada, 214 Ill. App. 153.

It is insisted that the cause should not be reversed because the affidavit of merits was not filed in proper time, but this argument fails because the record discloses that the time within which to file the affidavit of merits was extended by the parties and it was filed within the period of time so extended.

The only question before this court appears to be whether or not the affidavit of merits was sufficient. A defense of payment is a good defense, and the allegation in the affidavit of merits charged that the indebtedness had been paid.

Plaintiff takes the position that the cashier's check being specially endorsed and the name of the endorsee not appearing upon the check, that, therefore, he is entitled to recover. In the first place, it does not appear anywhere in the pleadings that the plaintiff is possessed of the check, nor is there any allegation that the check, endorsed as it was by plaintiff, was not delivered by the plaintiff to G. Frank Croissant, the endorsee named thereon. It is a general rule that where a cashier's check or a note is specifically endorsed,



the presumption is that in the hands of a stranger, he is not a bona fide holder, but this presumption may be overcome, the burden being upon the holder of the check to show that he came in possession of it properly. Collins v. Ogden, 323 Ill. 894. This is not, however, an action on the check by the person in possession of the same. In fact it may appear upon the trial that the cashier's check was delivered by the plaintiff to G. Frank Croissant for a valuable consideration, in which event the plaintiff would no longer be entitled to its possession nor to maintain an action thereon. It may further appear from the proof that Croissant was, in fact, an agent of G. Frank Croissant and properly authorized to endorse the check.

The affidavit of defendant filed herein, charging that it had paid any and all claims of the plaintiff, properly raised this question of fact and the trial court erred in striking the affidavit of merits from the files and entering judgment in favor of the plaintiff.

For the reasons stated in this opinion, the judgment of the Circuit Court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

REBEL, J. CONCURS.  
FRIEND, J. NOT PARTICIPATING.



The Commission is not in the position of a tribunal, but in the  
of a fact-finding body, and this Commission will be required to  
before being able to make any statement as to the results of its  
own investigation of the facts. The Commission will be required to  
this is not, however, an action in the sense of the  
action in question of the fact. In fact it is not a question  
the fact that the Commission's work was delayed in the  
interest in it. The Commission has a number of members,  
in which the Commission would be required to make a statement of  
its proceedings and its results in relation to the facts. It is  
therefore agreed that the Commission will be required to make a  
statement of its proceedings and its results in relation to the facts  
in relation to the facts.

The Commission of members will be required to make a statement  
that it has found and all claims of the Commission, including  
before the Commission is that the Commission will be required to  
submit the statement of its proceedings and its results in relation  
to the facts.

The Commission will be required to make a statement of its  
of the Commission is required to make a statement of its  
proceedings and its results in relation to the facts.

WILLIAM J. BROWN  
PHILIP J. BROWN

34076

HOWARD E. HURWITH,

Appellant,

v.

AMERICAN NIPPLE MANUFACTURING CO.,  
a Corporation, et al,

Appellee.

APPEAL FROM

CIRCUIT COURT,

259 I.A. 637<sup>4</sup>

COOK COUNTY.

Opinion filed Oct. 29, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion  
of the court.

The complainant, Howard E. Hurwith, filed his bill  
praying that the defendants be restrained from removing certain  
machinery and equipment from premises upon which complainant  
held a mortgage. A temporary restraining order was granted  
and, upon final hearing, was dissolved except as to one brick  
heat treating furnace. Damages were assessed for the issuance  
of the temporary restraining order and a final decree entered  
dismissing the bill for want of equity. From this decree an  
appeal was prayed and allowed to this court.

From the record it appears that prior to the filing  
of the bill for an investigation in this cause, a creditors'  
bill in the same court had been filed and a receiver appointed  
for the American Nipple Manufacturing Co., which was occupy-  
ing the premises in question and which was possessed of  
certain machinery, tools and appliances located on the premises.  
An order of sale was entered by the court directing that the  
machines, tools and stock of the company, together with its  
office equipment, should be sold to the highest bidder. The  
matter of bids came before the court on four or five different  
occasions and was continued from time to time. Hurwith,



Opinion filed Oct. 29, 1930

THE COURT, after having read the petition and the answer thereto, and the evidence submitted in support thereof, is of the opinion that the petition is not entitled to a decree of specific performance, and that the answer is entitled to a decree of dismissal.

The petition is in substance as follows: That the plaintiff is a citizen of the State of New York, and the defendant is a citizen of the State of New York, and that the plaintiff is entitled to a decree of specific performance of the contract made between them on the 1st day of January, 1929, inasmuch as the defendant has failed to perform the same.

The answer is in substance as follows: That the defendant is a citizen of the State of New York, and the plaintiff is a citizen of the State of New York, and that the defendant is not entitled to a decree of specific performance of the contract made between them on the 1st day of January, 1929, inasmuch as the plaintiff has failed to perform the same.

The court is of the opinion that the petition is not entitled to a decree of specific performance, and that the answer is entitled to a decree of dismissal.



according to the record, was present on these various occasions and participated in the bidding. He at no time questioned the right of the court to sell the articles in question nor objected to the sale until after the final bid was made and accepted by the court and the property ordered sold. The property in question was, in fact, sold to Michael Tauber & Company for \$4,050 on October 22, 1928, and on October 30, a bill for injunction was filed to restrain the removal of the property from the premises.

Two points are argued and presented for the consideration of this court: First, was the property in question so attached to the premises as to become a part of the realty and, therefore, included in the mortgage? Second, did the complainant in this cause by his conduct become estopped from setting up his claim to the property?

The original proceeding under which the receiver was appointed was instituted by the Chicago Tube & Tool Company, a creditor of the American Nipple Manufacturing Company, on a judgment obtained by it and upon an execution and levy made on the machinery, equipment and tools. The provision of the trust deed, under which complainant seeks to restrain the removal of the property, is contained in that portion of the trust deed showing the property covered by the mortgage and reads as follows: " \* \* \* real estate, with all buildings and improvements now and hereafter erected or located thereon, including all heating, gas and plumbing apparatus and fixtures, and everything appurtenant thereto." The sale of the property by the chancellor was "free and clear of all liens or incumbrances".

We are cited a number of authorities in regard to the law applicable to fixtures. Some of the cases relate to landlord and tenant and others to mortgagor and mortgagee. The



rule is more liberal in favor of the tenant in cases involving the relationship between the tenant and his landlord, but it may be stated that the intention of the parties is controlling. Machinery and equipment firmly fastened to the real estate, is a strong indication that the parties intend it to become a part of the realty, but it is not necessarily decisive. The character of the building and its purpose when erected is one of the considerations that the court looks to for guidance.

It is argued on behalf of the defendants that the fact that there was no mention made in the trust deed of machinery, tools or appliances, indicates that the parties did not intend that these particular instrumentalities should be covered by the trust deed. It might be argued that the term, "including all heating, gas and plumbing apparatus and fixtures, and everything appurtenant thereto", referred only to that class and character of improvement described by the words, "heating, gas and plumbing apparatus."

The building itself, according to the record, was not built for the specific purpose of housing the American Nipple Manufacturing Company. It was a one story building, half frame and half brick, and usable for any number of purposes. The testimony is conflicting as to the manner in which the machinery was attached to the premises and, in fact, it is apparent that some of the machinery was not attached in any manner, but was kept in place only by its own weight.

The complainant's witness Miller, testified that there were a number of machines such as are usually used to produce nipples for pipes, threading pipes and for annealing and finishing; that he found a 20 horse power motor bolted to the floor and the bolts sunk into concrete and that the same



1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged activities of the British Intelligence Service in the United States.

[illegible]

The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the American Telephone and Telegraph Company, for the year ending December 31, 1911.

[illegible]

condition existed with nine threading machines; that there were two lathes not fastened to the floor. He testified further that in his opinion the machinery was necessary to the business.

On the other hand, Donahue, a witness for the defendants, testified that the building was adaptable for other than manufacturing purposes and could be used as a factory, warehouse or garage; that no damage would result to the building after the removal of the machinery, some of which was bolted to the floor and could be easily taken out without damage; that there were no pits in the floor to accommodate machinery and that he did not see any 20 horse power motor, and that some of the machinery and equipment was unattached to the realty.

The decree found that the property in question was personal property and not covered by the mortgage. The fact that the complainant at no time, during the rather lengthy course of the proceedings, made any claim to this particular property, indicates rather strongly that he did not consider it to be covered by his trust deed. The position taken by the complainant, however, in our opinion is decisive. His participation in the proceedings, during the time bids were received by the court, was such as to preclude him from raising the question after the sale. As a result of his conduct, the time of the court was consumed in attempting to negotiate a sale for the best interests of the parties litigant; money was deposited by the purchaser which, necessarily, resulted in a loss of interest, and the bidders at the sale were lulled into a sense of security in their bids, which would not have resulted if the complainant in the first instance had claimed the property was covered by his trust deed. Parties should not be permitted to play fast and loose with the court, and it is





apparent that the claim of the complainant was an after-thought, when he found he would be unable to bid in the property at his own price. The filing of this bill for an injunction to prevent the removal of the property from the premises after the sale had been made and the money deposited in court, and after the complainant had participated in the proceedings for a period of over 30 days, comes too late.

For the reasons stated in this opinion, the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

HEBEL, J. CONCURS,  
FRIEND, J. NOT PARTICIPATING.

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34168

S. E. MITTELMAN, doing business as  
MIBRO INVESTMENT CO.,

Appellee,

v.

E. G. PAULING and E. H. SEEMAN,  
doing business as E. G. PAULING & CO.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 637<sup>5</sup>

Opinion filed Oct. 29, 1930

MR. PRESIDING JUSTICE WILSON delivered the  
opinion of the court.

Plaintiff, S. E. Mittelman, doing business as  
Mibro Investment Co., recovered a judgment for \$700.00  
against defendant, E. G. Pauling and E. H. Seeman, doing  
business as E. G. Pauling & Co. From this judgment an  
appeal has been taken to this court.

From the facts it appears that plaintiff had in  
his employ a man by the name of Harnreich, who negotiated  
a first mortgage loan with the defendants on behalf of  
one Hadesman, and which loan was, thereafter, made by the  
defendants. Plaintiff's claim is that, by reason of the  
making and executing of the said loan, defendants became  
obligated to pay him \$700 as a brokerage fee. Defendants  
deny that Harnreich was employed by the plaintiff and  
further charge that they had no knowledge of his employment,  
if he was so employed, and that the brokerage fee of \$700  
was paid to Harnreich without knowledge of said fact.

The cause was tried by the court without a jury  
and the issues found in favor of the plaintiff and judgment  
entered for \$700.



1930

U. S. DEPARTMENT OF AGRICULTURE  
BUREAU OF PLANT INDUSTRY

WASHINGTON, D. C.

U. S. DEPARTMENT OF AGRICULTURE  
BUREAU OF PLANT INDUSTRY

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Opinion filed Oct. 29, 1930

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BUREAU OF PLANT INDUSTRY  
WASHINGTON, D. C.

The principal question involved appears to be whether or not the defendants had knowledge of the fact that plaintiff was the principal and that Harnreich was his agent and that, therefore, it became the duty of the defendants to have paid the money to the disclosed principal, rather than to the agent.

Plaintiff testified that on December 22, 1925, a notice in writing was delivered to the defendants, signed by the plaintiff, Mibro Investment Co., directing them to make payment to the plaintiff and not to Harnreich or any other of the plaintiff's salesmen. Defendants denied ever having received such a notice. According to plaintiff's testimony this notice was served by delivery to one Erickson, who was in charge of the loan for the defendants. Erickson emphatically denied ever having received the notice.

The trial court had an opportunity of seeing and hearing the witnesses and was in a much better position to weigh the evidence and determine the truth of the testimony than this court.

If the payment was made to Harnreich, after having been notified by the principal to the effect that the payment should be made directly to the principal, the defendants would be liable. The trial court so found, and we see no reason for disturbing its finding.

It appears that there was an understanding between the plaintiff and his agent Harnreich, under which Harnreich was to receive 60 per cent commission which, in this case, would be 60 per cent of the \$700 judgment. It appears from the evidence, however, that advancements were made to him by the plaintiff, as his principal, which were charged against





the agent's share of this particular brokerage fee. Herbreich, the agent, appears to have disappeared after having collected the money and failed to account to his principal.

We are of the opinion that the trial court properly found that the measure of damages sustained by the principal, plaintiff in this case, for the full amount of the brokerage fee, was correct. There was sufficient evidence in the record upon which the court could arrive at an opinion that Erickson was acting for and on behalf of the defendants in conducting the negotiations in relation to the loan. Consequently, service of the notice upon him was a proper service upon his principal.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, J. CONCURS;  
FRIEND, J. NOT PARTICIPATING.



34506

WILLIAM SEED, as Trustee,  
(Complainant) Appellee,

v.

PEOPLES NATIONAL BANK AND TRUST  
COMPANY, CHARLES VAITEKUNAS and  
TEKLA VAITEKUNAS, et al,

Defendants,

INTERLOCUTORY APPEAL  
FROM CIRCUIT COURT,  
COOK COUNTY.

259 I.A. 638

On Appeal of CHARLES VAITEKUNAS and  
TEKLA VAITEKUNAS,  
(Co-Defendants) Appellants.

Opinion filed Oct. 29, 1930.

MR. PRESIDING JUSTICE WILSON delivered the  
opinion of the court.

This is an interlocutory appeal from an order  
appointing a receiver for certain real estate, together with  
the rents and income from the same.

The bill alleges that William Seed, as trustee, is  
the owner of certain principal and interest notes, together  
with a second mortgage securing the same, and that certain  
of the principal and interest notes covered by said mortgage  
or trust deed are past due and unpaid. The bill is inartistic-  
ally drawn, but it charges that there are a number of judgment  
liens against the property, although it does not appear from  
the bill that the person against whom the judgments were  
secured is or was the owner of the premises.

Notice was served on some of the defendants, but  
not on Charles Vaitekunas, who appears to be the owners of



24808

WILLIAM BROWN, as executor,  
(Deceased) Applicant,

INVESTMENT BANK  
AND TRUST COMPANY,  
INCORPORATED,  
Respondent.

WILLIAM BROWN, as executor,  
(Deceased) Applicant,  
Respondent.

24808 I.A. 638

WILLIAM BROWN, as executor,  
(Deceased) Applicant,  
Respondent.

Opinion filed Oct. 29, 1930.

WILLIAM BROWN, as executor,  
(Deceased) Applicant,  
Respondent.

Opinion of the court.

This is an application for a writ of habeas corpus.

The writ is a writ of habeas corpus, and is a writ of right.

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The writ is a writ of habeas corpus, and is a writ of right.

the equity and who executed the mortgage and notes in question. An affidavit was filed on behalf of the complainant to the effect that notice had been sent to his residence, 3323 South Halsted Street, Chicago, but that he could not be found at that address and that the affiant filing the affidavit was informed that he had moved and could not be found by said affiant.

The mortgage contains a clause to the effect that, upon default in the payment of principal or interest, a receiver could be appointed without notice and without bond. An order was entered by the Chancellor of the Circuit Court, appointing a receiver, stating that said receiver was appointed after a full hearing. The order further provided that the complainant should file a bond in the sum of \$250, within seven days, to be approved by the court. Complainant's bond was filed in accordance with the order, but, instead of running to the adverse party, as provided by statute, it appears to run to the People of the State of Illinois.

It is urged as a ground for reversal that even though the trust deed expressly pledges the rents and provides for the appointment of a receiver, the court will not make such an appointment unless it is necessary to protect the rights of complainant, and such receiver should not be appointed unless the property constituted scant and inadequate security for the indebtedness. Chapter 22, Section 55, Cahill's Illinois Revised Statutes, 1929, provides:

"That before any receiver shall be appointed the party making the application shall give bond to the adverse party in such penalty as the court or judge may order and with security to be approved by the court \* \* \* provided, that bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of the opinion that a receiver ought to be appointed without such bond."

The copy was also presented for signature and return in question. An affidavit was filed on behalf of the complainant, and it was stated that copies had been sent to all witnesses, 1200 North Western Avenue, Chicago, but that he could not be found at that address and that the affiant filing the affidavit was informed that he had moved and would not be found by said affiant.

to the adverse party, as provided by statute, it appears to  
 have been in accordance with the error, but, instead of being  
 never done, as he supposed by the court. Complainant's bond  
 the complainant should file a bond in the sum of \$250, within  
 10 days after a full hearing. The motion to dismiss was  
 granted, and the case was set for trial on the 10th day of  
 March, 1900.

It is urged as a ground for recovery that even though the bank had actually placed the note and proceeds in the hands of a trustee, the bank will not be held as obligated unless it is necessary to bring the note to maturity, and such recovery should not be required where the property constituted security and assigned to the bank for the indebtedness. (Carter vs. Carter, 100 N. D. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901,

[illegible]



The bond referred to is the complainant's bond. In the case at bar the complainant was required to and did give a bond. The fact that the bond runs to the People of the State of Illinois, instead of to the defendants, does not render the order itself void, nor subject to attack on this appeal. The bond would be corrected if it were called to the attention of the court. In the cases relied upon by counsel, requiring good cause shown and notice, it appears that the orders were entered in those cases without a complainant's bond, and where it had been waived in the order of appointment. There was sufficient in the affidavit in this case to warrant the court in believing that a bona fide attempt had been made to notify defendant, and there appears to be grounds sufficient in the bill to indicate that the terms of the trust deed were not being complied with, and the conditions broken.

It was held by this court in the case of Davis v. Blair, 252 Ill. <sup>App.</sup> 417, that the clause in the trust deed giving complainant the right to a receiver without notice and without bond is not controlling, but in that case no notice was served and no bond required of the complainant.

The provision of Section 55, requiring notice and full hearing, applies to those cases where it was attempted to have a receiver appointed without requiring complainant to give a bond. Such is not the fact in this case, as the order did require complainant to give a bond and if, in the opinion of defendants, it is insufficient, this should be corrected before the Chancellor and not on appeal.

We see no reason for disturbing the order appoint-



ing the receiver and the order of the Circuit Court  
appointing said receiver is affirmed.

ORDER AFFIRMED.

HEBEL, J. CONCURS;  
FRIEND, J. NOT PARTICIPATING.



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33726

HENRY F. BOARDMAN, and ANNA  
BELLE CRIST,

Appellants,

v.

STATE AUTO PARTS CORPORATION,  
an ILLINOIS CORPORATION,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 638<sup>2</sup>

Opinion filed Oct. 29, 1930

MR. JUSTICE HEBEL delivered the opinion of the court.

Henry F. Boardman and Anna Belle Crist, as plaintiffs, filed this suit to recover the sum of \$1,678.84, due them under the terms and provisions of a certain lease executed by the plaintiffs, as lessors, and by one Israel Levin, for and on behalf of himself and Phillip Levin, trading as Levin & Sons, as lessees.

The lease which was entered into on July 1, 1919, expired by its terms on July 1, 1921, but the said lessees, Levin & Sons, held over under said lease and continued to occupy the premises therein described under the terms and conditions thereof, until the 21st day of April, 1925, at which time the said Israel Levin and Phillip Levin dissolved the partnership of Levin & Sons, and together with Harry L. Michaelson and Louis Meyers, organized the State Auto Parts Corporation, the defendant. The assets, including good will and leasehold of the partnership of Levin & Sons, were transferred by them to the defendant corporation at the time of its incorporation on the 21st day of April, 1925, and the said Phillip Levin and Israel Levin, members of said partnership, received in payment for such assets, good will and leasehold, 400 shares of the capital stock of the State Auto Parts

HENRY F. BORTMAN and ANNA BORTMAN  
vs.  
LEVIN & SONS

A Petition

STATE AUTO PARTS CORPORATION  
an Illinois corporation

Respondent

259 I.A. 638

Opinion filed Oct. 29, 1930

MR. JUSTICE KILPATRICK delivered the opinion of the court.

HENRY F. BORTMAN and ANNA BORTMAN, as plaintiffs,

filed this suit to recover the sum of \$1,876.84, due them under the terms and provisions of a certain lease executed by the defendants, as lessors, and by one Israel Levin, for and on behalf of himself and Phillip Levin, trading as Levin & Sons, as lessees.

The lease was executed on July 1, 1925, expired by its terms on July 1, 1927, and the said lessees, Levin & Sons, held over under said lease and continued to occupy the premises thereafter until the first day of April, 1928, at which time the said Israel Levin and Phillip Levin dissolved the partnership of Levin & Sons, and together with Henry L. Michaelson and Louis Meyers, organized the State Auto Parts Corporation, the defendant. The assets, including good will and leasehold of the partnership of Levin & Sons, were transferred by them to the defendant corporation at the time of its incorporation on the first day of April, 1928, and the said Phillip Levin and Israel Levin, members of said partnership, received in payment for such assets, good will and leasehold, 400 shares of the capital stock of the State Auto Parts



Corporation, which capital stock had a par value of \$40,000. The defendant continued the business theretofore conducted by Levin & Sons, occupied the premises described in said lease, and continued to pay the monthly rental of \$20.00 due thereunder.

The lease involved in this litigation contains a covenant as follows:

"It is further covenanted and agreed by the said party of the second part that they will pay, or cause to be paid all water rates, and all taxes and assessments that may be laid, charged or assessed on said demised premises, pending the existence of this lease, or if at any time after any tax, assessment or water rates shall have become due or payable, the party of the second part, or their legal representatives, shall neglect to pay such water rates, taxes or assessments, it may be lawful for the party of the first part to pay the same at any time thereafter, and the amount of any and all such payments so made by the party of the first part shall be deemed and taken, and are hereby declared to be so much additional and further rent for the above demised premises due from and payable by the party of the second part; and may be collected in the same manner, by distress or otherwise, as is hereinafter provided for the collection of other rents to grow due thereon."

This action is to recover from the defendant moneys paid for taxes for the years 1921, 1922, 1923, 1924 and 1925, amounting to the sum of \$1,678.84 by the plaintiff, which sum it is alleged became due as so much additional rent under the terms of the lease.

The defendant admits that it took over the leasehold and all the rights of said Phillip and Israel Levin, and that it occupied the premises described in the plaintiffs' statement of claim.

It is the plaintiffs' contention that the defendant corporation became obligated under the covenants of the lease executed by Levin & Sons, when it took over the leasehold,

• Evidence collected also at level and level set

Received 20 July 1987; accepted 16 September 1987

executed by David S. Hunt, whom it was the intention  
to execute because although under the authority of the law

occupied the demised premises, and continued to pay the rent due under the said lease. The defendant's reply to this contention is that practically all of the plaintiffs' claim had accrued and was long due and payable before the corporation began its existence, and contend that an assignee of a lease is not liable for the rents due and accruing prior to the date of assignment. It is clear from the record that the defendant took possession of the premises as assignee of the lessees from the fact that it admits its possession, the payment of rent, and purchase of the assets of Israel and Phillip Levin, together with the good will and leasehold rights of the said Israel and Phillip Levin, and the rule is well established that where an assignee, as in this case, took possession and paid the rent they were in privity of estate, but not in privity of contract with the lessor, and that the assignee is therefore liable only for a breach of such covenants as run with the land. The payment of rent reserved and taxes are covenants binding upon such an assignee. The contention of the defendant that it was without knowledge of the provisions of the lease is not a controlling factor in this case for the reason that it must have had knowledge, to some extent, of the amount of the rental and the duration or balance of the term, for it appears from the record that the defendant paid the amount that had heretofore been paid by the Levins for the premises and took possession and continued in possession under the terms of the leasehold interest of the Levins, which was assigned to the defendant. Taking possession and the benefits that it derived from such possession, it also assumed such obligations as were a part of the leasehold contract, and it cannot now say that notwithstanding the taking possession, paying of the rent, and receiving benefits under the terms of



occurred the defendant's promise, and continued to pay the rent  
the matter was held. The defendant's promise in this case  
then is that practically all of the defendant's assets and  
resources and the land and the property within the jurisdiction  
before the defendant, and continued to pay the rent of a lease  
is not liable for the rent due and occurring after to the  
date of assignment. It is clear from the record that the  
defendant took possession of the premises on 1-1-35, at the  
lease from the fact that it holds the possession, the pay-  
ment of rent, and payment of the amount of interest and taxes  
levied, together with the good will and leasehold interest of the  
said premises and the fact that the rent is paid continuously  
that there is no change, as it was said, from possession and  
paid the rent that was in effect at the time, but that is  
privately of contract with the lessor, and that the assignment is  
therefore liable only for a breach of such covenants as run  
with the land. The payment of rent occurred and there are  
covenants relating to the assignment. The defendant's  
the fact that it was without knowledge of the provisions  
of the lease is not a controlling factor in this case for the  
reason that it must have had knowledge, to some extent, of  
the amount of the rental and the amount of interest of the  
rent, for it appears from the record that the defendant paid  
the amount that had heretofore been paid by the lessor for  
the premises and took possession and continued in possession  
under the terms of the leasehold interest of the premises, which  
was assigned to the defendant. Taking possession and the  
benefit that it derived from such possession, it also assumed  
such obligations as were a part of the leasehold interest, and  
it cannot now say that notwithstanding the taking possession,  
paying of the rent, and receiving benefits under the terms of

the lease, it is not obligated to carry out the covenants that run with the land.

In Webster et al. v. Nichols, et al., 104 Ill. 160, the court held that

"Covenants in a deed that extend to a thing in esse, parcel of the demise, and of benefit to the estate, run with the land, and bind not only the covenantor and his personal representatives by privity of contract, but also the assignee, though not named, and every other person who is in, of any estate created by or growing out of the original demise, by privity of estate."

It is also contended by the plaintiffs that the court was in error in not holding that the defendant, having absorbed all of the assets and good will of Levin & Sons, a partnership, and issuing stock to the individuals named, is liable for the debts of the Levin partnership to the creditors. It is not necessary to decide that question in this case for the reasons we have already indicated. In this case it is not the payment of a debt that is due to a creditor that is the subject of the controversy, but that the defendant, having taken possession of the premises under the terms of the lease and receiving the benefit of the contract, assumed the liabilities necessarily incurred by the provisions of the lease.

The only question remaining to be considered is the liability of the defendant for the payment of taxes as additional rent paid by the plaintiffs for the years already referred to. The defendant as assignee is bound to a performance of the express covenants which run with the land by reason of its privity of estate, and in the absence of an express contract the defendant is liable only for breaches of the same which occur while such privity continues.

Consolidated Coal Co. v. Peers, 166 Ill. 361.

the land, it is not obligated to strip and the Government has  
won with the land.

... ..

1-11-1944

1. The Government of the United States of America, hereinafter referred to as the Government, has the honor to acknowledge the receipt of the letter of the Government of the Republic of the Philippines, dated at Manila, Philippines, on the 10th day of March, 1946, in relation to the subject matter of the letter, to wit: "Request for the return of the remains of the late General Douglas MacArthur, United States Army, to the Philippines for interment in the Philippines." The Government of the United States of America, in reply to the letter of the Government of the Republic of the Philippines, dated at Manila, Philippines, on the 10th day of March, 1946, has the honor to inform the Government of the Republic of the Philippines that the remains of the late General Douglas MacArthur, United States Army, are being held in the custody of the United States Army, and that the Government of the United States of America is in the process of making arrangements for the return of the remains of the late General Douglas MacArthur, United States Army, to the Philippines for interment in the Philippines.

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The only condition mentioned in the indictment is the possibility of the defendant for the purpose of this act additional work paid by the defendant for the same already referred to. The defendant as mentioned is found to be a defendant of the above mentioned with the fact and by means of his private activity, not in the absence of an express contract the defendant is liable only for payment of the same which shall be duly certified.



In 24 Cyc. 1180, the doctrine is announced that an assignee being liable solely in privity of estate is liable only for rent maturing while he holds the estate as assignee and not for that which matured before he became assignee or after he ceased to be such, even though it was payable in advance for the period for which the assignment was made. In support of this doctrine a number of cases are cited. Applying the law that is supported by weight of authority, the defendant is not bound to perform the express covenants in a lease because of privity of contract, but is liable only for the performance of express covenants which run with the land by reason of his privity of estate. Covenants to pay rent and taxes reserved are covenants that run with the land. From the evidence, the payment of taxes for the year 1925, amounting to the sum of \$339.39, was paid by the plaintiffs, and the failure to perform in this regard by the defendant, made this sum which accrued during the defendant's occupancy, so much additional rent to be paid by the defendant.

In conclusion, the court holds, as a matter of law, that the defendant is liable to the plaintiff, under the terms and conditions of the lease transferred from Phillip Levin and Israel Levin and accepted by the defendant for the sum of \$339.39, paid by the plaintiff, being the taxes for the year 1925, which accrued during the occupancy of the premises, and became so much additional rent and was not paid by the defendant.

For the reasons stated in this opinion the judgment is reversed and judgment entered here in favor of the plaintiff and against the defendant in the sum of \$339.39, together with costs.

JUDGMENT REVERSED AND JUDGMENT  
ENTERED HERE.

WILSON, P.J. CONCURS,  
FRIEND, J. NOT PARTICIPATING.

In 1914, the defendant is announced that an assignment being made solely in favor of plaintiff is made only for year ending 1914, he holds the note as assignee and not for that which assigned before he became assignee as after he acted as he was, then though it was payable in advance for the period for which the assignment was made. In support of this position a number of cases are cited. Plaintiff the law then is supported by weight of authority. The defendant is not bound to perform the express covenants in a lease because of plaintiff's contract, but in lease only for the performance of express covenants which run with the land by reason of his privity of estate. Defendant in 1914 and 1915 received no dividends from the defendant, 1916 the defendant, the payment of taxes for the year 1915, amounting to the sum of \$100.55, was paid by the plaintiff, and the balance to plaintiff in this regard by the defendant, said this was also received during the defendant's ownership, as well as additional taxes to be paid by the defendant.

In connection, the court holds, as a matter of fact, that the defendant is liable to the plaintiff, under the terms and conditions of the lease contracted from 1914 to 1915 and 1916, said balance was received by the defendant for the sum of \$100.55, paid by the plaintiff, being the taxes for the year 1915, which accrued during the ownership of the plaintiff, and hence as well as additional taxes and was paid by the defendant.

The evidence stated in this opinion the plaintiff is reversed and judgment entered here in favor of the plaintiff and against the defendant in the sum of \$100.55, together with costs.

FOR PLAINTIFF AND DEFENDANT  
RESPECTIVELY

WITNESSES:  
JAMES E. HARRIS,  
JAMES E. HARRIS.

33741

DAN BLANKENSHIP,  
Appellee.

v.

LIBERTY SUPPLY & LUMBER CO.,  
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 638<sup>3</sup>

Opinion filed Oct. 29, 1930

MR. JUSTICE NEBEL delivered the opinion of the court.

The plaintiff filed a suit in the Municipal Court to recover for certain work, labor and extras furnished by the plaintiff at the request of the defendant. The defendant filed an affidavit of merits and a set-off. At the close of all the evidence in the case the court, on motion of the plaintiff, directed the jury to return a verdict for the plaintiff on his statement of claim and against the defendant on its set-off in the sum of \$1,723.12, and entered a judgment on the verdict, from which the defendant has appealed.

The statement of claim alleges that the plaintiff entered into a written contract with the defendant to supply all carpenter labor necessary to erect a certain building for the sum of \$700, according to plans and specifications furnished by the defendant; that subsequently the plaintiff entered into a verbal contract with the defendant to supply carpenter labor on four other buildings of the same type at the same price; that the plaintiff did said work, making a total sum due him of \$3500 plus certain extras, to-wit, extra work in extending wooden walls from floor joists to foundation, \$750; waiting time of carpenters for failure to supply lumber on time,



Opinion filed Oct. 29, 1930

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\$350; advance in schedule of wages of carpenters caused by delay in furnishing materials, \$450, making a total of \$5,050, less \$2,926.88, which had been paid, or a balance of \$2,123.12, for which the suit is brought, together with interest thereon from October 2, 1926. The plaintiff further alleges that he supplied all labor, and performed every act and thing required by him.

The defendant in its affidavit of merits admitted the making of five contracts for a total sum of \$3500, but alleged that subsequently the defendant agreed to allow plaintiff \$50.00 per building for making the change for extending the wooden walls from floor joists to foundation, in place of concrete, and not a total of \$750, as claimed by the plaintiff; denied that there was any waiting time of carpenters due to any fault of the defendant, or that the plaintiff paid anything therefor, and denied any delay in furnishing material other than the usual delays, or any liability therefor. The defendant further alleged that the plaintiff did not complete the buildings in accordance with said contract, and that the defendant was obliged to and did pay out the sum of \$1,502.30 to complete the same, or the sum of \$679.50 above the contract price, for which the defendant claimed a set-off.

The testimony of the plaintiff, in brief, was to the effect that the contracts were made, as set forth in the statement of claim; that subsequently the defendant agreed to pay \$125 extra on each building to put in wood walls from floor joists to foundation in place of concrete. After the buildings were partially completed the plaintiff stopped work on the buildings at the request of the defendant, and when he returned

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two weeks later found that the buildings had been partially destroyed; that the defendant's representative stated that the defendant would pay a fair price for putting the buildings back in the same condition as they had been.

The plaintiff testified that Johnson was the superintendent for the defendant during the course of the construction, and that he said he would pay a fair price for putting the buildings back in good condition; that he told Johnson that it would run from \$400 to \$500; that Johnson said that he would take care of it, and that the fair, reasonable and customary charge for repairing the damage would be \$350 or \$400.

The testimony on behalf of the defendant is to the effect that the defendant agreed to pay \$50.00 per building for making the change from concrete to wood, referred to by the plaintiff, and that the defendant never entered into any agreement with the plaintiff with reference to any increase in the wage scale; that the work was not completed when plaintiff left the premises, but further work was necessary, and the work was completed by the defendant.

The trial court in arriving at the sum of \$1,723.12, the amount of the judgment, allowed the plaintiff \$3500, being \$700 agreed upon to construct each of the five buildings. Reducting from that amount the sum of \$400 for work that was left unfinished by the plaintiff, and adding \$750, being \$150. for each of the five buildings for extra work in extending wooden walls from floor joists to foundation, also \$350 for waiting time and repair of damage to each of said buildings, and the further sum of \$450 for advance in wages of carpenters caused by delay in furnishing materials, or a total sum of



\$4650.00, and allowing the defendant credit for \$2,926.88, money paid on account of said buildings, leaves a balance due the plaintiff of \$1,723.12, the amount of the judgment in this case.

It is apparent from the evidence of both the plaintiff and the defendant that there was a controversy as to what agreement was entered into with reference to the extra work that was performed by the plaintiff in making the change from the plans, and constructing and putting in wood walls in the place of concrete from the first floor to the foundation. In other words, making a change from concrete to wood, referred to by the plaintiff, and this was practically admitted by the plaintiff in the brief filed; that if there was any error committed by the trial court in directing a verdict, it was in directing too large a verdict, for it was directed on the basis of \$125 for the extras on each building, and that could be cured by this court's requiring a remittitur of a difference of \$375.

The plaintiff claimed that he was entitled to an extra for waiting time caused by delay, and also for advance in wage schedules.

The plaintiff testified in regard to the waiting time of carpenters in these words,

"I don't know how much time was consumed in making these repairs or adjustments. When we started back to work I told Johnson it would run about \$400.00 or \$500.00. He said, all right, he would take care of it. I didn't keep track of the amount of time. I haven't any definite idea of the amount of work I did there. The fair, reasonable, customary charge for replacing these items would be about \$350.00 or \$400.00."

that

"A fellow by the name of Hudson and I were there. Nobody else was present. Mr. Johnson said he would see that he would take care of it and would pay a fair price for putting the buildings back in condition like they was. There was no real price set. That is the only conversation I had with the Liberty Supply & Lumber Company with reference to repairing the damage caused by the delay. I did not have any talk with anybody else about



...and allowing the following words to be written, "I am, Sir, your obedient servant, J. B. ..."

It is requested that the following be written in the margin of the letter, "I am, Sir, your obedient servant, J. B. ..."

It is requested that the following be written in the margin of the letter, "I am, Sir, your obedient servant, J. B. ..."

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It is requested that the following be written in the margin of the letter, "I am, Sir, your obedient servant, J. B. ..."

the matter besides Mr. Johnson."

Mr. Johnson testified on behalf of the defendant that he never had any conversation with the plaintiff in this case; that he was not present at the time there was any conversation; that there was no conversation to which he was a party with reference to an advance in the wage scale.

It is clear from the record that there was a conflict in the evidence of the plaintiff and the defendant, and such being the fact, of course the trial court is not in a position to pass upon the credibility of witnesses and to weigh the evidence. That was for the jury. The law is well settled that the jury is to pass upon all controverted questions of fact, and where there is any conflict in the evidence, or there is a dispute about the facts, it is for the jury to pass upon such facts. The evidence of the defendant, by its witnesses, tends to show, with reference to the extras for changing the concrete work to wood from the first floor to the foundation, that it agreed to pay \$50.00 more per building for such work. On the other hand, the plaintiff testified that the amount agreed upon was \$125. There was a contradiction in the amount to be paid by plaintiff's own witnesses, in that one witness testified that the amount was \$135, and another \$135 to \$150. That clearly is a question of fact for the jury, and there was error in the instruction to the jury to find for the plaintiff for the amount that appears in this record.

Then again, as to the evidence for an increase in the wage scale, the plaintiff testified that Johnson, the superintendent for the defendant, said he would take care of it, and that the plaintiff told him it would cost between \$300 and \$400,

It is also true that the

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but that he did not know what he paid out on account of the increased wage scale; that he had not figured it out; that it was put at a lump sum. Johnson, already referred to, denied that he at any time had any conversation regarding the increased wage scale, or that any conversation about that matter was ever had in his presence, so that the court would be unable to enter a remittitur here, as suggested by the plaintiff, and heretofore referred to, for the reason that there is also a controversy regarding the increased wage scale, and it seems to the court that all the facts in this case should have been submitted to the jury. For that reason the judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

WILSON, F.J. CONCURS.  
FRIEND, J. NOT PARTICIPATING.



86  
33786

A. HARRIS,

Appellee,

v.

GERTRUDE YEGENDORF, ET AL.

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 638<sup>4</sup>

Opinion filed Oct. 29, 1930

MR. JUSTICE NEBEL delivered the opinion of the Court.

This cause was commenced by the plaintiff in the Municipal Court of Chicago as a first-class case, wherein he sought to recover from the defendants the sum of \$5,000.00 for certain materials, work and labor performed on a building situated at 1359 Edgemont Avenue, Chicago, Illinois, to which claim the defendants filed an amended affidavit of merits. A trial was had and a verdict of the jury was returned in favor of the plaintiff and against the defendants in the sum of \$3100.00, of which the plaintiff remitted the sum of \$965, and upon the entry of a remittitur by the plaintiff, judgment was entered for \$2,135.00, from which judgment the defendants have perfected their appeal to this court.

The plaintiff in his statement of claim alleged that his claim was for materials furnished and work and labor done on the building situated at 1359 Edgemont Avenue, which property was legally described in his statement of claim, at the special instance and request of the defendants between the dates of January 1, 1921 and April 1, 1925, to the damage of the plaintiff in the sum of \$5,000.00.

An affidavit of merits was filed by the defendants to said claim, in which they denied that the plaintiff had done



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WESTERN TECHNOLOGY ET AL.

Opinion filed Oct. 28, 1930

MR. JUSTICE BRANDEIS delivered the opinion of the

court.

This case was removed to the district in the

district court of Chicago as a first-class case, under

the act to remove from the district the case of the

the certain matters, with the first payment of a

amount of \$100,000, which, Illinois, is now

claim the defendant filed an answer denying all

A trial was had on a verdict of the jury was returned in

favor of the plaintiff and against the defendant in the sum

of \$100,000, of which the plaintiff received the sum of \$60,000,

and upon the entry of a verdict by the plaintiff, judgment was

entered for \$6,125.00, from which judgment the defendant has

petitioned for a writ of habeas corpus.

The plaintiff is the owner of the building and

his claim was for materials furnished and work and labor done

on the building situated at 1500 Wabash Avenue, which property

was legally conveyed to the defendant as shown in the record

and record of the defendant between the dates of

January 1, 1921 and April 1, 1922, to the damage of the plaintiff

in the sum of \$1,000.00.

A writ of habeas corpus was filed by the defendant

to void claim, in which they denied that the plaintiff is owner

work or furnished any material at the special instance and request of the defendants between the dates of January 1, 1921 and April 1, 1922, in and about repairing the building therein described, and as a further defense to said cause, the defendants stated that the plaintiff entered into a certain contract with the defendant Gertrude Yegendorf, which is in words and figures as follows:

"Privilege Contract, August 21, 1922. Contract between A. Harris and Mrs. Yegendorf to reconstruct the property located at 1352 Edgemont Avenue, corner Locais, for the sum of \$1300.00. A new concrete foundation, the space between the sidewalk and property should be paved with cement, one iron post replaced at the corner and a new porch and stairs sidings should be repaired, new passage door and stairs, one plate glass to be replaced in store facing north, property painted, flats papered and painted, any damage done on plumbing works should be repaired by Mr. A. Harris, two coats painting inside flats, two coats painting on property, all labor, materials and labor must be furnished and paid by Mr. A. Harris. Mr. Harris also agrees to have this contract transferred on a regular contract. Money to be paid when job is complete.

Signed - A. Harris

Signed by Mrs. G. Yegendorf.

Witness E. Stearnson

Witness Benjamin Bachin"

The defendants further stated that the said

A. Harris entered upon the premises of the defendants on or about the date of said contract above mentioned, and disconnected the water-pipes. thereafter raised the building by means of jacks and placed said building on pillars and posts, began to make a cement foundation for a part thereof, and without any cause except for the purpose of extorting money from the defendants, left the premises and without any cause abandoned the work thereon. Upon notice to the plaintiff to finish his

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work according to contract, the plaintiff refused to do any further work or perform any other act under his said contract, and by reason of the premises being left in that condition, defendants' tenants were compelled to, and did, move out of said premises, and the defendant Gertrude Yegendorf, then living there, was compelled to move, and the premises were then and there greatly depreciated in value; that thereafter the defendant Stearensen, at great expense to said defendants, repaired and did the work which was contracted to be done in said contract, none of which did the plaintiff perform and for which the defendants claim the right to recoup against any claim of the plaintiff.

The plaintiff, A. Harris, is a contractor and builder in the City of Chicago, and the defendants, Gertrude Yegendorf, Katy Machin and Harry Yegendorf were the owners of the premises in question. The premises are improved with a two-story frame building having a store on the first floor, with an apartment in the rear, and two apartments on the second floor.

The plaintiff after the so-called privilege contract was prepared, signed it and commenced work on the building of the defendants the second day after the contract was signed by the parties thereto.

The plaintiff to sustain the burden of proof, testified that he commenced work by putting four concrete workers to do the concrete work; that they worked twenty-two days. The evidence, however, is not entirely clear as to the number of days that they were employed in doing the concrete work on the foundation of the building. From his testimony it appears that these men were employed 200 hours, and then again it appears that they were there two weeks, making a total of

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U.S.A. AND CANADA  
OTHER COUNTRIES: 100 Brook Hill Drive, Secaucus, N.J. 07094

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed amendments to the Bill. It is therefore not possible to say whether or not the Commission will be able to make any recommendations on this subject.

84 hours for each worker; that the amount that was received was 72½ cents an hour. He further testified that he paid the men employed on this work about \$1500; that L. E. Christie, an architect, looked after the work and told the plaintiff that everything on the building must be in good shape; that he put in the sills at the direction of Mr. Christie and cut out the rotten sills; that he was directed to cut off Sx4s that were rotten and put back boards, and the architect ordered him to patch the roof, which he did.

It further appears from the evidence that the plaintiff, at the direction of the architect, L. E. Christie, put in 18 inch pillars, also a new base all around the inside of the building, did some plastering and painting, fixed three doors, also flooring in the side rooms. He testified, over objection, that he paid \$800 for the materials and iron work used in the building, and increased the amount for materials to \$1100; that he also employed at the time from three to eight men, three painters, four concrete workers, three carpenters and gas fitters; that he paid about \$1500 to workmen, which was objected to by the defendant; and there is evidence that the wage paid was a fair, reasonable and customary wage for the services that appear in the record; that the plaintiff was in the contracting business 10 years and is familiar with the fair, reasonable and customary charge for work and labor performed and materials furnished by him, and his work in this building was between \$4500 and \$5,000.

The plaintiff admits signing the contract in evidence, but testified that he is unable to read and that the defendants retained the contract, and that he was to be paid for work



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10-11-1964

Doc no 7087    title = How do you see your future .xx

actual work of the law officers from 1862 to the year of 1864.

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Article 421 of the Criminal Code of the USSR, which provided for the death penalty for the crime of espionage, was applied to the defendant.

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He added that because the road was a public facility that it was

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Received 10 February 1999; accepted 10 February 1999

and their places all at once, as they were not able to

80 The study is treated with great skill and is a triumph.

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Witnessed and attested the day and date above written of us, Justices of said Court.

How not like it was in your last journey and tonight

performed and material furnished, and that this understanding was reached when the architect Christie was directed by the defendants to supervise the work of the plaintiff on this building. It was a controverted question of fact whether the contract introduced in evidence by the defendants was binding upon the parties for the amount to be paid and the work and services to be rendered.

The plaintiff insists that his action is based upon quantum meruit; that the theory of the plaintiff is to the effect that he is entitled to a fair and reasonable sum for the work, materials and services furnished, and that the evidence fully sustains the verdict. The defendants contend to the contrary, that the contract in evidence is binding upon the parties, and that there is no competent evidence in the record to justify the entry of a judgment; that the evidence is vague, uncertain and largely conclusions, and that the jury was confused by the evidence introduced by the plaintiff.

The court on examining the record finds that John W. Crowe, a witness for the plaintiff, doing business as Crowe Brothers, was permitted to testify to the value of the services rendered in raising the building in question, and that his business was with the defendants. The plaintiff in his testimony testified that the defendants were liable for such services, all of which evidence was objected to by the defendants. Upon what theory this evidence is admissible this court is unable to determine. If these services were rendered for the plaintiff at his request, which he disputes, it would be





a part of the services rendered and the defendants would be liable to the plaintiff, and if these defendants are liable for the services rendered by Crowe Brothers, then this evidence is clearly not admissible, and such evidence would only confuse the jury in determining the issue between the parties.

L. R. Christie, a witness, was employed as an architect by the defendants to supervise the work. There is no question in the record about such employment. Still the plaintiff, when the said Christie was on the witness stand developed the fact that he was not paid for his services, and that they were reasonably worth \$100.00. This evidence was clearly incompetent, and the court was in error in permitting that evidence to go to the jury. The evidence of the plaintiff did not establish what materials were furnished and the value thereof, if any, with the certainty that is required by the rules of evidence. The court on examining the record found that bills for lumber and paints appeared therein, otherwise it is silent, except the statement of the plaintiff that he paid for materials, to which we have heretofore referred. His evidence regarding the service of men employed by him on the work is more certain, but his evidence that he paid \$1500 to the men is not borne out by the record. And finally, his statement that a fair, reasonable and customary charge for the work, labor and materials furnished was between \$4500 and \$5,000, was not justified by anything in the record, and is clearly erroneous,



and did not aid the jury in passing upon the question that the court submitted to them. The defendants further contend that the contract specifies the work to be done and that many of the items specified in the contract were not performed by the plaintiff, but in view of the conclusion reached by the court, it will not be necessary at this time to pass on these questions, and for the reasons that we have assigned, the judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE  
REMANDED.

WILSON, P. J. CONCURS  
FRIEND, J. NOT PARTICIPATING.





33795

LIONEL J. HIRSCH,  
Appellant,

v.

YELLOW CAB COMPANY,  
a corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 639'

Opinion filed Oct. 29, 1930

MR. JUSTICE NEBEL delivered the opinion of the court.

This suit was brought by Lionel J. Hirsch, plaintiff, against the Yellow Cab Company, defendant, and is for damages to the automobile of the plaintiff as a result of a collision which occurred at Western Avenue and Wilson Avenue in Chicago on December 16, 1925. The defendant, in its affidavit of merits, denied the negligence alleged in the statement of claim of the plaintiff, and in addition thereto pleaded a release.

The plaintiff testified as to the occurrence, and one Gross as to the damages to the plaintiff's automobile. An ordinance of the City of Chicago was offered and received in evidence, and the plaintiff rested his case. The defendant called Mr. Hirsch, the plaintiff, as a witness, under Section 33 of the Municipal Court Act of Chicago. He admitted the execution of the release now in question, whereupon the release was offered and received in evidence as Defendant's Exhibit 2, which release is in words and figures as follows:

"For And In Consideration of the sum of \$1.00 to me in hand paid by the Yellow Cab Company, a corporation, the receipt whereof I do hereby acknowledge, I Lionel Hirsch do for myself, my heirs, executors, administrators





and assigns Release and Forever Discharge said Yellow Cab Company, and all of its employees of and from any and all claims or demands of any and every kind or nature whatsoever, as well legal as equitable, that I now or may at any and all times hereafter have against it, by reason of any and all matters, causes, or claims whatsoever arising at any and all times prior to the date of these presents, and by reason of any claim resulting from an accident which occurred to Lionel J. Hirsch, Jr. on or about the 18th day of December 1935, at Chicago, Ill. Wilson & Western Ave.

Witness my hand and seal at Chicago, Ill., this 22nd day of January, A. D. 1937.

Lionel J. Hirsch (Seal)

In presence of  
Jacob H. Jaffee."

Thereafter, the defendant rested its case, and there being no further evidence offered on behalf of the plaintiff, the defendant moved the court to instruct the jury to find the defendant not guilty, which motion the trial court sustained and the jury, so instructed, returned its verdict finding the defendant not guilty.

There is no conflict in the evidence that the plaintiff signed the release offered in evidence, but from the record it appears that a short time after the accident he engaged the law firm of Maddox, Jaffe and Green to prosecute his claim against the defendant; that at the time the release was signed it appears that Jacob H. Jaffee of the law firm of Maddox, Jaffee and Green signed as a witness to the execution of this document.

There is only one question in this case, and that is, whether or not this release is general or whether it is a special release intended to release only the plaintiff's claim for damages to Lionel J. Hirsch, Jr., his minor son. To arrive at a proper conclusion it will be necessary, of course, to determine what the parties intended at the time the document

This document contains information that is exempt from release under the Freedom of Information Act, 5 U.S.C. 552, because it is information that is exempt from release under 5 U.S.C. 552(a)(7)(C), which exempts from release information that is confidential, privileged, or otherwise protected by an applicable law, regulation, or policy.

By the University of  
Cambridge, 11 March

THESE ARE THE RESULTS OF THE INVESTIGATION OF THE  
MATTERS OF THE ABOVE NAMED PERSONS, AND THE  
FINDINGS OF THE COMMISSIONERS OF THE LAND OFFICE,  
AND THE RESULTS OF THE INVESTIGATION OF THE  
MATTERS OF THE ABOVE NAMED PERSONS, AND THE  
FINDINGS OF THE COMMISSIONERS OF THE LAND OFFICE,

[illegible]

THESE ARE THE ONLY TWO COPIES OF THE BOOK IN THE  
LIBRARY OF THE UNIVERSITY OF CHICAGO. IT IS  
A VERY RARE BOOK, AND IS NOT IN THE  
LIBRARY OF THE UNIVERSITY OF MICHIGAN.  
IT IS A VERY RARE BOOK, AND IS NOT IN THE  
LIBRARY OF THE UNIVERSITY OF MICHIGAN.  
IT IS A VERY RARE BOOK, AND IS NOT IN THE  
LIBRARY OF THE UNIVERSITY OF MICHIGAN.

was signed, and in doing this it is to be gathered from the instrument itself, and in the light of the circumstances surrounding the transaction. Counsel for the plaintiff, in calling the Court's attention to the release in question, refer to certain words written in, especially referring to the words inserted, "to my son, Lionel J. Hirsch, Jr." The release that is called to the Court's attention does not bear out this suggestion. It is apparent from the wording of the release that it was to release all claims that Lionel J. Hirsch, had against the defendant, or its employees, from any and all claims or demands of any and every kind or nature whatsoever, and that the insertion of the provision, "and by reason of any claim resulting from an accident which occurred to Lionel J. Hirsch, Jr.", does not, in the opinion of the court, restrict this release so that the only claim released was a claim that the plaintiff had for damages resulting from injuries to Lionel J. Hirsch, Jr.

The rule of construction applicable to the release involved in this litigation is that where the larger and more general intent is first stated and the circumstances are such that it was the intent of the parties to the release to pass and release all claims and demands thus expressed such intent will not be defeated or limited by subsequent expressions more restricted in their application. Grum v. Sawyer, et al., 133 Ill. 443. This rule of construction applied by the court in the instant case was approved by the Supreme Court in the case of Chicago Union Trac. Co. v. O'Connell, 224 Ill. 428.

No doubt Mr. Jaffee, the plaintiff's attorney at the time the release was signed, examined the document in





question, and as far as the record shows, the plaintiff was advised as to its terms.

It might be said in passing that no fraud, duress or mistake is alleged, nor is there any evidence to prove such was true, so that the court has before it only the release in question and the circumstances under which it was executed.

From the document itself, we are of the opinion that the plaintiff in this case released any and all claims he had against the defendant for any and all damages, including the damage to his automobile resulting from the collision, which is the subject of this suit.

As there was no error in the Court's directing the jury to return a verdict of not guilty, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. CONCURS.  
FRIEND, J. NOT PARTICIPATING.

question, and on the other hand, the subject was  
discussed in the same way.

It might be said in answer that the subject, however  
of course is simple, and in some way, it is  
very easy to see, and that the subject is very  
simple in question and the answer is very simple  
and simple.

There are several points, and it is not possible to  
the subject is very easy to see, and the subject is  
very simple, and the subject is very simple, and  
the subject is very simple, and the subject is very  
simple, and the subject is very simple, and the subject  
is very simple, and the subject is very simple.

As there are no more in the subject, the subject  
is very simple, and the subject is very simple,  
in answer.

THOMAS ALVA EDISON.

EDISON, T. A. 1874-1931  
1874-1931, T. A. EDISON



33807

KATE RUSK and DAVID RUSK,

Appellees,

v.

FRANCIS ALLEN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 639<sup>2</sup>

Opinion filed Oct. 29, 1930

MR. JUSTICE NEBEL delivered the opinion of the court.

This is an appeal from a judgment entered in the Municipal Court of Chicago, in favor of the plaintiffs, Kate Rusk and David Rusk, and against the defendant, Francis Allen, in the sum of \$885.00 and costs.

The plaintiffs' claim is for money due for rent from October 1, 1926 to April 30, 1927, at the rate of \$115.00 per month, and it is alleged that the defendant moved into the premises on the 1st day of April, 1926, and agreed to execute a lease to April 30, 1927, and in May, 1926, notified the plaintiffs that he would accept the premises until April 30, 1927, but failed and neglected to sign the lease, and vacated the premises the latter part of September, 1926. The defendant denies that he agreed to execute a lease, and alleges that he entered into an oral month to month lease, and vacated the premises the latter part of September, 1926, after first giving notice to the plaintiffs, and that he paid all the rent that was due up to the time he vacated the premises.

The defendant contends that the evidence shows that sometime in March, 1926, the defendant and his wife looked over the apartment of the plaintiffs. Allen, the defendant, said, "It is rented, draw up a lease." The plaintiffs claim

Opinion filed Oct. 28, 1921

[illegible]

The following is a list of the names of the persons who have been appointed to the various positions in the Department of the Interior, under the act of March 3, 1879, and who have been sworn in to their offices:

It is noted that the following information was obtained from the records of the Department of the Interior, Bureau of Land Management, Washington, D. C., dated 10/10/50:

that the leases were drawn, but do not contend that the leases were presented or shown to the defendant. Mr. Rusk, one of the plaintiffs, stated that he met the defendant on the stairway and said "Mr. Allen, I wish you would sign them leases," and he said "I will, Mr. Rusk, as soon as I have time, don't be afraid, I am going to stay a year or more." The defendant moved into the premises in the latter part of March, 1926, and paid rent up to the first of October. No leases were ever signed; and no time was fixed in any of the conversations as to the time the leases were to begin or end, or the time that the defendant was to stay in the premises. The leases, which were drawn by the plaintiffs but never shown to the defendant, were admitted in evidence over the defendant's objection, and he denies that he ever said, "It doesn't make any difference whether I sign a lease or not, we are going to stay a year anyhow," and nothing was said about a lease, nor did the plaintiffs at any time present him with the leases, or ask him to sign them.

The plaintiffs', on the other hand, contend that the defendant called at their premises, and after viewing the same, said that the flat and garage thereto connected were acceptable, and that the price of \$115.00 per month was acceptable, and notified the plaintiffs to prepare a lease expiring on the 30th of April, 1927, at said rental, and at the same time, the defendant informed the plaintiffs that he would stay there a year or more. In the month of May, 1926, the plaintiffs again notified the defendant that the lease had been prepared, which said lease so prepared by the plaintiffs covered the period from the first day of May, 1926, to the 30th day of April, 1927. The defendant then notified both of the plaintiffs that he would sign as soon as he had time, as he intended to stay a year. The



that the leases were drawn, but do not contend that the leases were presented or shown to the defendant. Mr. Bush, one of the plaintiffs, stated that he met the defendant on the first day of May, 1935, and said "Mr. Allen, I wish you would sign these leases," and he said "I will, Mr. Bush, as soon as I have time, but I am going to stay a year or more." The defendant moved into the premises in the latter part of March, 1935, and paid rent up to the first of May. He never signed any of the conversations or signed; and no time was fixed in any of the conversations as to the time the leases were to begin or end, or the time that the defendant was to stay in the premises. The leases, which were drawn by the plaintiffs and never shown to the defendant, were admitted in evidence over the defendant's objection, and he denies that he ever said, "I don't make any difference whether I sign a lease or not, we are going to stay a year anyhow," and nothing was said about a lease, nor did the plaintiffs at any time present him with the leases, or ask him to sign them.

The plaintiffs, on the other hand, contend that the defendant called at their premises, and after talking to them said that the list and groups thereof connected were acceptable, and that the value of said 100 per month was acceptable, and notified the plaintiffs to prepare a lease expiring on the first of April, 1937, at said rental, and at the same time, the defendant informed the plaintiffs that he would stay there a year or more. In the month of May, 1935, the plaintiffs again notified the defendant that the lease had been prepared, and said lease as prepared by the plaintiffs covered the period from the first day of May, 1935, to the first day of April, 1937. The defendant then notified both of the plaintiffs that he would sign as soon as he had time, as he intended to stay a year. The

defendant continued to pay the rent up to and including September, 1936, during which month he had purchased a home in a suburban district in Cook County, and, without notice to the plaintiffs, moved out of his flat, and the flat and the garage remained vacant from the first of October until the 30th day of April, 1937, notwithstanding the efforts of the plaintiffs to rent the same.

It is apparent from the contention of counsel that there is a controverted question of fact in this case as to when the lease was to begin and when it was to expire. However, there does not appear to be any controversy over the amount to be paid as rental for the apartment and the garage, the possession of which was in the defendant.

It is always for the trial court in a non jury case to pass upon the credibility of witnesses and to determine from the evidence whether the plaintiffs have established their case by a preponderance of the evidence. From an examination of the record, it is apparent that the evidence is conflicting, and it was for the trial court to find what facts, if any, were proved by the plaintiffs, by a preponderance of the evidence. In reaching that conclusion it was necessary, of course, to determine from the evidence when the lease was to begin, and the term thereof. However, the attorney for the defendant insists that there is no evidence of a meeting of the minds of the parties, or anything upon which the minds could meet; that nothing was said as to when the lease should begin or end, and, admitting the plaintiffs' evidence to be true, the verbal lease was void, because it was indefinite and uncertain, and if it was to begin on April 1, 1936, and end on April 30, 1937, it was within the Statute of Frauds. At most, the defendant

Witness continued to say the rest up to and including September, 1937, during which month he had witnessed a man in a red shirt listed in Jack Ruby's list, sitting next to the plaintiff, moved out of his list, and the list and the group remained where from the time of witness until the 10th of April, 1937, notwithstanding the efforts of the plaintiff to read the list.

It is suggested from the testimony of witness that there is a contradiction of fact in this case as to when the man was in the list and when it was in Ruby's. However, there does not appear to be any contradiction over the amount he paid as rental for the apartment and the group, the possession of which was in the defendant.

It is also suggested that the trial court in a non-jury case to pass upon the credibility of witnesses and to determine the evidence against the plaintiff's own testimony. In a jury case by a preponderance of the evidence, the evidence of the plaintiff, it is suggested that the evidence is conflicting and it was the trial court to find that it was, and it was proved by the plaintiff, by a preponderance of the evidence. In finding that defendant is not guilty, or guilty, or defendant from the evidence given the facts as to the trial, the trial court, however, the witness and the defendant insist that there is no evidence of a meeting of the minds of the parties, or anything upon which the man could say; that nothing was said to him that the man should begin to act, and, stating the plaintiff's evidence as to the trial, the trial court was said, because it was insufficient and contradictory, and it was to begin on April 1, 1937, and on April 10, 1937, it was within the scope of the trial, it was, the defendant.



went into possession, according to the testimony of the plaintiff, which the defendant denies, upon a promise to execute a lease for thirteen months. That was a matter of controversy between the parties, whether or not the term of the lease was from the first day of May, 1926, until the 30th day of April, 1927, and one of the controverted questions necessary for the court to pass upon. Having done so, and concluding that the judgment is not manifestly against the weight of the evidence, this court will not reverse the judgment.

Counsel further contends that a party going into possession of premises under an agreement to make a lease which he afterwards refuses to do, is a mere tenant at will. The facts in this case do not bear out this contention, and so far as the evidence discloses, the defendant never refused to execute and deliver a lease.

The defendant contends that the trial court was in error in admitting the leases prepared by the plaintiffs, on the ground that the defendant had not signed the same. The plaintiffs admit that the lease was not offered for the purpose of proving a binding contract, but as an evidentiary fact of the existence of the prepared lease at the time the conversation was had with the defendant in the month of May. The lease was relevant for the purpose of showing that it was prepared at the time of the conversation referred to, and is part of the res gestae. Citing Fusbeck v. Frances E. Willard N. T. H. Ass'n, 94 Ill. App. 192.

Finding no reversible error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. CONCURS,  
FRIEND, J. NOT PARTICIPATING.

went into possession, according to the testimony of the plain-  
tiff, which the defendant denies, upon a promise to deliver a  
lease for fifteen months. That the promise of conveyance  
between the parties, whether or not the term of the lease was  
from the first day of May, 1886, until the first day of April,  
1887, and one of the controverted questions necessary for the  
court to pass upon. Having done so, and concluding that the  
judgment is not manifestly against the weight of the evidence,  
this court will not reverse the judgment.

Counsel further contends that a party going into  
possession of premises under an agreement to make a lease which  
he afterwards refuses to do, is a mere tenant at will. The facts  
in this case do not bear out this contention, and no law on the  
evidence disclosed, the defendant never refused to execute and  
deliver a lease.

The defendant contends that the trial court was in  
error in admitting the leases prepared by the plaintiff, on the  
ground that the defendant had not signed the same. The plaintiff  
admits that the lease was not offered for the purpose of proving  
a binding contract, but as an evidentiary fact of the existence  
of the proposed lease at the time the controversy was set on foot  
the defendant in the month of May. The lease was relevant for  
the purpose of showing that it was prepared at the time of the  
conversation referred to, and is part of the res gestae. Divine  
Leasehold v. Leasing Co., 114 Ill. App. 183.

finding no reversible error in the record, the

judgment is affirmed.

THOMAS ALPHEUS

ALPHEUS, J. C. CLARK,  
JAMES, J. C. CLARK.

33877

GERTRUDE HESLER,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,  
ET AL.,

Appellants.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY.

259 I.A. 639<sup>3</sup>

Opinion filed Oct. 29, 1930

MR. JUSTICE REBEL delivered the opinion of the court.

This is an appeal from a judgment of \$3,000 recovered by the plaintiff, as damages for personal injury, in an action on the case against the defendants. The judgment is based upon a verdict of the jury for \$5,000 against the defendants, from which the plaintiff remitted \$2,000.

Plaintiff, on October 25, 1927, in the midnight hour, was a passenger on a street car of defendants being operated eastward on 63rd street, and was standing on the rear platform of the car, leaning with her back against the closed sliding door on the north or blind side of the platform as the car was making a stop at Bixel Avenue, where the plaintiff was injured, and upon the evidence of the parties, the case was submitted to the jury. The court refused to direct a verdict at the close of plaintiff's case and at the close of all the evidence, or to arrest judgment. Defendants contend that there was a total failure to prove the elements essential to liability; that the damages awarded are excessive and unwarranted, and also that the





defendants were prejudiced by serious errors on the trial; and that the judgment is not supported by the verdict of the jury entered of record in court.

Plaintiff's declaration contains five counts. The first count charged negligence in failing to exercise the highest degree of care in the operation and management of the street car, by reason of which plaintiff was thrown, pitched and impelled from her position on the platform of the car to the street, and injured. The second count alleged failure to exercise the highest degree of care to keep the north door on the rear platform of said street car closed and securely fastened while said street car was moving easterly along 63rd street, and in permitting and allowing said door to fly or become open while the street car was in motion, in consequence of which plaintiff was pitched, thrown and fell through said opening or doorway to the street. The court instructed the jury to disregard this count, at the close of plaintiff's evidence. The third count alleged failure to exercise the highest degree of care so as not to cause or permit or allow the north door on the rear platform of said street car to open, and that defendants so negligently operated said street car that the said door was violently jerked and swung open and the plaintiff was pitched, thrown and impelled from her place on the rear platform to the street. The fourth count alleged failure to exercise the highest degree of care in the management, maintenance and control of said street car, and to keep the doors on said street car in a reasonably safe condition and good working order, and that defendants permitted the north door on the rear platform of said street car to become and remain in an unsafe and dangerous

that would suggest negligence in failing to disclose the  
discovery before it was in the opinion of the management of  
the company that it was a material fact.

100-443887-100

There is no doubt that the above information is correct and that the same is being furnished to the proper authorities for their consideration.

[illegible]

1. The first step in the process of identifying a problem is to determine the scope of the problem. This involves identifying the specific area of concern and the individuals or groups affected by the problem. Once the scope of the problem is determined, the next step is to gather information about the problem. This can be done through a variety of methods, including interviews, surveys, and observation. The information gathered should be used to identify the causes of the problem and to develop a plan of action to address the problem. The final step in the process is to implement the plan of action and to monitor the results. This involves putting the plan into action and then evaluating the progress made towards solving the problem. If the problem is not solved, the plan should be revised and the process should be repeated.

at present at which the work done in the last 12 months is  
being carried out by the staff, and that the work is being  
carried out with a view to the work being done in the

Washed in water, dried, and then distilled under reduced pressure. The yield was 100%.

[illegible]

with respect to the amount of time in the field and the amount of time in the office. The amount of time in the field is the amount of time in the field and the amount of time in the office is the amount of time in the office.



condition and in a manner easily thrown or jerked open, and that said door was defective and impaired and negligently insured when said door was closed, in consequence of which while the said street car was in motion the door was caused to be opened and plaintiff was thrown and fell through said doorway to the street. The jury was instructed to disregard this count at the close of plaintiff's evidence. The fifth count alleged willful and wanton negligence in operating the street car and in willfully and wantonly applying the air brake with such violence and force that the north door on the rear platform of said street car was forced to fly and become open, in consequence of which plaintiff was thrown to the street. This count was dismissed on motion of plaintiff.

Each count alleged that the plaintiff was a passenger for hire and was standing on the rear platform of defendant's street car in the exercise of due care and caution for her own personal safety.

The defendants filed pleas of not guilty to the first, second, third and fourth counts of the declaration, and a general and special demurrer to the fifth count, which demurrer was sustained and leave given to amend. Upon amendment it was ordered that the defendants' pleas of not guilty stand as pleas to the fifth count as amended. The fifth count was subsequently dismissed by plaintiff.

The accident happened between twelve and one o'clock midnight of October 25, 1927, at 63rd street and Brezel avenue, when the car stopped at the latter street.

The 63rd street line of railway extends along 63rd street exclusively from the east end of the line at Stony Island avenue to the west end at Melvina street, a distance

[illegible]

of approximately ten and a half miles. It is a double track street car line. The street car in question ran back and forth both ways on 63rd street. At the west end of the line the car does not turn around on a loop, but there is a crossover where the conductor and motorman change ends. This was a pay-as-you-enter car; the passengers get on at the rear end and get off from either the front or the rear end. The front vestibule is kept closed and is opened by the motorman when a passenger desires to get off. At the west end of the line the change from track to track is made by a crossover; that is, the motorman leaves the west end of the street car and takes his controller, appliances, etc., to the east end, which becomes the front end, and the conductor takes his appliances to the west end, which becomes the rear end, as the car begins its eastbound trip.

The street car in question, No. 5497, was a double-track standard pay-as-you-enter car, which passengers enter at the rear end alone but may leave from either the front or rear end of the right-hand side of the car; that is, when the car is eastbound entrances and exits are made at the south doors of the platform, and the north doors are kept closed and fastened. The north side of the car is called the blind side. If the car were westbound, passengers would enter and leave at the north side of the street car, and the south side of the street car would then be the blind side. On an eastbound car the conductor's platform is at the west end of the car. This platform is vestibuled. The south doors of the platform are used for entrance and exit during the trip. The north door is closed, and when the car is eastbound the north side of the car is called the blind side. The platform



of approximately ten and a half miles. It is a double track street car line. The street car in question was back and forth both ways on 32nd street. At the west end of the line the car does not turn around on a loop, but there is a crossover where the conductor and motorman change ends. This was a pay-as-you-enter car; the passengers got on at the rear end and got off from either the front or the rear end. The front vestibule is kept closed and is opened by the motorman when a passenger desires to get off. At the east end of the line the change from back to front is made by a crossover; that is, the motorman leaves the rear end of the street car and takes his seat, leaving the front end, to the east end, which becomes the front end, and the conductor takes his position at the rear end, which becomes the rear end, as the car begins its second trip. The street car in question, No. 8457, was a double-track pay-as-you-enter car, which passengers enter at the rear end and may leave from either the front or rear end at the right-hand side of the car; that is, when the car is eastbound passengers and exits are made at the south side of the platform, and the north door was kept closed and locked. The north side of the car is called the blind side. If the car were westbound, passengers would enter and leave at the north side of the street car, and the south side of the street car would then be the blind side. On an eastbound car the conductor's position is at the west end of the car. This platform is vestibuled. The north doors of the platform are used for entrance and exit during the trip. The north door is closed, and when the car is westbound the north side of the car is called the blind side. The platform

of the car is separated from the body of the car by a partition, on each side of which is a door. The door on the south side of the partition slides north and south and is for the exit of passengers onto the platform; the door on the north side of the partition is a swinging door about three feet wide, which is used for entrance into the car. This door swings toward the back of the car. The conductor sits or stands behind a little iron railing, with his back to the partition and his face toward the rear of the car, and thus observes and collects from all who enter.

The door on the blind side of the car is a sliding door. When closed its west end is tight against a four by four post at the extreme west end of the street car. When this door opens, it slides toward the front of the car making a total open space of about three feet; in other words, one-half of the blind door is permanently closed, while the remaining half is a sliding door.

As a safety device to keep the sliding door closed it is fastened by a catch to the 4 x 4 inch post at the rear of the car, the device or contrivance being a metal piece with a slot in it about  $1\frac{1}{2}$  inches long and about three-fourths to seven-eighths of an inch deep into which a three inch metal catch with a hook on it drops and fits snugly. The slot is imbedded and screwed into the rear corner post on the back end of the car and the catch which is fastened on the door drops into it. When the motorman operates the sliding door on the front end of the car as an exit-way, he uses a handle or lever. The position of this contrivance





is about six and a half feet above the floor of the platform of the car.

A street car traveling the 63rd street line from the west end to the east end must cross eight double-track intersecting street car lines and eight cross-over frogs. It must also cross some switches. In addition there are three overhead steam railway lines, to clear which the street car track dips so that the street car must operate at a down grade and up grade. In addition, service stops occur at any stop streets along the line.

The accident happened at Brexel avenue, which is fourteen blocks from the east end of the line or approximately three-quarters of a mile and is therefore approximately nine miles east of the west end of the line at Melvina street.

It is contended by the defendants that the trial court should have directed a verdict for the defendants because of the utter failure of proof of the material allegations of the declaration. In considering this contention, the court is guided by rules that are well established by our courts, and such rules must be applied whether the defendants make a motion at the close of the plaintiff's case, or at the close of all the evidence, and of course if there is no evidence, or but a scintilla of evidence, tending to prove the allegations of the declaration, the court should direct the jury to return a verdict for the defendant. If the evidence of the plaintiff standing alone is sufficient to support a verdict in favor of the plaintiff the cause should be submitted to the jury. In passing upon such a motion when made by defendant, the court does not consider the



weight of the evidence and will view it in the light most favorable to the plaintiff and without reference to the evidence introduced by the defendant. The courts have uniformly held in this State that where the evidence of a witness is merely inconsistent with reasonable probabilities, and the circumstances are such that it might be believed by a jury, the court could not ignore it on a motion to direct a verdict. Libby, McNeill & Libby v. Cook, 222 Ill. 206; Campbell v. C. R. I & P. Ry. Co., 243 Ill. 620; Geller v. Patterson, 137 Ill. 403; Chicago City Railroad Co. v. Hagenback, 228 Ill. 290; Chicago City Ry. Co. v. Henry, 218 Ill. 92; Offutt v. Columbian Exposition, 175 Ill. 472.

In the instant case the plaintiff was a passenger for hire on a street car operated by the defendants through its agents, and was standing on the platform, which was enclosed on three sides and open on one side, for the entrance and exit of passengers. The plaintiff stood upon the platform away from the open entrance and in a position of apparent safety. While standing upon the platform, a sliding door back of plaintiff suddenly opened by sliding into the body of the car. The evidence tends to show that the car stopped very suddenly, or as one witness expressed it, "the car came to a jolt" at 63rd street and Drexel avenue at the time the door suddenly opened, and the plaintiff was thrown from the platform through the open door upon the street and was injured.

Applying the rule that the court is to view the evidence of the plaintiff in its most favorable light, the trial court was justified in denying the motion of the defendants to direct a verdict of not guilty. The plaintiff was a passenger for hire and in a place upon the car platform



weight of the evidence and will also be in the light  
most favorable to the liability and without reference to  
the evidence introduced by the defendant. The court has  
uniformly held in this case that where the statement of a  
witness is merely inconsistent with previous statements,  
and the circumstances are such that it might be believed by a  
jury, the court should not ignore it on a motion to direct a  
verdict. Alley, 100 Ill. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000  
In the instant case the plaintiff was a passenger  
for hire on a street car operated by the defendant through  
its agency, and was standing on the platform, when the  
defendant on three sides and open on one side, for the  
entire length of the car. The plaintiff stood upon  
the platform very close to the open side and in a position  
of exposure. While standing upon the platform, a  
sliding door back of plaintiff suddenly opened by which  
into the body of the car. The evidence tends to show that the  
car stopped very suddenly, or on one wheel stopped it,  
"the car came to a halt" at Bird street and Urethel avenue  
at the time the door suddenly opened, and the plaintiff was  
thrown into the platform through the open door when the car  
stopped and was injured.

So far as the record discloses, she did not do anything to bring about the accident, and had a right to rely upon the defendant, through its agents in charge of and operating the street car in question, to observe its duty to her to exercise the highest degree of care consistent with the practical operation of the car. This case was properly submitted to the jury.

It is strenuously insisted upon by the defendants that the manifest weight of the evidence is contrary to the verdict. From the evidence it appears that the plaintiff got on the street car at 63rd Street and Normal Avenue, where she met Mr. Sterling, whom she had met twice before the accident, and a Mr. Murphy, whom she was not acquainted with. All three of them got on the car and stood on the platform. The conductor testified that he requested them to go in and sit down, or step out of the way; that he had no objection to these people standing on the platform, if they were orderly; that people stand on the platform quite frequently. There is no rule of the company, and no rule laid down by him against it; that people have a right to stand either on the platform in the aisle or to sit down; that it is his duty to see that they are safely carried, whether they are standing up or sitting down. The plaintiff and her companions were over toward the rear end of the vestibule, one of her companions, Mr. Murphy, standing on the right side of the plaintiff near the corner between the brake wheel and the blind side. The plaintiff stood at his left side at the sliding portion of the blind door and the tall man, Mr. Sterling, who did not testify (as he had not been seen for six months

to say as the record discloses, she did not see anything  
to bring about the accident, and had a right to rely upon  
the defendant, through the agency in which he was operating  
the street car in question, to observe its duty to her as  
exercising the highest degree of care consistent with the  
practical operation of the car. This case was properly  
submitted to the jury.

It is strenuously insisted upon by the defendant  
that the weight of the evidence is against the plaintiff  
verdict. From the evidence it appears that the plaintiff  
was on the street car at 12th Street and Howard Avenue,  
where she met Mr. Murphy, whom she had met twice before  
the accident, and a Mr. Murphy, whom she was not acquainted  
with. All three of them got on the car and stood on the  
platform. The plaintiff testified that as the car was  
going east and down, or was out of the way; that he had no  
objection to those people standing on the platform, it being  
well known; that people stood on the platform while  
the car was going. There is no rule of the company, and no rule  
told them by the defendant; that people have a right to  
stand either on the platform or the aisle or to sit down;  
that it is his duty to see that they are safely seated, and that  
they are standing up or sitting down. The plaintiff did not  
complain when they were toward the rear end of the car, and  
one of her companions, Mr. Murphy, standing on the right side  
of the platform near the corner between the front wheel and  
the blind side. The plaintiff stood at his left side at the  
sliding portion of the blind door and the fall was, Mr. Murphy,  
who did not testify (as he had not been seen for six months



prior to the trial, and when last heard from was in Kansas City), stood just on the left side of the plaintiff. The plaintiff stated that she stood up against the door from the time she got on the car until the accident occurred, and that Mr. Sterling was about a foot and a half away from her on her left side, and that Mr. Murphy was standing near the motorman's box. Mr. Sterling is about five feet ten inches tall and Mr. Murphy about five feet seven inches. When the plaintiff and Sterling were there talking, she was facing the conductor with her back against the door. Just before the accident Mr. Sterling was standing with his hand up against the rear end of the car very close to the safety device which fastened the sliding door, possibly an inch or so. The conduct of these people caused the conductor to look up at the door and catch, and he looked to see if it was all right. The last time was at Cottage Grove Avenue. During that trip no one else had his hand on or close to the catch. At Brexel Avenue the car came to a stop. The plaintiff's witnesses said it was a sudden stop or jolt. The conductor said it was a smooth, regular stop, and the motorman and a passenger witness, not connected with the street car company, said the same.

When the car stopped, the sliding door back of the plaintiff suddenly opened by sliding into the body of the car, and the plaintiff fell out backwards into the street. The actual falling of the plaintiff was not testified to by any one, the nearest approach being that she herself said that all of a sudden "she went out and does not remember landing." The conductor had given the bell for Brexel Avenue,

... to the trial, and when last heard from was in  
Kansas City, about four or five miles from the  
The witness stated that she stood up against the door  
The first thing she saw was the man in the suit  
and that Mr. ... was about a foot and a half away  
from her on her left side, and that Mr. ... was standing  
near the woman's box. Mr. ... is about five feet  
and a half tall and Mr. ... weighs about five feet  
When the witness and ... were talking, she  
noticed the man in the suit was back against the door, and  
before the witness saw, ... was standing with his  
hand against the top of the door very close to the  
... which looked like a sliding door, ...  
... The witness of these people seemed to be  
... to look up at the door and water, and he looked to  
see if it was all right. The last time she saw ...  
... During that trip he also had his hand on the  
... At that time she saw ... in a  
The witness's witness said it was a woman who was  
The witness said it was a woman, regular dress, and she  
... and a ...  
... with the door.  
... the ... the sliding door was at the  
... by sliding into the body of the  
... and the witness said she was ...  
The witness of the witness was not satisfied by  
any one, the witness ... that the witness was  
... the witness ... and then ...  
... The witness ... the door ...

and when the car stopped he was attending to letting the passengers on and off. While he was doing this, one of the men on the back platform said, "There was a lady fell off the car," and the conductor found the plaintiff lying directly outside the door of the street car. The conductor did not see her fall. Edward Farr, a police officer, heard someone say, "Look out," and he turned and saw the plaintiff falling out of the door.

Mr. Walter Knight, a witness for the plaintiff, was acquainted with Mr. Murphy, but not with the plaintiff or Mr. Sterling. He entered the car at Cottage Grove Avenue and walked from the platform into the body of the car. He testified that the plaintiff was standing on the back end of the car on the north side where the blind door is; that she and Mr. Sterling were standing there talking, she was facing the conductor and her back was against the door.

It is not disputed by the defendants that the door slid open at Drexel Avenue and that the plaintiff fell through the opening and was injured. They contend, however, that so far as proving any negligence of the defendants, the evidence on behalf of the plaintiff is a complete failure and establishes only the following ultimate facts:

- (a) The car stopped suddenly. It was a more violent stop. The car stopped with a jolt. The car stopped very suddenly.
- (b) The plaintiff was leaning against the door at the time.
- (c) The sliding door came open. (d) The plaintiff went out.
- (e) When the door was opened the latch was unfastened. (f) The



and when the car stopped he was attending to letting  
the passengers on and off. While he was doing this,  
one of the men on the back platform said, "There was  
a lady tell off the car," and the conductor found the  
plaintiff lying directly outside the door of the street  
car. The conductor did not see her fall. Edward Perry,  
a police officer, being present saw "her fall" and  
he turned and saw the plaintiff falling out of the car.  
Mr. Walter Haines, a witness for the plaintiff,  
was acquainted with Mr. Murphy, but not with the plaintiff  
or Mr. Fleming. He entered the car at Chicago Grove Avenue  
and walked from the platform into the body of the car.

He testified that the plaintiff was standing on the back  
and of the car at the north side when the thing happened;  
that she and Mr. Fleming were standing there talking, and  
was facing the conductor and her back was toward the door.  
It is not disputed by the defendant that the door

also open at Grand Avenue and that the plaintiff fell  
through the opening and was injured. It is admitted, however,  
that as far as proving the negligence of the defendant, the  
evidence on behalf of the plaintiff is a complete failure.

and submitted only the following issues to the jury:

- (a) The car stopped suddenly. It was a more violent stop.  
The car stopped with a jerk. The car stopped very suddenly.
- (b) The plaintiff was leaning against the door at the time.
- (c) The sliding door was open. (d) The plaintiff was not.
- (e) That the door was opened and closed and released. (f) The

accident occurred at 63rd and Drexel avenue, and that there is no evidence in the record that the latch of the door was either fastened or unfastened prior to the accident, and the only evidence is that when the door was open the latch was unfastened.

The testimony of the motorman and the conductor is to the effect that the safety device had been fastened at the west end of the trip, and that the conductor had an opportunity to observe it at all times during the trip, and that just before reaching Drexel Boulevard he looked up and the latch was still fastened; that after the accident it was unfastened; that the metal catch was inspected, examined and tested by both the motorman and the conductor; that it was in working order and that it was used during the remainder of the night; that just before the street car reached Drexel Avenue Mr. Sterling had his hand there near the catch: that immediately when the plaintiff fell she was picked up and taken to the Washington Park Hospital where she received treatment.

The evidence introduced by the plaintiff made out a prima facie case and the facts raised a presumption of negligence chargeable against the defendants, which it was necessary to rebut. The defendants contend that by showing the so-called blind sliding door was closed and fastened, the defendants did all that they could do and were therefore unable to anticipate and prevent the accident to the plaintiff, and should not be held responsible. Surely that fact, together with the fact that the sliding door suddenly opened, is properly a question of fact for the jury. The credibility of the evidence and whether the explanations of the accident sufficiently rebut the evidence of the plaintiff are always questions for the jury to pass upon. The Supreme Court in Chicago City Ry. Co. v. Barker, 309 Ill. 321, announces the

accident occurred at 12:15 and 12:16, and that there is no evidence in the record that the latch of the door was either fastened or unfastened prior to the accident, and the only evidence is that when the door was open the latch was unfastened.

The testimony of the motorist and the witness is to the effect that the safety device had been fastened at the west end of the trip, and that the motorist had no opportunity to observe it at all times during the trip, and that just before reaching the accident it was fastened, and that it was unfastened; that after the accident it was unfastened; that the motorist was inspected, examined and tested by both the motorist and the witness; that it was in working order and that it was used during the remainder of the trip; that just before the accident it reached the motorist's car, and that he had his hand near the latch; that immediately after the accident he told the jury that he was picked up and taken to the hospital, and that he received treatment.

The evidence introduced by the plaintiff was not a

prima facie case and the facts raised a presumption of negligence against the defendant, and it was necessary to prove. The defendant contended that by showing the so-called blind sliding door was closed and fastened, the defendant did all that they could do and were not negligent, and to anticipate and prevent the accident to the plaintiff, and should not be held responsible. Truly that is not, in fact, with the fact that the sliding door suddenly opened, is properly a question of fact for the jury. The evidence of the evidence and whether the explanation of the accident sufficiently shows the evidence of the plaintiff are also questions for the jury to pass upon. The evidence that is Chicago City Ry. Co. v. Barker, 203 Ill. 331, 69 Am. 2d 211.



rule that applies in the instant case in these words:

"The contention of the appellant is that, if it was necessary for it to rebut the prima facie presumption of negligence raised by the occurrence of the accident in the manner stated, it did so by showing that the motorman was thrown from the car by an electric shock, which the appellant was unable to anticipate or prevent, and that, therefore, it should not be held responsible, because the car was not in the control of any one when it struck Eick's wagon. It was a question for the jury to determine, whether the explanation of the accident sufficiently rebutted the presumption in question. The credibility of such rebutting evidence is held by the authorities to be a question for the jury. (Uggula v. West End Street Railway Co., 160 Mass. 351; O'Flaherty v. Nassau Electric Railway Co., 54 N. Y. Supp. 96.). In actions brought for damages, alleged to result from fire, caused by the escape of sparks from locomotive engines, the fact of the communication of the fire to the property destroyed or injured is taken as prima facie evidence to charge with negligence the corporation or other person, who, at the time of injury, is in the use and occupation of the railroad, and in such cases, 'the question whether the defendant's evidence was sufficient, under all the circumstances, to rebut the prima facie proof of negligence, arising from the undisputed fact that the fire was communicated from the engine, was clearly a question of fact for the jury, and as to which the judgment of the Appellate Court is conclusive.' (Louisville, Evansville and St. Louis Consolidated Railroad Co. v. Spencer, 149 Ill. 97; Cleveland, Cincinnati, Chicago and St. Louis Railway Co. v. Hornsby, 202 id. 138.)"

One of the questions raised by the defendants is that the verdict is excessive. It appears from the evidence that the plaintiff sustained a fracture of the 9th rib, and X-rays that were used in evidence display a thickening and displacement of the 9th, 10th and 11th ribs, indicating fractures. An X-ray view of the head, which is a right lateral view, shows a fracture line beginning about three inches down from the curve of the vertex of the skull and passing directly upward and slightly forward. This evidence was disputed by the defendants. The plaintiff was also attended by a physician who examined and treated her, and found an unhealed wound on the occipital region of the head. There were discolorations and marked tenderness of the chest. The





plaintiff testified that "her head hurt right where the skull is," and that the upper part of her ribs on the right side hurt her; that following the accident she developed bronchitis; was sick in bed about two months the first time, and the very first day that she was up she had a relapse which kept her in bed during January and February of 1928; since her recovery from the relapse she has not been able to work, due to attacks of numbness and dizziness in her head, and these spells were accompanied by nausea. Of course, these facts are to be passed upon by the jury, and unless the verdict is so clearly excessive as to be unconscionable, the court will not reverse it on the ground of excessive recovery. The trial court had the opportunity of seeing and observing the condition of the plaintiff, and hearing the testimony and observing the witnesses, and we therefore can see no good reason to disturb the verdict on the ground that it is excessive. Spencer v. Chicago & N. W. Ry. Co. 249 Ill. App. 483.

The defendants contend that the admission in evidence of the plaintiff's X-ray Exhibits A, B, C, and D was erroneous because it was not shown that they accurately portrayed the condition of the plaintiff. The Supreme Court of the State of Illinois has passed on the question as to what evidence is necessary to qualify X-ray pictures. In Stevens v. Illinois Central R. R. Co., 306 Ill. 370, the court said:

"It must be established by competent evidence that the picture correctly portrays the condition it purports to represent before it has any place in the case. Some witness must be able to testify that the picture offered in evidence shows accurately what the witness saw when he looked into the body of the fluoroscope, or he must be able to say that he is skilled in the use of the X-ray machine and in taking and developing X-ray pictures, and that he took the picture offered in evidence with the body in a certain position, with a machine which he knew to be in good working condition and accurate, and that from his experience he was able to say that the picture produced by the machine was an accurate picture of the internal condition of the body. These methods of establishing the accuracy of the picture



[illegible]

are not exclusive, but whatever method is used, its accuracy must be established before it is admitted. Ligon v. Allen, 157 Ky. 101, 163 S. W. 538, 51 L. R. A. (N.S.) 842, note p. 858.

Therefore, it will be necessary to consider the record with reference to the evidence that qualified the doctor who took these pictures. The witness testified that he has made a particular study of X-ray work and has been reading and interpreting X-ray plates for over 30 years, and has been operating in his own X-ray laboratory since the war; that he had experience with the United States Government during the world war, one year's experience in the medical corps over-seas doing surgery consistently and persistently about 12 hours a day; was for seven months attached to the British Army as an American medical officer; that in connection with his work he has made a thorough study of the human anatomy, that is one of the required courses before you are admitted to practice; that he has examined the skeleton of the human body and the different muscle formations; that the first time he saw the plaintiff he examined her and made X-ray pictures. It was on October 28, 1927; that he saw her a month later in November, and again in January, 1928, and in March - March 14, 1928. Looking at plaintiff's Exhibit A he testified that it was a picture which he took of the plaintiff, Gertrude Hesser; that it was a picture of the right chest; that he uses a Victor X-ray machine, which is a standard type of machine; that in his opinion it was in good working condition the day he took the picture; that this Exhibit A is an X-ray picture taken in what is called the antero-posterior position, by that he meant the patient was lying on her back on the X-ray table and the film was beneath her chest; that the X-ray tube was suspended above her chest, the rays passing through from the front to the back, which is called the antero-posterior view;



the day following, but whether method is used, the  
accuracy must be established before it is admitted.  
J. E. A. (1911) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Therefore, it will be necessary to consider the  
recent and reference to the evidence that qualified the finding  
the fact these witnesses. The witness testified that he had  
made a preliminary study of X-ray work and had been reading and  
interested X-ray plates for over 15 years, and had been  
operating in his own X-ray laboratory since the war; that he  
had experience with the United States Government during the  
war, and that he was an expert in the medical X-ray work-  
ing being carried out, and particularly about the X-ray  
work; and that he was present at the British Army as  
an American medical officer; that in connection with his  
work he has made a thorough study of the human anatomy, that  
in one of the required courses before he was admitted to  
practice; that he has examined the skeleton of the human body  
and the different muscle formations; that the first class  
and the plaintiff he examined him and made X-ray pictures.  
It was on October 25, 1937; that he was not a month later  
in November, and again in January, 1938, and in March - April  
1938. Looking at plaintiff's records a few days later that  
it was a picture which he took of the plaintiff, and  
Hosmer; that it was a picture of the right chest; that he  
used a Vistar X-ray machine, which is a standard type of  
machine; that in the machine it was in good working condition  
the day he took the picture; that this machine is in an X-ray  
picture which is what he called the anterior-posterior position,  
by that he meant the patient was lying on her back on the X-ray  
table and the film was placed in front of her; that the X-ray tube  
was positioned about her chest, the X-ray passing through the  
the film to the wall, which is called the anteroposterior view;



that he uses the fluoroscope consistently; that he did not recall whether he examined this particular person with the fluoroscope, but uses the fluoroscope consistently to check the working condition and see whether or not the machine does it properly. The court allowed the exhibits to go in and permitted the witness to read the plate to the jury. Exhibits B, C, and D are pictures of Miss Gertrude Hesser, also taken in his office by him with the same Victor X-ray machine and the same technique was used.

Question: "Do these pictures correctly show from a medical and surgical viewpoint the view of the head?"

The answer by the doctor to the question was "Yes". The court permitted the plates to go in evidence.

It appears from this record that the X-ray machine was a standard machine and that the witness testified he consistently used the fluoroscope to determine whether the machine worked properly in taking the picture of the anatomy, although he was uncertain as to whether or not he used it in the case of the exhibits of the plaintiff; that in taking the Exhibits B, C and D he testified, in answer to a question, that from a medical and surgical viewpoint as to the view of the head, these exhibits were correct. That seems to follow the rule laid down by the Supreme Court in the case we have just referred to, that the evidence was required to show that the picture produced by the machine was an accurate picture of the internal condition of the body, which was complied with, and the evidence in this case seems to indicate that that rule was followed. There was no error in the admission of these exhibits in evidence.

The next question to be considered is, Was the Court

that he knew the Linotype machine; that he did not  
recall whether he examined this particular machine with the  
Linotype, but that the Linotype was generally in use  
the working condition and see whether or not the machine does  
it properly. The court allowed the exhibits to go in and  
permitted the witness to reach the place of the jury. Exhibits  
B, C, and D are pictures of Miss Gertrude Kassar, also taken  
in his office by him with the same Victor 3-ray machine and  
the same technique was used.

Question: "On these pictures correctly taken  
from a medical and surgical viewpoint the view of  
the body?"

The answer by the witness to the question was "Yes".  
The court permitted the witness to go in witness.

It appears from this record that the X-ray machine

was a standard machine and that the witness testified he

consistently used the Linotype to determine whether the  
machine worked properly in taking the picture of the anatomy,

although he was uncertain as to whether or not he knew it in  
the case of the exhibit of the picture; that in taking the

exhibits B, C and D he testified, in answer to a question,

that from a medical and surgical viewpoint as to the view of  
the body, these exhibits were correct. That seems to follow

the rule laid down by the Supreme Court in the case we have

just referred to, that the witness was required to show that

the picture produced by the machine was an accurate picture

of the anatomical condition of the body, which was required to be

and the witness in this case seems to indicate that this rule

was followed. There was no error in the admission of these

exhibits in evidence.

The next question to be considered is, was the body

in error in refusing the motion of the defendant to withdraw a juror because of the acts that occurred in the court room during the absence of court and counsel?

The defendants contend that while the court and counsel were in chambers discussing the instructions at the close of the case, the bailiff came in and reported that Mrs. Margaret Fitzer, the mother of the plaintiff and a witness, in the case had approached the railing of the jury box and addressed the jurors, telling them that the neighbors of the plaintiff who had testified on behalf of the defendants had lied about the plaintiff. The trial judge stepped out of chambers into the court room and taking his place upon the bench questioned Mrs. Fitzer and the bailiff. The court stated that he had noticed her conduct during the trial, and that her conduct was deliberate. The court then pronounced a sentence of five days in the county jail for contempt of court, although there is no order in the record finding this witness guilty of contempt of court. The plaintiff admitted that Margaret Fitzer was her mother, and that, apparently, she stepped to the railing of the jury during the absence of the court and counsel and stated that neighbors of the plaintiff who testified on behalf of the defendant, lied about the plaintiff; and conceded that the conduct of her mother was improper, and that the cutting of the verdict by the trial court to \$3,000.00 was punishment for an occurrence over which she the plaintiff had no control.

It is a well settled rule of law that the withdrawal of a juror rests in the sound discretion of the court, and that the ruling of the trial court in such case will not be cause for a reversal by the Appellate and Supreme Courts except



in error in retaining the motion of the defendant to withdraw  
the motion of the case first occurred in the trial court.

During the absence of court and counsel.

The defendant advised that while the court and

counsel were in chambers discussing the instructions of the  
case, the plaintiff came in and requested that the

defendant withdraw the motion of the plaintiff and a witness.

In the case had approached the telling of the jury box and

addressed the jury, telling them that the defendant

the plaintiff had testified on behalf of the defendant

had lied about the plaintiff. The trial judge stated that

of chambers into the court room and telling the jury that the

plaintiff had testified that the plaintiff and the defendant

stated that he had noticed her conduct during the trial, and

that her conduct was deliberate. The court then pronounced

a sentence of five days in the county jail for contempt of

court. Although there is no order in the record showing that

the plaintiff was in contempt of court. The plaintiff admitted

that Margaret Fisher was her mother, and that, consequently,

she stepped to the telling of the jury during the absence of

the court and counsel and stated that testimony to the plaintiff

who testified on behalf of the defendant, lied about the trial

and conceded that the conduct of her mother was improper,

and that the verdict of the jury by the trial court was

in error. The court then pronounced her an accomplice and she

plaintiff had no control.

It is a well settled rule of law that the plaintiff

of a jury case in the second discussion of the court, and

that the ruling of the trial court in such cases will not be

cause for a reversal by the appellate and Supreme Courts.

where there has been an abuse of such discretion.

In the case of the Chicago & Erie R. R. Co. v. Meech, 163 Ill. 305, the court says,

"The fact that a plaintiff or defendant, or witness, or any other person, suddenly swoons or faints, or gives vent to hysterical exclamations, or breaks down with hysteria, does not call for the granting of a new trial, - and especially so when the party claiming to be prejudiced does not ask for the withdrawal of a juror and continuance of the case, but lies by and speculates upon his chances for a verdict. It is hardly probable that the occurrence in question, affected in any way, the verdict. If it had any effect, it was as likely to prejudice as to help the case of the plaintiff. Of course, if it appeared that the dramatic occurrence that took place in the midst of the trial was intentional and for an improper motive it would afford ground for setting aside the verdict."

In the case now under consideration there is no evidence that seems to indicate that the plaintiff knew of or was responsible for the outburst of her mother in the presence of the jury. It appears too that the attorney for the defendants did not immediately make a motion to withdraw a juror, but then and there stated to the court, "I hate to make a mistrial out of this," and thereafter on the following day, before the beginning of arguments, the defendants moved the court for the withdrawal of a juror, which was denied. While it is true that the court should not countenance outbursts in the presence of the jury that might interfere with the orderly disposition of a case, still we cannot say that in this case the court in exercising its discretion was not justified by the record.

The defendants urge that the judgment entered is contrary to the verdict filed with the Clerk, and entered of record. The verdict of the jury which was filed at the time the verdict was rendered, finds the defendant guilty. There are several defendants. The jury found one of them guilty,

[illegible]

in the case now under consideration there is no evidence that means to indicate that the plaintiff knew of or was responsible for the conduct of her mother in the payment of the jury. It appears too that the plaintiff was the witness and not immediately with a motion to withdraw a juror, but that she was asked in the court, "I have no more a witness but of this," and thereafter on the following day, before the beginning of argument, the defendant moved the court for the withdrawal of a juror, which was denied. While it is true that the court should not remove witnesses in the presence of the jury that might prejudice with the already discussion of a woman, still we cannot say that in this case the court in exercising the discretion was not justified by the record.

The defendant says that the judgment entered is contrary to the verdict filed with the bill, and moved to set aside. The verdict of the jury which was filed at the time the verdict was returned, reads the defendant guilty. That is correct. The jury found one of them guilty.



but did not designate which one. It is contended that the court was in error when it entered a judgment against the defendants based upon such a verdict.

It appears from the declaration in this case that the suit is against the Chicago City Railway Co., Calumet & South Chicago Railway Co., the Southern Street Railway Co., corporations, and Henry A. Blair and Frederick H. Rawson, as receivers of the Chicago Railways Company, a corporation, all operating as Chicago Surface Lines, defendants. The same defendants appeared and filed a plea setting up that they are all operating as the Chicago Surface Lines. It does not appear to be an issue in the case that the defendants are operating separately, nor was a plea filed denying ownership, operation or control of the street car in question, but the entire record indicates that they are operating the street car lines in the manner to which the court has referred.

In the case of Bacon v. Schepflin, 185 Ill. 132, the court says:

"The verdict of the jury in this case was that they found the issues for the 'defendant', and inasmuch as there was more than one defendant, it is claimed by the appellants, that the verdict did not dispose of the issue as to all of the appellees, and, for that reason, did not authorize the entry of a judgment. Here the court instructed the jury to find the issues submitted to them 'for the defendants'. By some carelessness, or slip of the pen, the verdict of the jury used the word, 'defendant,' instead of the word, 'defendants,' their verdict being, 'We, the jury, find the issues for the defendant.' This objection is disposed of by what was said by the Appellate Court in Daft v. Drex, 40 Ill. App. 266, 'As to irregular and informal verdicts, the rule is that if, by looking into the record, the verdict can be seen to be responsive, it will be sustained. Looking into the record, it appears that there were two parties plaintiff. There is no uncertainty about this verdict; it finds the issues for the plaintiff and assesses the damages at \$112.40. (Citing a number of authorities.) The defendant was in no wise prejudiced by the informality in the verdict, nor by the entry of judgment thereon, and the judgment is affirmed.'

[illegible]

101 111 121 131 141 151 161 171 181 191 201 211 221 231 241 251 261 271 281 291 301 311 321 331 341 351 361 371 381 391 401 411 421 431 441 451 461 471 481 491 501 511 521 531 541 551 561 571 581 591 601 611 621 631 641 651 661 671 681 691 701 711 721 731 741 751 761 771 781 791 801 811 821 831 841 851 861 871 881 891 901 911 921 931 941 951 961 971 981 991 1001 1011 1021 1031 1041 1051 1061 1071 1081 1091 1101 1111 1121 1131 1141 1151 1161 1171 1181 1191 1201 1211 1221 1231 1241 1251 1261 1271 1281 1291 1301 1311 1321 1331 1341 1351 1361 1371 1381 1391 1401 1411 1421 1431 1441 1451 1461 1471 1481 1491 1501 1511 1521 1531 1541 1551 1561 1571 1581 1591 1601 1611 1621 1631 1641 1651 1661 1671 1681 1691 1701 1711 1721 1731 1741 1751 1761 1771 1781 1791 1801 1811 1821 1831 1841 1851 1861 1871 1881 1891 1901 1911 1921 1931 1941 1951 1961 1971 1981 1991 2001 2011 2021 2031 2041 2051 2061 2071 2081 2091 2101 2111 2121 2131 2141 2151 2161 2171 2181 2191 2201 2211 2221 2231 2241 2251 2261 2271 2281 2291 2301 2311 2321 2331 2341 2351 2361 2371 2381 2391 2401 2411 2421 2431 2441 2451 2461 2471 2481 2491 2501 2511 2521 2531 2541 2551 2561 2571 2581 2591 2601 2611 2621 2631 2641 2651 2661 2671 2681 2691 2701 2711 2721 2731 2741 2751 2761 2771 2781 2791 2801 2811 2821 2831 2841 2851 2861 2871 2881 2891 2901 2911 2921 2931 2941 2951 2961 2971 2981 2991 3001 3011 3021 3031 3041 3051 3061 3071 3081 3091 3101 3111 3121 3131 3141 3151 3161 3171 3181 3191 3201 3211 3221 3231 3241 3251 3261 3271 3281 3291 3301 3311 3321 3331 3341 3351 3361 3371 3381 3391 3401 3411 3421 3431 3441 3451 3461 3471 3481 3491 3501 3511 3521 3531 3541 3551 3561 3571 3581 3591 3601 3611 3621 3631 3641 3651 3661 3671 3681 3691 3701 3711 3721 3731 3741 3751 3761 3771 3781 3791 3801 3811 3821 3831 3841 3851 3861 3871 3881 3891 3901 3911 3921 3931 3941 3951 3961 3971 3981 3991 4001 4011 4021 4031 4041 4051 4061 4071 4081 4091 4101 4111 4121 4131 4141 4151 4161 4171 4181 4191 4201 4211 4221 4231 4241 4251 4261 4271 4281 4291 4301 4311 4321 4331 4341 4351 4361 4371 4381 4391 4401 4411 4421 4431 4441 4451 4461 4471 4481 4491 4501 4511 4521 4531 4541 4551 4561 4571 4581 4591 4601 4611 4621 4631 4641 4651 4661 4671 4681 4691 4701 4711 4721 4731 4741 4751 4761 4771 4781 4791 4801 4811 4821 4831 4841 4851 4861 4871 4881 4891 4901 4911 4921 4931 4941 4951 4961 4971 4981 4991 5001 5011 5021 5031 5041 5051 5061 5071 5081 5091 5101 5111 5121 5131 5141 5151 5161 5171 5181 5191 5201 5211 5221 5231 5241 5251 5261 5271 5281 5291 5301 5311 5321 5331 5341 5351 5361 5371 5381 5391 5401 5411 5421 5431 5441 5451 5461 5471 5481 5491 5501 5511 5521 5531 5541 5551 5561 5571 5581 5591 5601 5611 5621 5631 5641 5651 5661 5671 5681 5691 5701 5711 5721 5731 5741 5751 5761 5771 5781 5791 5801 5811 5821 5831 5841 5851 5861 5871 5881 5891 5901 5911 5921 5931 5941 5951 5961 5971 5981 5991 6001 6011 6021 6031 6041 6051 6061 6071 6081 6091 6101 6111 6121 6131 6141 6151 6161 6171 6181 6191 6201 6211 6221 6231 6241 6251 6261 6271 6281 6291 6301 6311 6321 6331 6341 6351 6361 6371 6381 6391 6401 6411 6421 6431 6441 6451 6461 6471 6481 6491 6501 6511 6521 6531 6541 6551 6561 6571 6581 6591 6601 6611 6621 6631 6641 6651 6661 6671 6681 6691 6701 6711 6721 6731 6741 6751 6761 6771 6781 6791 6801 6811 6821 6831 6841 6851 6861 6871 6881 6891 6901 6911 6921 6931 6941 6951 6961 6971 6981 6991 7001 7011 7021 7031 7041 7051 7061 7071 7081 7091 7101 7111 7121 7131 7141 7151 7161 7171 7181 7191 7201 7211 7221 7231 7241 7251 7261 7271 7281 7291 7301 7311 7321 7331 7341 7351 7361 7371 7381 7391 7401 7411 7421 7431 7441 7451 7461 7471 7481 7491 7501 7511 7521 7531 7541 7551 7561 7571 7581 7591 7601 7611 7621 7631 7641 7651 7661 7671 7681 7691 7701 7711 7721 7731 7741 7751 7761 7771 7781 7791 7801 7811 7821 7831 7841 7851 7861 7871 7881 7891 7901 7911 7921 7931 7941 7951 7961 7971 7981 7991 8001 8011 8021 8031 8041 8051 8061 8071 8081 8091 8101 8111 8121 8131 8141 8151 8161 8171 8181 8191 8201 8211 8221 8231 8241 8251 8261 8271 8281 8291 8301 8311 8321 8331 8341 8351 8361 8371 8381 8391 8401 8411 8421 8431 8441 8451 8461

The verdict of the jury in this case was that the defendant was guilty of the crime charged. The evidence was overwhelming and the defendant's guilt was beyond a reasonable doubt. The jury found the defendant guilty of the crime charged and recommended a sentence of life imprisonment. The court accepted the jury's recommendation and sentenced the defendant to life imprisonment. The defendant is now in the state prison where he will serve his sentence. The state has the right to prosecute a crime and the defendant has the right to a fair trial. The jury's verdict is final and the defendant must accept the consequences of his actions. The state has the duty to protect the public and the defendant has the duty to obey the law. The jury's verdict is a reflection of the community's sense of justice and the defendant's guilt is a fact that cannot be denied. The defendant's actions were a violation of the law and he must be punished accordingly. The state has the right to punish a crime and the defendant has the right to a fair trial. The jury's verdict is final and the defendant must accept the consequences of his actions. The state has the duty to protect the public and the defendant has the duty to obey the law. The jury's verdict is a reflection of the community's sense of justice and the defendant's guilt is a fact that cannot be denied. The defendant's actions were a violation of the law and he must be punished accordingly.

There are cases where a verdict, returned for the 'defendant', instead of the 'defendants' has been held to be defective; but these cases proceed upon the ground that the defendants are severally, as well as jointly, liable, and, therefore, by the terms of the verdict, it would be uncertain which one was found to be guilty. Here, however, the rights of appellees were identical. Their pleadings were joint, and a judgment could not be for or against either alone. The verdict settled all the rights involved, and was responsive to the issues. Although there was more than one defendant, there was but one defense. The instruction of the court required the jury to find the issues for the 'defendants', and not for the 'defendant' alone."

In the instant case, although there is more than one defendant, it appears from the record that there was but one defense, and this is clear from the instructions given by the court, which refer to the defendants collectively. There was no issue involved which was not determined by the finding of the verdict, and the technical omission of the letter "s", indicating thereby the singular instead of the plural number, cannot vitiate the validity of the verdict and the judgment entered by the court.

Finding no reversible error in the record, the judgment of the trial court entered in this case is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. CONCURS,  
FRIEND, J. NOT PARTICIPATING.



There are cases where a verdict, returned for the defendant, is based on the testimony of one witness only; but these cases are exceptional, and the general rule is that the testimony of one witness is not sufficient to sustain a verdict. In the case of the defendant, the testimony of one witness is not sufficient to sustain a verdict, unless the witness is a person of high character and credit, and the testimony is corroborated by other evidence. In the case of the plaintiff, the testimony of one witness is not sufficient to sustain a verdict, unless the witness is a person of high character and credit, and the testimony is corroborated by other evidence. In the case of the defendant, the testimony of one witness is not sufficient to sustain a verdict, unless the witness is a person of high character and credit, and the testimony is corroborated by other evidence. In the case of the plaintiff, the testimony of one witness is not sufficient to sustain a verdict, unless the witness is a person of high character and credit, and the testimony is corroborated by other evidence.

In the instant case, although there is more than

one defendant, it appears from the record that there was but one defense, and this is shown from the instructions given by the court, which refer to the defense collectively. There was no issue involved which was not determined by the finding of the verdict, and the factual question of the latter part of the testimony merely the question of the plaintiff's burden, cannot vitiate the validity of the verdict and the judgment

entered by the court.

Finding no reversible error in the record, the judgment

of the trial court entered in this case is affirmed.

THOMAS J. ALLEN, J.

WILLIAM L. ALLEN, J.  
JAMES H. ALLEN, J.

34270

MAE LEWIN and PAULINE LEWIN  
WILLIAMS,

Appellants,

vs.

GREENEBAUM SONS BANK AND TRUST  
COMPANY, a Corporation, Trustee, and  
Individually, E. E. GREENEBAUM, Trustee  
and Individually, and JAMES B. WESCOTT,  
Appellees.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

259 I.A. 639<sup>4</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

On October 28, 1929, Mae Lewin and Pauline Lewin Williams filed their amended cross bill in a cause in chancery No. 471109. They made defendants to the cross bill Greenebaum Sons Bank & Trust Co., and E. E. Greenebaum, individually and as trustees, James B. Wescott, James W. Good, Robert W. Childs, Dwight S. Bobb and James E. Brown.

As to Good, Childs, Bobb and Wescott, they demurred to the cross bill generally and specially, asserting as grounds for demurrer that the cross bill was not germane to the original bill; that it was multifarious; that the amended bill was in substance a bill for the review of a former decree entered on December 11, 1924; that the amended bill was not filed within two years as required by statute; that in other respects it did not comply with the essentials of a bill to review a decree, and that it showed on its face that cross complainants were guilty of laches.

By a motion of cross complainants the amended bill was thereafter dismissed as to Good, Childs, Bobb and Brown.

Greenebaum Sons Bank & Trust Co. and E. E. Greenebaum filed a joint and several motion in writing to dismiss the cross bill on the grounds that it was in the nature of a bill of review; that it was filed without leave of court first had and obtained more than two years after the entry of the decree which it asked





might be reviewed; that this decree was entered by consent, and that it was therefore not subject to review; that the amended cross bill did not state a former bill and proceedings or the decree as required by chancery practice; that Pauline L. Williams had been joined as a co-complainant without her consent; that the allegations of the bill as to newly discovered evidence were wholly insufficient under the established chancery practice.

The demurrer of Wescott was sustained, the joint and several motion of the several other cross defendants granted, and an order entered dismissing the cross bill, which order the cross complainants seek by this appeal to reverse.

Cross defendants characterize the amended cross bill as a bill in the nature of a bill of review. Cross complainants assert that it is a bill to compel an accounting by a trustee named under a trust agreement. The amended cross bill, which consists of 115 typewritten pages, is an unusual document and seems well designed to conceal the knowledge necessary to a decision upon the rights of cross complainants. The record which is per praeceptum does not contain the original bill, any of the pleadings filed, nor orders entered by the court prior to the filing of the cross bill, nor does the supposed cross bill give information as to the nature and character of these proceedings, except in a vague, incomplete and desultory manner.

We gather from the amended cross bill that cross complainants were defendants to an original bill of complaint filed by Francis C. Williams, individually and as trustee, under the living trust of Frank C. Lewin, deceased; that Mae Lewin is the wife of said Frank C. Lewin, and that Francis C. Williams is the husband of cross complainant, Pauline Lewin Williams; that Frank C. Lewin in his lifetime was engaged in the business of constructing apartment buildings and hotels; that he banked with the Greenebaum

might be reviewed; that this device was subject to review, and that it was therefore not subject to review; that the amended cross bill did not state a former bill and proceedings of the device as required by statutory provision; that Pauline L. Williams had been joined as a co-defendant; without further comment; that the allegations of the bill as to newly discovered evidence were wholly insubstantial under the established statutory provision.

The remedy of review was established, the bill was reversed motion of the several other cross defendants granted, and an order entered dismissing the cross bill, which order the cross complainants seek by this appeal to reverse.

These defendants submit that the amended cross bill as a bill for the review of a bill of review, does not state a cause that it is a bill to compel an accounting by a former owner under a trust agreement. The amended cross bill, which contains 115 typewritten pages, is an unusual document and seems well adapted to conceal the knowledge necessary to a decision upon the rights of these complainants. The record which is not presented does not contain the original bill, any of the pleadings filed, nor exhibits entered by the court prior to the filing of the cross bill, nor does the amended cross bill give information as to the nature and character of these proceedings, except in a vague, incomplete and conclusory manner.

It appears from the amended cross bill that cross complainants were introduced as an original bill of complaint filed by Pauline L. Williams, defendant, and as amended, under the living trust of Frank C. Lewis, deceased; that the Lewis is the wife of said Frank C. Lewis, and that Pauline L. Williams is the daughter of these complainants. Pauline Lewis Williams, now known as Lewis in this litigation was named in the answers of respondents as respondent Williams and related; that he related with the respondents



Sons Bank & Trust Company; that his attorneys during the last five or six years of his life were Elmer H. Adams, now deceased, and cross defendant Wescott, who was associated with Adams in the practice of the law, and that after the death of Adams Wescott became the sole adviser of Lewin; that Lewin and cross complainant Mae Lewin reposed great confidence in Wescott; that shortly after June 1, 1920, Frank C. Lewin sustained an accident through which he was confined to his bed until his death July 29, 1921; that while he was suffering from this injury and as he was largely indebted to the bank, he executed a trust agreement on July 2, 1921, which Wescott advised him to do; that on the same day he signed and published his last will and testament in and by which he devised all his property to his wife, Mae Lewin, and named her as executrix; that the property described in the trust agreement, which is attached to the cross bill as Exhibit "A" was of the value of about a million dollars; that upon the execution of this agreement the bank and M. E. Greenebaum, who were designated as trustees, went into possession and control of all this property; that the bank and M. E. Greenebaum knew of Lewin's physical condition at that time and that he was unable to take care of himself; that the agreement looked to the liquidation and settlement of the indebtedness of Frank C. Lewin; that Mae Lewin was unfamiliar with the amount, kind or whereabouts of her husband's property or the condition of his business; that she devoted all her time to caring for her husband during his illness; that she had faith in and relied on the bank, Greenebaum and Wescott; that the bank and Greenebaum failed to comply with certain provisions of the trust deed and made improper application of the proceeds of the property conveyed by it; that the bank and Greenebaum desired to resign as trustees and have a successor in trust to act under the trust agreement of July 2, 1921; that Mae Lewin was induced to and did



and that a third company; that his attorney during the last year  
of his years of his life was James E. Lewis, and deceased, and  
other persons named, who are mentioned with him in the  
petition of the law, and that after the death of James Lewis, Jr.  
and the wife of James Lewis, Jr. and other persons named,  
James Lewis retained Great Continental Insurance Company, New York, after  
June 1, 1880, James C. Lewis executed an agreement with them which  
he was entitled to his full share of the profits of the  
company and was entitled to the full share of the profits of the  
company as the bank, he executed a trust agreement on July 1, 1881,  
which terms were agreed to by him; that he was then and is now an  
equitable owner of the bank with and without any other person or persons  
all his property in his wife, and Lewis, and named in the  
trust; that the property mentioned in the trust agreement, which  
is attached to the trust bill as Exhibit "A", was at the time of  
about a million dollars; that when the execution of this agreement  
the bank and E. B. Greenbaum, who were partners in the bank,  
want into possession and control of all the property, and the  
bank and E. B. Greenbaum have of Lewis's property mentioned in  
that time and that he was unable to take care of himself; that the  
agreement looked to the liquidation and settlement of the business  
of James C. Lewis; that the bank and Lewis were partners with the  
amount, kind or character of the husband's property at the time  
of his business, that was stated in the bill of Lewis  
for the husband during his illness; that the bank and Green-  
baum failed to comply with certain provisions of the trust deed  
and made improper application of the proceeds of the trust deed  
conveyed by it; that the bank and Greenbaum failed to resign as  
trustees and have a successor in trust to get rid of the  
agreement of July 1, 1881; that James Lewis was entitled to his full

join in the bill of complaint with Pauline Lewin Williams to have a successor in trust appointed; that Mae Lewin engaged the services of James E. Brown to represent her but was not able to properly advise him with reference to the trust; that on or about December 11, 1924, Wescott prepared a decree which was entered in the Superior court of Cook county in case No. 412175; that this decree permitted the bank and Greenbaum to resign and found that under the trust agreement the sum of \$5,000 a year should be paid to Mae Lewin, no part of which amount had been paid by reason of the fact that there had not been sufficient funds in the hands of the trustee to make such payments; that the decree adjudged compensation to the bank and Greenbaum in the sum of \$16,000, of which \$9,500 had been paid; that the compensation of Good, Childs, Bobb and Wescott as attorneys for the trustees was fixed at the sum of \$8,500, and that the compensation of one Joseph Bokr was fixed at the sum of \$1,000; that Newby, Murphy and Walker, solicitors for cross complainants, were allowed the sum of \$2500 as solicitors' fees, and James Edgar Brown the sum of \$1,000 for compensation in connection with the proceeding.

The cross bill further states that the payments made to Newby, Murphy and Walker were illegal and unlawful; "that in the alleged or pretended reports and accounts filed in causes numbered 412175 and 412176, Superior court, on or about December 11, 1924, there is no mention or reference to any of the moneys and receipts of the Evanston Hotel being a part of the trust property; that the alleged and pretended Trustees' report of December, 1924, filed in cases numbered 412175 and 412176 are likewise silent and make no mention of the receipt of between \$20,000 and \$25,000, which was received by the Trustees from the sale of the real estate located in Evanston;" that other property belonging to the trust was not accounted for in these proceedings;



join in the bill of complaint with families Lewis Williams to have  
a successor in trust appointed; that Mrs Lewis entered the service  
of James M. Brown as representative but was not able to properly ad-  
vise him with reference to the trust; that on or about December 11,  
1934, Woodcock prepared a notice which was entered in the probate  
court of Cook County in case No. 41117; that this notice contained  
the name and address of the trustee and stated that money was held  
agreement the sum of \$5,000 a year should be paid to the trust, and  
part of which amount had been paid by reason of the fact that the  
had not been sufficient funds in the hands of the trustee to make  
such payments; that the notice required compensation to the trustee  
and Stenochron in the sum of \$15,000, of which \$5,000 was paid  
paid; that the compensation of \$5,000, which was paid to the trustee  
attorney for the trustee was fixed at the sum of \$5,000, and that  
the compensation of one lawyer was fixed at the sum of \$5,000;  
that Murphy, Murphy and Wilson, solicitors for the trustee,  
were allowed the sum of \$5,000 as solicitors' fees, and James Brown  
Brown the sum of \$1,000 for compensation in connection with the  
trust.

The case Bill Brown stated that the payments made  
to Murphy, Murphy and Wilson were all paid and allowed; that in  
the alleged or pretended reports and accounts filed in cases  
numbered 41117 and 41118, separate accounts, as or where number  
41, 1934, there is no mention or reference to any of the money  
and receipts of the Kymonick Hotel being a part of the trust  
property; that the alleged and pretended trustees, Brown and  
December, 1934, filed in cases numbered 41117 and 41118 and  
liberative action and made no mention of the receipt of between  
\$20,000 and \$25,000, which was received by the trustee from the  
sale of the real estate located in Evanston; that a check number  
bearing on the trust was not accounted for in these proceedings;



that cross complainant Mae Lewin is entitled to have paid to her \$5,000 a year with interest and is entitled to priority of payment to all of the claims and indebtedness, trustees' fees, costs, commissions and other expenses paid and disbursed; that Williams as trustee has likewise failed and neglected to make payments to Mae Lewin from January 1, 1925, the time he commenced to act under the trust agreement; that there is no longer any necessity for the continuance of the trust estate or of Williams as trustee; that all the property should be forthwith surrendered and delivered to Mae Lewin and Pauline Lewin Williams in the proportions of four-fifths and one-fifth respectively, or to a competent person to be appointed receiver thereof; that on the hearing of the causes Nos. 412175 and 412176 in the Superior court on or about December 11, 1924, what purported to be a statement of assets that had come into the possession of Greenebaum and the bank was submitted to the court and was a part of the certificate of evidence filed in these causes but was not in truth and in fact a statement of the assets that came into the hands of the trustees; that while the statement showed an aggregate of \$451,336.61, as a matter of fact the statement made no reference to moneys received from the operation of the Evanston Hotel Company from July 2, 1921, to December 11, 1924, of more than \$540,000, and that no reference was made to other assets; that the certificate of evidence is contradictory to the decree; that there was never any decree of accounting entered; that the alleged decree of accounting by the trustees was ineffectual, invalid, contradicted by the certificate of evidence, not based upon facts, and was contradictory to the evidence supporting the same, as shown by the certificate of evidence attached to the cross bill.

The bill makes the bank and Greenebaum, as trustees and individuals, and Wescott, parties defendant thereto and demands answer but not under oath; prays that an accounting may be taken





under the direction of the court of the amount due cross complainants from the bank, Greenebaum and Wescott, and that cross defendants may be required to pay the sums found due with interest; that the court shall appoint Mae Lewin and the Chicago Title & Trust Co. trustees to demand, receive and take over all of the balance of the money and property, assets and effects now remaining in the hands of Francis C. Williams, trustee, belonging to the trust.

In behalf of the bank and Greenebaum, it is contended that this bill is in the nature of a bill to review the decree entered on December 11, 1924, and it is urged that the same was properly dismissed because it did not set out the original bill and answer and the proceedings thereunder, because it was filed without leave of court, because it sought to have reviewed a consent decree, because it failed to show diligence but affirmatively showed gross neglect and delay on the part of Mae Lewin, and because it was filed after the expiration of the period allowed by law for the filing of bills of review or bills in the nature of bills of review.

If the cross bill is to be regarded as a bill of review, each and all of these points are well taken. Aholtz v. Purfee, 122 Ill. 286; Harrigan v. County of Peoria, 262 Ill. 36; Schaefer v. Wunderle, 154 Ill. 577; Cole v. Littledale, 164 Ill. 630. Indeed, cross complainants do not argue to the contrary but contend that their bill is neither a bill of review nor a bill in the nature of a bill of review, but contend, to quote the language of their reply brief, "that their amended cross bill was an original bill asking an accounting of the trust estate from the trustees. They point out that the so-called accounting of December 11, 1924, was in fact no accounting." If, however, the bill is regarded simply as an amended cross bill for an accounting, cross complainants are in no better position, for the reason that it is elementary that a





cross bill must be germane to the original bill and neither the original bill nor the decree entered therein are in the record. Hollan v. Kenner, 297 Ill. 332; Coombs v. Furey, 255 Ill. 61; Patterson v. Northern Trust Co., 231 Ill. 22. Moreover, it affirmatively appears that the decree was entered upon a bill brought by cross complainant, Mae Lewin; that she was duly represented by counsel, and that the decree entered upon her bill was a consent decree. Every presumption is in favor of the proceedings which were attacked, and in the absence of the original bill from the record and in view of the fragmentary nature of those parts of the decree which are set up in the cross bill, every presumption must be in favor of that decree. Deibel v. Paxier, 164 Ill. 639; People v. Drainage District No. 3, 236 Ill. 278; Peter Hand Brewing Co. v. Mauseada, 210 Ill. App. 153.

The case stated by the cross bill is wholly without merit, and the order which sustained the demurrer and motion to dismiss was properly entered and is affirmed.

AFFIRMED.

McSurely and O'Conner, JJ., concur.





34365

MAURICE S. STERN and CHARLES H. STERN,  
Individually and as Executors of the  
Estate of Esther Stern, Deceased,  
Appellees,

vs.

FAYE A. STERN et al., Defendants.

JENNIE A. LEVI and BECCA ALEXANDER,  
Appellants.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 640<sup>1</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

On January 31, 1925, Esther Stern, a resident of Cook county, Illinois, died testate, leaving a last will and testament which was executed by her on November 30, 1923, and which has been duly admitted to probate in the Probate court of Cook county. She left her surviving as heirs at law and next of kin her sons and daughters, Charles S. Stern, Maurice S. Stern, Ruby I. Stern, Faye A. Stern, Benold H. Stern, Becca Alexander and Jennie A. Levi. All of these children, with the exception of Becca Alexander and Jennie A. Levi, were unmarried, and testatrix resided with those unmarried children and was cared for by them prior to her death. Mrs. Alexander and Mrs. Levi lived apart from their mother and with their own families.

The will disposed of an estate of the approximate value of more than \$125,000. The real estate was of the value of about \$81,600. The will consisted of eleven paragraphs, by some of which trusts were created, and Maurice S. Stern and Charles H. Stern were named as executors and trustees.

This appeal is by Becca Alexander and Jennie A. Levi from a decree construing this last will and testament as prayed for in an amended bill filed by Charles H. and Maurice S. Stern as executors of said will and as individuals. Upon the filing of the

JAMES A. LEVI and CHARLES E. LEVI,  
 Executors of the  
 Estate of JAMES A. LEVI,  
 Deceased.

vs.

JAMES A. LEVI and CHARLES E. LEVI,  
 Defendants.

JAMES A. LEVI and CHARLES E. LEVI,  
 Plaintiffs.

2531A.610

IN PROBATE COURT OF THE COUNTY OF  
 SHERBORN, MASSACHUSETTS.

On January 21, 1918, James A. Levi, a resident of said  
 county, Middlesex, died testate, leaving a last will and testament  
 which was executed by him on November 20, 1915, and which has been  
 duly admitted to probate in the Probate Court of said county. The  
 last part surviving of him at the time of his death was and

daughters, Charles E. Levi, William E. Levi, Mary I. Levi, and  
 A. Levi, Emma E. Levi, Joseph A. Levi, and James A. Levi. All  
 of these children, with the exception of Joseph A. Levi and James  
 A. Levi, were unmarried, and Charles E. Levi resided with them until his

children and was cared for by them until he died. His children  
 and Mrs. Levi lived with him until his death and after that time

remained.

The will disposed of an estate of the decedent value  
 of more than \$100,000. The real estate was of the value of about  
 \$25,000. The will consisted of eleven paragraphs, of which the  
 firsts were granted, and Charles E. Levi and Emma E. Levi were  
 named as executors and trustees.

This appeal is by James A. Levi and Emma E. Levi

from a decree construing this last will and testament as stayed for  
 in an amended bill filed by Charles E. Levi and Emma E. Levi as  
 executors of said will and as individuals. Upon the filing of the

ORIGINAL PROBATE COURT

OF SHERBORN COUNTY

bill, Becca Alexander and Jennie Levi filed a joint and several demurrer, which was overruled. Jennie Levi elected to stand by her demurrer and an order was entered that the amended bill be taken as confessed by her. Becca Alexander answered denying the equity of the amended bill.

The cause was tried before the chancellor, who heard evidence which was in part presented by stipulation and in part given by Maurice S. Stern, who was permitted to testify over objection interposed in behalf of Becca Alexander that he was an incompetent witness under section 2 of chapter 51 of the Illinois Revised statutes.

The controversy in regard to the will concerns the meaning of the second paragraph, which is as follows:

"Second: All moneys that I have in the safety deposit box and vault and all mortgages and negotiable instruments that I may die seized with and possessed of are to be distributed as follows, to-wit: I give, devise and bequeath unto my son, Maurice S. Stern the sum of Three Thousand (\$3000.00) Dollars. I give, devise and bequeath unto my son, Ruby I. Stern, the sum of Two Thousand (\$2000.00) Dollars, provided, however, that he is not married to a girl of gentile birth as specified in Paragraph 'Fifth,' Section 'B', Page Two of this instrument. All of the balance of said moneys in said safety deposit box and vault together with all mortgages and other negotiable instruments, I give, devise, and bequeath unto my children, Charles H. Stern, Fay A. Stern, and Benold H. Stern, in equal shares, share and share alike.

"This paragraph pertains to the safety deposit box and vault that is held in the names of Charles H. Stern and Benold H. Stern and not to the private boxes and vaults of said Charles H. Stern and Benold H. Stern; this paragraph pertains to only the money that I have in deposit in the name of Charles H. Stern and Benold H. Stern, subject to my order, and does not pertain to the private accounts of said Charles H. Stern and Benold H. Stern; the private boxes and vaults and accounts of Charles H. Stern and Benold H. Stern are their own private property."

At the time the will was executed testatrix had on deposit in the Illinois Trust & Savings Bank of Chicago in the names of Charles H. Stern and Benold H. Stern the sum of \$21,243.93, which was deposited in a savings account. It was in the names of Charles H. Stern and Benold H. Stern, but was the property of the



Bill, Robert Alexander and James have filed a joint and several  
amendment, which was accepted. James has agreed to stand by me  
hereafter and an order was entered that the amended bill be taken  
as confessed by me. Robert Alexander answered denying the validity  
of the amended bill.

The case was tried before the undersigned, who heard  
evidence which was in part presented by stipulation and in part  
given by Robert A. Brown, who was permitted to testify over objection  
then interposed in behalf of Robert Alexander that he was an incompetent witness under section 7 of chapter 11 of the Illinois Revised  
Statutes.

The controversy in regard to the will concerns the validity  
of the second paragraph, which is as follows:

"I declare: All money that I have in the United States for  
and which and all mortgages and negotiable instruments that I  
may be seized with and possession of me to be distributed  
as follows: I give, devise and bequeath unto my son,  
Robert A. Brown the sum of Twenty Thousand Dollars (\$20,000.00) Dollars.  
I give, devise and bequeath unto my son, John A. Brown, the sum  
of Two Thousand Dollars (\$2,000.00) Dollars, provided, however, that he  
is not entitled to a gift of money in his own right.  
Robert A. Brown, John A. Brown, the two of said instruments.  
All of the balance of said money he said actually received for  
and which together with all mortgages and other negotiable in-  
struments, I give, devise, and bequeath unto my daughter, Mary  
A. Brown, my A. Brown, and David A. Brown, in equal shares,  
share and share alike.

"This paragraph contains no legal demand for and  
cannot be held as valid in the hands of Robert A. Brown and David  
A. Brown and not in the hands of John A. Brown and Mary A. Brown  
and David A. Brown; this paragraph contains no legal  
demand that I have in fact in the hands of Robert A. Brown  
and David A. Brown, together with my estate, and then said money  
to the entire amount of said Charles A. Brown and David A.  
Brown; the entire money and which and amount of Charles A.  
Brown and David A. Brown are their own private property."

At the time the will was executed Robert A. Brown and David  
possess in the Illinois Trust & Savings Bank of Chicago in the names  
of Charles A. Brown and David A. Brown the sum of \$27,500.00,  
which was deposited in a savings account. It was in the names of  
Charles A. Brown and David A. Brown, but not the property of the

testatrix and subject to be disposed of by Charles H. Stern and Benold H. Stern only in accordance with the instructions of the testatrix, although her name did not appear in respect to this account on the books of the bank.

At the time of the execution of the will the testatrix had on deposit in a safety deposit box at the Independence Safe Deposit Company \$4,500. The box or vault in which this money was placed was in the names of Charles H. Stern and Benold H. Stern, but the money was the property of Esther Stern, although her name did not appear upon the books of the company.

On the date of the execution of the will testatrix did not own any mortgages or negotiable instruments. However, she contemplated investing the whole or a part of her money then in the bank in such securities, but she did not, in fact, thereafter make any such investment.

At the death of the testatrix the amount of her savings account in the bank had increased to \$30,554.48. At that time she had in the box of the Independence Safe Deposit Company \$4610. She owned certain accounts receivable amounting to \$5695.46.

The amended bill alleged, as complainants contend and the court found, that it was the intention of the testatrix, by the second paragraph of the will to bequeath the money deposited in the safety deposit box and also the money deposited for her in the bank in the names of Charles H. and Benold H. Stern, if necessary, to pay the legacies in full; but defendants contend it was not the intention of the testatrix as expressed in said second paragraph to include the moneys which she had on deposit in the bank. Mrs. Alexander and Mrs. Levi contend that there is no ambiguity in this paragraph of the will either patent or latent; that no equitable right or trust is involved, and that the court was therefore without jurisdiction to construe the will, citing Warren v. Warren,

testatrix and subject to be disposed of by Charles E. Smith and  
 Harold W. Smith only in accordance with the instructions of the  
 testatrix, although her name did not appear in power in this  
 account on the books of the bank.

At the time of the execution of the will the testatrix  
 had on deposit in a safety deposit box at the bank a  
 safe deposit Company No. 100. The box of which in which this  
 money was placed was in the name of Charles E. Smith and Harold  
 W. Smith, and the money was the property of Harold W. Smith, although  
 her name did not appear upon the books of the company.

On the date of the execution of the will testatrix  
 did not own any mortgages or negotiable instruments, but she  
 contemplated investing the whole of a part of her money then in  
 the bank in such securities, but she did not, in fact, thereafter  
 make any such investment.

At the death of the testatrix the account of her money  
 account in the bank had increased to \$11,754.44. At that time she  
 had in the box of the safe deposit Company No. 100.  
 The account certain securities representing amounting to \$100.00.  
 The account still showed, as negotiable instruments and

the court found, that it was the intention of the testatrix, by  
 the second paragraph of the will to pay to her money deposited in  
 the safety deposit box and also the money deposited by her in the  
 bank in the name of Charles E. Smith and Harold W. Smith, if testatrix  
 to pay the balance in full; but testatrix wanted to pay out the  
 interest of the testatrix as expressed in this account mentioned  
 to include the money which was not on deposit in the bank. The  
 testatrix and her executors then there is no difficulty in this  
 payment of the will either before or after; that no securities  
 right or fund is involved, and that the money was deposited  
 without limitation as to the will, which is the only



279 Ill. 217; Buckner v. Carr, 303 Ill. 337; Carlberg v. State Savings Bank, 312 Ill. 181, and other cases holding that a court of equity will not assume jurisdiction to construe a will which is neither ambiguous nor uncertain, where there is no equitable right to be enforced.

We do not regard this second paragraph of the will as expressing the intention of the testatrix in such clear and unequivocal manner as to make a construction of the same unnecessary. It is, of course, elementary that a will must be in writing and that oral evidence is not admissible for the purpose of changing its provisions; but such evidence is admissible for the purpose of establishing the identity of property bequeathed or persons to whom it is bequeathed. It is not admissible for the purpose of importing into a will an intention which is not expressed therein, but the surrounding circumstances may be proved for the purpose of making clearer an intention which is uncertainly or doubtfully expressed. Engelthaler v. Engelthaler, 196 Ill. 230.

This second paragraph does clearly express the intention of the testatrix to give to Maurice Stern \$3,000 and to Ruby I. Stern \$2,000. If the second paragraph is to be construed as covering only the money in the safety deposit box, that intention cannot be carried out because there is not enough money in the box to pay these legacies. It is true, as defendants contend, that this fact alone will not control, if the language of the will is such as to make it impossible to infer such an intention. Nevertheless, this is a circumstance which may properly be considered in determining (as we are here required to determine) the identity of the funds to which the paragraph refers.

The first clause of this second paragraph purports to dispose of all moneys which the testatrix has in the safety deposit box and vault and "all mortgages and negotiable instruments" of





which she may die possessed. She owned no mortgages or negotiable instruments of any kind either when she made her will or when she died, and there is not sufficient money in the box to pay these legacies. However, if she had said nothing more, it would have been impossible, without inserting other words into her will (which we may not do) to ascertain therefrom that she intended to bequeath anything other than the property which was in the box.

However, testatrix has used other words. She undertakes in the latter part of the paragraph to particularly explain just where the property bequeathed is located. She says that the paragraph "pertains" to the safety deposit box and vault held in the names of Charles M. and Benold M. Stern. She adds that it does not pertain to private boxes and vaults of said Charles and Benold. This discloses only her intention to identify the property bequeathed so definitely that it might not be confused with the property of her sons, which, of course, she would have no right to dispose of by her will.

She next undertakes to state a further identification of the property covered by the paragraph. She says: "This paragraph pertains to only the money that I have in deposit in the name of Charles M. Stern and Benold M. Stern, subject to my order," then adds another clause stating that the paragraph does not pertain to the private accounts of her sons, as those were their own private property. By the language used in these clauses she does not limit the money that she has on deposit in the name of Charles M. and Benold M. Stern to that which was in the safety deposit box. She uses words broad enough to cover both the money on deposit in the box and the money on deposit in the bank. The language is positive. It covers the money in both places and identifies it as pertaining to the legacies named in the paragraph.

Such is the necessary implication from the language





used by the testatrix. It very distinctly describes the property which she does not undertake to devise, and the money in the bank is not included in either one of these negative statements.

This construction conforms to the clearly expressed intention of the testatrix to give to the two children named the sums specified in the paragraph; and the whole purpose of construing a will is to determine and carry out, if possible, the intention of the testatrix or testator.

Moreover, this construction gives a reasonable meaning to a clause of this paragraph which would otherwise have no meaning at all, and conforms to the rule that every word or phrase of a will should be given effect if it is possible to do so without defeating the general intention expressed. Marshall Field III v. Marshall Field IV., 297 Ill. 379; McClure v. McClure, 319 Ill. 271. This construction is not inconsistent with the intention of the testatrix as expressed in the whole will and also conforms to the well settled rule that as between two inconsistent clauses in a paragraph of a will, the later clause prevails unless inconsistent with the general intention. Leisman v. Leisman, 331 Ill. 237.

Moreover, this construction may be sustained upon the theory that this recital in these clauses of the paragraph amounts to a devise by implication. Hunt v. Evans, 134 Ill. 496; Lander v. Lander, 217 Ill. 289; Moble v. Tipton, 219 Ill. 182; Merchants Loan & Trust Co. v. Patterson, 308 Ill. 519.

We think the bill was properly filed upon the theory that there was a latent ambiguity which in the interest of executors, trustees and legatees it was necessary for the court to construe; that Maurice H. Stern was a competent witness, notwithstanding section 2 of chapter 51 of the Illinois Revised Statutes, because the controversy concerned only the distribution of the estate between

used by the testatrix. It very distinctly described the property which she had not intended to devise, and the money in the bank is not included in either one of these negative statements.

This construction conforms to the clearly expressed intention of the testatrix to give to the two children named the same specified in the paragraph; and the words "and any and all" in the will is to determine and carry out, if possible, the intention of the testatrix as testator.

Moreover, this construction gives a reasonable meaning to a clause of this paragraph which would otherwise have no meaning at all, and declares to the facts every word of sense of a will would be given effect if it is possible to do so without defeating the general intention expressed.

Y. Harold Field IV, May 1st, 1901; William A. Field, May 1st, 1901.

XVI. This construction is not inconsistent with the intention of the testatrix as expressed in the will and also conforms to the well settled rule that in between two inconsistent clauses in a paragraph of a will, the later clause prevails unless inconsistent with the general intention.

Moreover, this construction may be sustained upon the theory that this will is to be construed in the light of the facts of the testatrix's life.

James W. May, May 1st, 1901; James W. May, May 1st, 1901; James W. May, May 1st, 1901.

Alfred W. May, May 1st, 1901; James W. May, May 1st, 1901.

As to the will was properly filed and the property that there was a latent ambiguity which in the interest of the testatrix, it was necessary for the court to construe the will as a whole and not as a part, and the court is not bound by the construction of the will as stated in the opinion of the court in the case of the testatrix.



the heirs and legatees of the testatrix, of which the witness was one, and because his testimony did not in any way tend to reduce or impair the estate. Mueller v. Rebhan, 94 Ill. 142; Laurence v. Laurence, 164 Ill. 367; Bogart v. Bragg, 331 Ill. 160.

It was therefore proper for the court to allow solicitors' fees to complainants, and the sum of \$750 which was allowed is not, in our opinion, unreasonable.

There being no reversible error in the record, the decree is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

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34374

SUPERIOR ELECTRIC SUPPLY CO.,  
a Corporation,

Appellant,

vs.

JOHN B. SULLIVAN, Doing Business  
as Michigan Electric Co.,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 640<sup>2-</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

The record in this case discloses that on December 16, 1929, the Superior Electric Supply Co., a corporation, confessed a judgment against John B. Sullivan, doing business as Michigan Electric Co., for \$1357.80; that on December 23, 1929, a writ of execution issued to the bailiff of the Municipal court and was returned unsatisfied; that on December 27, 1929, the judgment creditor caused an affidavit for garnishment to be filed and a summons issued against John Pekara, as garnishee; that this writ was returned as served on John Pekara on December 28th "by delivering a copy thereof together with a copy of written interrogatories filed in said suit to him, and at the same time informing him of the contents thereof;" that no answer or appearance was filed in behalf of said Pekara; that on January 14, 1930, his default was entered and a conditional judgment was entered against him for \$1357.80, and that it was ordered that a writ of scire facias issue; that said writ of scire facias issued on January 16, 1930, and was returned by the bailiff; that he served the same on said John Pekara by delivering a copy thereof to him and at the same time informing him of the contents thereof, in the city of Chicago, January 17, 1930; that said writ of scire facias was returnable on January 27, 1930; that Pekara did not appear in response to said writ; that on motion of plaintiff judgment by default was entered against him for want of an appearance and the conditional judgment was confirmed and made final as



3414

SUPERIOR ELECTRIC SUPPLY CO.,  
a corporation,

Appellant,

vs.

JOHN E. WILLIAMS, doing business  
as William Williams Co.,  
Appellee.

3414

BEFORE THE COURT OF THE DISTRICT OF COLUMBIA  
IN REPLY TO THE PETITION OF THE APPELLEE.

The facts in this case disclosed that on January 14, 1930, the Superior Electric Supply Co., a corporation, commenced a judgment against John E. Williams, doing business as William Williams Co., for \$1137.50; that on January 17, 1930, a writ of attachment issued in the District of Columbia Court and was returned against appellant; that on January 17, 1930, the judgment against appellant was returned to be filed and a return was made against John Williams, as defendant; that this writ was returned as served on John Williams on January 17th by delivering a copy thereof together with a copy of the writ of attachment filed in said court to him, and at the same time informing him of the return of the writ; that no answer or objection was filed in behalf of said return; that on January 17, 1930, the return was entered and a conditional judgment was entered against him for the sum of \$1137.50, and that it was so served that a writ of selling his goods was issued; that said writ of selling was issued on January 18, 1930, and was returned to the District Court by delivery to him on said date by delivering a copy thereof to him and at the same time informing him of the return of the writ; that in the City of Chicago, January 17, 1930; that said writ of selling was returned on January 17, 1930; that return was not entered in response to said writ; that on motion of appellant judgment by default was entered against him for want of an answer and the conditional judgment was confirmed and made final on

of January 14, 1930; that an execution issued against Pekara on February 18, 1930, and was returned "No property found and no part satisfied" on February 28th thereafter; that on March 3, 1930, an affidavit for garnishment based on this judgment against Pekara was filed naming the Elston State Bank, a corporation, as garnishee; that summons issued against said bank and was returned as served on March 3rd; that on March 19th Pekara filed his petition to vacate and set aside the judgment against him theretofore entered, and that the court on March 22nd entered an order setting aside and vacating said order.

To reverse that order this appeal has been perfected by the judgment creditor, Superior Electric Supply Company.

As the motion to set aside this judgment was made more than thirty days after the entry of the judgment, the appeal involves a construction of section 21 of chapter 409 of the Municipal Court act, and it is contended on the authority of Bardonski v. Bardonski, 144 Ill. 284, and American Surety Co. v. Bliss, 214 Ill. App. 463, that the court erred in vacating the judgment.

That section, in substance, provides that orders and decrees of the Municipal court may be vacated and modified to the same extent as a judgment order or decree of a circuit court during the term at which the same was returned, provided the motion is entered thirty days after the entry of the judgment, order or decree, but if no motion to vacate or set aside has been made within thirty days after the entry of the judgment, order or decree the same shall not be vacated, set aside or modified except upon appeal or writ of error, or by a bill in equity, or by a petition to the municipal court setting forth grounds which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; but that errors in fact in the proceedings, which might have been corrected at common law by the writ of error coram

that summons issued against said bank and was returned as served on March 2nd; that on March 19th Peters filed his petition to vacate and set aside the judgment against the defendant bank, and that the court on March 22nd entered an order setting aside and annulling

It is further stated that the court has been advised by the following cases, *Superior v. Superior*, 101 Cal. 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



nobis may be corrected by motion, or that the judgment may be set aside in the manner provided by law for similar cases in the circuit court.

It is apparent that the question to be decided here is whether the petition filed by the judgment garnishee debtor Pekara sets forth facts which would justify a court of equity in granting a new trial.

The petition sets up that service of the garnishment summons was made by the bailiff by leaving a copy of the summons at the office of the petitioner during his absence; that petitioner believed such service to be insufficient and took no action thereon; that the scire facias was issued and served on the petitioner, returnable on or about January 27, 1930; that petitioner appeared in court on that date and was there at the opening of court but did not hear the case called; that upon inquiring of the clerk regarding the case he was informed that it was continued but was not informed as to the date; that he understood that he would be served with notice of further proceedings; that petitioner received no notice and had no knowledge that the hearing was set for February 4, 1930; that on that date final judgment was entered against him as garnishee by default, and that execution issued under said judgment was never served upon him, though plaintiff knew where he could be found in Chicago; that petitioner had no knowledge of the entry of the order of February 4, 1930, making the conditional judgment final, until about March 6th or 7th, 1930, when he was informed by the Elston State Bank that the money he had on deposit in said bank had been tied up by garnishment proceedings; that at the time of the service of the garnishment summons petitioner was not indebted to defendant Sullivan and was not indebted to him at any time during the proceedings; that he had no moneys or property

made in the manner provided by law for election cases in the

It is suggested that the question be decided before  
is whether the petition filed by the defendant constitutes a  
petition for relief which would justify a writ of habeas corpus  
or a writ of certiorari.

The petition sets up that knowledge of the respondent's presence was made by the petition by finding a copy of the petition at the office of the petitioner during his absence; that petitioner followed with service in his investigation and that he acted thereon; that the same finding was made and acted on the petition, so-  
turnable as to about January 27, 1934; that petitioner appeared in court on that date and was found at the signing of writs and did not hear the case called; that upon signing of the writs regard-  
ing the case he was informed that it was continued but was not in-  
formed as to the date; that he understood that he would be served with notice of further proceedings; that petitioner received no notice and had no knowledge that the hearing was set for January 4, 1934; that on that date that judgment was entered against him as garnished by default, and that execution issued against said judgment was never served upon him, known plaintiff knew of no one who would be found in Chicago; that petitioner had no knowledge of the entry of the order of February 1, 1934, making the continuation judgment final, until about June 21 at 1934, when he was informed by the United States Court that the money he had so judgment was not paid and that it was by default judgment; that at the time of the entry of the judgment against petitioner was not located in defendant's office and was not notified in time of any time during the proceedings; that he had no knowledge of the



in his possession or control belonging to said Sullivan, and that when petitioner appeared in court on January 27, 1930, he was ready to make proof of the fact that he was not indebted to Sullivan and that he had no moneys or property of any kind or nature owing to or belonging to Sullivan at that time; "that he is now ready and willing to show and prove that he was not at the time of the garnishment summons or at any time thereafter" indebted to the judgment debtor Sullivan, and that judgment should not have been rendered against petitioner; that upon receiving information from the Elston State Bank that his account had been garnisheed, he immediately called at the office of plaintiff and informed it that he was not indebted to Sullivan, whereupon he was advised by one of the agents of plaintiff to take the matter up with its attorney; that he called at the office of the attorney and informed him of the facts; that petitioner was never served with an execution; that he has title to real estate in Chicago; that the judgment is a lien thereon, but that no effort was made by plaintiff to serve petitioner with the execution or to collect the same out of and from the property owned by and in the possession of petitioner.

Defendant garnishee relies on Gottschall v. Kimbark State Bank, 220 Ill. App. 473, and Izzi v. Ialongo, 248 Ill. App. 90.

The rule is that a defendant who seeks the aid of a court of equity to the end that a judgment may be set aside and a new trial granted, must show that he has used reasonable diligence, that he was not negligent in permitting the judgment to be entered, and that he has a good defense upon the merits. If we assume that the petition here submitted shows a good defense, it is nevertheless defective in that it does not allege facts tending to show either reasonable diligence or a want of negligence. On the contrary it affirmatively shows a lack of diligence and gross negligence. The



in his possession or control belonging to said Sullivan, and that when petitioner appeared in court on January 27, 1924, he was ready to make proof of the fact that he was not indebted to Sullivan and that he had no message or property of any kind or nature owing to or belonging to Sullivan at that time; that he is now ready and willing to show and prove that he was not at the time of the judgment debtor Sullivan, and that judgment should not have been rendered against petitioner; that when receiving information from the clerk of said court that his account had been reviewed, he immediately called at the office of said clerk and informed it that he was not indebted to Sullivan, whereupon he was advised by one of the agents of said clerk to call the matter up with the attorney; that he called at the office of the attorney and informed him of the facts; that petitioner was never served with an execution; that he has title to real estate in Chicago; that the judgment is a lien thereon, but that no effort was made by said clerk to serve petitioner with the execution or to collect the same out of and from the property owned by and in the possession of petitioner.

DEFENDANT'S ANSWER TO PETITIONER'S COMPLAINT

JOHN J. SULLIVAN, JR., and JOHN J. SULLIVAN, JR., and JOHN J. SULLIVAN, JR.,

et al.

That this is a bill in equity and seeks the aid of a court of equity to the end that a judgment may be set aside and a new trial granted, and that petitioner has used reasonable diligence, that he was not negligent in permitting the judgment to be entered, and that he has a good defense upon the merits. It is assumed that the petition here submitted shows a good defense, it is nevertheless defective in that it does not allege facts tending to show either reasonable diligence or a want of negligence. On the contrary it affirmatively shows a lack of diligence and want of negligence. The

case is easily distinguishable in this respect from Izzi v. Isalongo, supra, on which the garnishee relies.

The court therefore erred in setting aside the judgment, and the order will be reversed and the cause remanded with directions to set aside the order appealed from and to enter an order denying the motion to set aside the judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely and O'Connor, JJ., concur.

in his possession or control belonging to said Sullivan, and that when petitioner appeared on January 27, 1930, he was ready to make proof of the fact that he was not indebted to Sullivan and that he had no money or property of any kind or nature which he or belonging to Sullivan at that time; "that he is now ready and willing to show and prove that he was not at the time of the garnishment summons or at any time thereafter" indebted to the judgment debtor Sullivan, and that judgment should not have been rendered against petitioner; that upon receiving information from the Elston State Bank that his account had been garnished, he immediately called at the office of the attorney and informed him that he was not indebted to Sullivan, whereupon he was advised by one of the agents of said bank to take the matter up with the attorney; that he called at the office of the attorney and informed him of the facts; that petitioner was never served with an execution; that he has title to real estate in Chicago; that the judgment is a lien thereon, but that no effort was made by plaintiff to serve petitioner with the execution or to collect the same out of and from the property owned by and in the possession of petitioner.

DEFENDANT'S EXCELSION MOTION FOR JUDGMENT

ELSTON STATE BANK, THE III. A. B. CO., and JAMES E. JAMES, JR. vs. JAMES E. JAMES, JR.

90.

The rule is that a defendant who seeks the aid of a court of equity to the end that a judgment may be set aside and a new trial granted, must show that he has used reasonable diligence, that he was not negligent in submitting the judgment as he entered, and that he has a good defense upon the merits. If he cannot show the petition have admitted shows a good defense, it is never shown defective in that it does not allege facts involving a gross negligent or a want of diligence. On the contrary it affirmatively shows a lack of diligence and gross negligence. The



case is easily distinguishable in this respect from Izzi v. Ialongo, supra, on which the garnishee relies.

The court therefore erred in setting aside the judgment, and the order will be reversed and the cause remanded with directions to set aside the order appealed from and to enter an order denying the motion to set aside the judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely and O'Connor, JJ., concur.

case is easily distinguishable in this respect from Ex parte

Ex parte, which is with the same result.

The court therefore acted in setting aside the

judgment, and the order will be reversed and the cause remanded

with directions to set aside the order appealed from and to enter

an order changing the motion to set aside the judgment.

Reversed and remanded with directions to set aside the judgment.

Respectfully submitted,  
J. H. C. O'Connell, Jr., counsel.

34397

SOUTH CHICAGO SAVINGS BANK,  
Individually and as Trustee,  
Appellee,

vs.

RICHARD D. DIVINE and ELLA F.  
DIVINE,  
Appellants.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 640<sup>3</sup>

MR. PRESIDING JUSTICE RITCHETT  
DELIVERED THE OPINION OF THE COURT.

On March 27, 1926, complainant bank filed a bill to foreclose a trust deed executed by appellants, Richard D. Divine and Ella F. Divine, his wife, on November 24, 1922, thereby conveying certain real estate to secure the payment of their note for the principal amount of \$8700 with interest. The bill alleged default of defendants; that Robert L. Perry and the Royal Building and Loan Association claimed an interest in the premises, and prayed for a foreclosure of the trust deed.

The Divines answered, charging the fraudulent sale by complainant of certain collateral held by it; that fraudulent representations were made by complainant as to the amount actually due upon the indebtedness evidenced by the note; that the same was obtained by means of intimidation and oppression; that Charles W. Kraft was a guarantor of the payment of the indebtedness, to secure which the note and trust deed of defendants were executed; and that Kraft was liable for and offered to pay the indebtedness but that complainants through fraud and negligence had failed and refused to collect the indebtedness or to make Kraft a party defendant to the suit.

These charges of fraud and oppression are amplified in an amended cross bill filed by defendants, which complainant answered, denying the material allegations thereof in detail.

The cause was put at issue and referred to a master,





who took the evidence and reported in favor of complainant. Objections by defendants were overruled, and the cause was heard by a chancellor upon these objections, which by order stood as exceptions. The chancellor overruled the exceptions and approved the report of the master and a decree was entered dismissing the cross bills for want of equity and directing the foreclosure as prayed by complainant. This decree is challenged by this appeal.

The several contentions made in behalf of defendant require a statement of the material facts, which may be summarized as follows:

Richard Divine and Benjamin Hedges, copartners, were indebted to complainant bank in the sum of \$13,700 upon three promissory judgment notes, which were signed by the partnership and by the individual partners. Hedges died December 24, 1921, and complainant was appointed the administrator of his estate. On April 1, 1922, complainant caused judgment to be entered on the notes against Divine as the surviving partner in the sum of \$14,349.57. An execution issued and was returned "No property found." Certain capital stock of the Stevenson-Benke Company had been deposited as security for these notes, and the same was sold, as the bank claimed, for \$3500.

Clarence W. Kraft was one of a number of other creditors of the partnership who held notes representing an aggregate indebtedness of \$19,000. These creditors and Divine opened negotiations with complainant with reference to the situation, and as a result of several conferences on November 24, 1922, two contracts in writing were made. One of these was between the Divines and Kraft. It recited the note obligations of the partnership and provided that Divine and Kraft would cause a corporation to be organized, to which the assets of the partnership should be trans-

who gave the evidence and reported in favor of conviction. These claims by defendants were overruled, and the cases were based on a confession upon these objections, filed by order about an hour later. The confession overruled the objection and returned the report of the master and a decision was entered sustaining the order. This for want of ability was directed for the defendant to prove by compulsion. This feature is omitted by this report.

The report against the case in behalf of defendant requires a statement of the medical facts which may be submitted as follows:

Richard Irvine and Benjamin Taylor, defendants, were indicted as principals in the case of Sir, the same were previously indicted before, which were signed by the physicians and by the medical personnel. Before said December 24, 1911, the defendant was appointed the administrator of his estate. On April 1, 1911, defendant caused judgment to be entered on the notes against Taylor as the principal debtor in the sum of \$12,544.87. An execution issued and was returned "no property found." Certain medical notes of the defendant's doctors had been deposited on account of the same notes, and the same had been, the same dated, for 1911.

Statement T. Taylor was one of a number of other persons late of the partnership who had been represented as witnesses independent of 1911. These included the Irvine family and a statement was submitted with reference to the affidavits, and as a result of several confessions on November 24, 1911, the defendants in writing were made. One of these was between the Irvine and Taylor. It further was made exhibited at the partnership and further that Irvine and Taylor again signed a confession as to the same, as which the records of the partnership should be taken.



ferred, and that said corporation should assume the indebtedness of the partnership and indemnify Divine and the estate of Hedges from partnership liabilities. Complainant, as administrator of the estate of Hedges, approved this contract subject to the approval of the Probate court.

The other contract was made between complainant, the Divines and Kraft. It recited the indebtedness held by complainant, the sale of collateral for \$3500, which the parties approved, and provided that Divine and Kraft would organize a corporation speedily; that this corporation would execute a note for the amount due from the copartnership, less a credit of \$5000 on account of the collateral which had been sold; that Kraft should guarantee the note of the corporation; that Divine and his wife would execute a mortgage of the premises described in the bill to secure the payment of this note, and that upon the performance of these things, prior to January 1, 1923, complainant would release its judgment claim.

On the same day this agreement was entered into, namely, November 24, 1922, the Divines executed their promissory note for the principal sum of \$3700, due on or before three years after date, to the order of themselves and by them endorsed, with interest at the rate of six per cent per annum, and delivered same to complainant together with the trust deeds securing the same, to be held by complainant as security for the indebtedness of the corporation known as the Hedges & Divine Sinc Company in the same amount, evidenced by the principal note of said corporation. On the back of said corporation note appears the following endorsement:

"Waiving demand, notice and protest, I guarantee payment of the within note at maturity. C. W. Kraft."

The corporation having been organized, Richard Divine was made secretary and manager and Kraft president, and the judg-



ment held by complainant was duly released.

On April 25, 1923, all of the common capital stock of this corporation was sold to one Woldenberg. Richard Livine continued to serve the corporation until July, 1923, when the plant burned down and the business ceased to function.

The indebtedness represented by the note of the corporation guaranteed by Kraft has not been paid, and the master finds that there is due on the same principal and interest amounting to \$11,739.29.

The foregoing summary of facts as found by the master are not in dispute, nor indeed do defendants argue specifically that any particular finding of facts by the master, as approved by the chancellor, is against the manifest preponderance of the evidence.

It is, however, contended on behalf of defendants that they are only secondarily liable on the note, and they insist that Kraft offered to pay the same and that complainant refused to accept payment, and that they are thereby discharged from liability. Cases are cited to the legal proposition, which it will be unnecessary to discuss since the master by his sixty-first finding held:

"No offer was ever made to the complainant by the said Clarence W. Kraft or anyone else to pay the said note of Hedges & Divine Zinc Co. for \$8,700.00."

Although defendants, as already stated, do not undertake to show that this finding is manifestly against the evidence, they have in their argument assumed that the evidence shows that there was an offer to pay the note, which was not accepted. The record does not sustain this assumption. It discloses that complainant brought a suit at law against Kraft on his guaranty, and that Kraft filed a plea in which he stated:



sent only by complaints was fully released.

On April 22, 1932, all of the common capital stock of  
only corporation was sold to one defendant. Defendant having been  
found to have the corporation until July, 1932, when the same  
was sold and the defendant moved to London.

The defendant was removed by the sale of interest-

position purchased by itself and some other party, and the matter  
which was there in the same periodical and financial matters  
was to April, 1932.

The foregoing summary of facts as found by the court  
are not in dispute, but indeed the defendant's own testimony  
shows any question of fact of facts by the court, as appears  
by the statement in regard to the defendant's statement of the  
defendant.

It is, however, necessary on behalf of defendant  
that they are only nominally liable on the stock, and that in-  
stead that facts shown to pay the same and that defendant refused  
to accept payment, and that they are jointly obligated to pay  
definitely. These are also in the legal proceedings, which is also  
the necessity in London about the matter by the defendant.

Nothing more:

"An offer was made to the defendant by the court  
to pay the same and to pay the same at London  
to the same and to the same."

Although defendant, as already stated, is not liable  
and as now that fact is not legally settled in London,  
they have in their arguments shown that the defendant were not  
there was no offer to pay the same, which was not accepted. The  
court does not believe this conclusion. It is believed that the  
defendant accepted a suit at law against them in his capacity, and  
that they filed a plea to which he agreed:

\*\*\* "that he has repeatedly offered to pay the amount of the note of the Hedges & Divine Zinc Company if the plaintiff would deliver to him the note and real estate mortgage for Eighty-seven hundred (\$700) Dollars signed by the said Richard D. and Ella F. Divine, covering the property above described," etc.

The answer of complainant specifically denies that Kraft had offered to pay the note

\*\*\* "'unless said note and trust deed, executed by Richard D. Divine and wife should be transferred' to Kraft and that said Divine and wife have refused to permit complainant to accept any payment of said corporation note from Kraft and thereupon transfer said trust deed to Kraft."

A substantially similar statement was made upon the trial of the case by the solicitor for complainant. The plea filed in a law suit between different parties was not competent evidence on this point against complainant. Sanitary Dist. of Chicago v. Joliet Pioneer Stone Co., 109 Ill. App. 283. At most, all this evidence tends only to show a conditional offer on the part of Kraft to pay, which there was no obligation on the part of complainant bank to accept. It is therefore unnecessary to discuss the numerous cases cited to the proposition of law for which defendant contends.

The further contention of defendants that the foreclosure cannot be maintained because of fraud in connection with the execution of the note and trust deed, is even less meritorious. It is urged, contrary to the finding of the master and the chancellor, that the bank falsely represented that upon a sale of the stock of the Stevenson-Benko Company, which complainant held as collateral, it had realized only \$3500. While it is true that complainant represented, there being no other bids, that it had purchased this collateral for that amount, the uncontradicted evidence shows that the sale was in fact disregarded at the time the settlement was made and defendants were credited with \$5600 on account of this stock, which was \$300 more than was finally obtained by complainant when the stock was sold to a third party. This indicates, not



... that he had previously offered to pay the amount of the note of the bank & living line company if the plaintiff would deliver to him the note and cashed check for the sum of five hundred (\$500) Dollars signed by the bank, which he had in his possession, covering the property above described, etc.

The answer of defendant was that the plaintiff had

not offered to pay the note

... "whereas said note and check were, executed by Plaintiff, and the same be returned, as Plaintiff had said, and Plaintiff was not required to pay the check to the bank, any payment of said corporation was from Plaintiff and not from Plaintiff said check to bank."

A substantially similar statement was made upon the

trial of the case by the collector for complainant. The plea

is a fact which different parties had not disputed

evidence on this point against complainant. Plaintiff said that

Plaintiff v. John J. Jones, et al., 100 Ill. App. 285. 286. As noted,

all this evidence tends only to show a conditional offer on the

part of Plaintiff to pay, which there was no obligation on the part

of complainant to accept. It is therefore unnecessary to

discuss the numerous cases cited as the authorities of law for

which defendant contends.

The further contention of defendant that the force

of the note cannot be maintained because of fraud is connected with

the execution of the note and check, is even less meritorious.

It is urged, contrary to the finding of the master and the court,

that the bank failed to cash the note and give a cash for the

of the five hundred dollars. This contention is also without

it had received only \$100. While it is true that complainant

responded, there being no other plea, that it had procured this

collector for that amount. The amount of the evidence shows that

the note was in fact dishonored at the time the statement was

made and defendant was credited with \$500 on account of this

stock, which was \$500 more than was finally obtained by complainant.

and when the stock was sold to a third party. This statement, not



fraud, but rather liberal treatment.

Complaint is made that the bank refused permission to Divine to sell the Aurora plant of the dissolved partnership. There is some evidence by defendant, Richard Divine, to that effect, but it is denied, and the master properly found (and the chancellor approved the finding) that the contention was not sustained by the evidence. At any rate, had all this been true, complainant was only insisting on its legal rights, and there is nothing in the evidence to indicate that it acted oppressively or arbitrarily.

It is next contended that as the note of the Hedges & Divine Zinc Company was not, so far as the evidence disclosed, presented for payment, defendants were discharged from liability. In this respect it is apparent that defendants have misapprehended the law applicable. Kraft is a guarantor on the note of the corporation, not an endorser; moreover, his guaranty waived demand and notice. Defendants are not parties to the note of the corporation at all. Their own note and trust deed were delivered as collateral security for the payment of that note, but we are not aware of any rule of law by which their liability could be made contingent upon presentment, demand or notice. The legal liability of defendants is that of surety for the payment of the note of the corporation, and a demand on the principal is not, as we understand it, necessary to establish the liability of a surety. 27 Cyc, 1542; 32 Cyc, 166. For the same reason notice by complainant to defendants that the corporation note had not been paid was unnecessary. 50 C. J. 175.

Even less meritorious is the contention that the note and trust deed were given without consideration. To say nothing of other considerations, the satisfaction of the judgment which had already been obtained against Divine on the partnership indebtedness





was a present and ample consideration. Nor is there even the semblance of merit to the further contention of defendants that by suing Kraft on his guaranty complainant had made an election of remedies which precludes it from maintaining this suit. That rule is not applicable, since the remedies by suit at law on the guaranty and by suit in equity to foreclose the trust deeds are not at all inconsistent. Stier v. Harms, 154 Ill. 476; Jackson v. Industrial Board, 280 Ill. 526.

In somewhat obscure language defendants invoke the principle that equity will in a single suit investigate and determine all questions incidental to the determination of the main controversy and will grant all the relief necessary to the accomplishment of the main object of the bill. Apparently, the thought is that the equities as between Kraft and defendants should have been settled in this suit. The issues as between Kraft and the Divines, however, are not germane to the issues made by the bill to foreclose. Wight v. Downing, 90 Ill. App. 1; Farlin and Orendorff Co. v. Galloway, 95 Ill. App. 60; Dinsmoor v. Rowe, 200 Ill. 555; Patterson v. Northern Trust Co., 231 Ill. 22. As a matter of fact, however, notwithstanding complainant's objection, the evidence was heard on the cross bills, and there was a finding that the allegations thereof had not been sustained. Moreover, Kraft would not have been a proper party to the bill. Walsh v. VanHorn, 22 Ill. App. 170.

The only point made that has the semblance of merit is that the solicitor's fees of \$2500 allowed were excessive.

However, it does not appear that the charges are unreasonable in view of the amount of work which complainant's solicitors were compelled to perform, for which the rather frivolous defenses interposed by defendants are responsible.

The decree is therefore affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.



was a present and single consideration. But in some cases the same  
violation of right to the former consideration of defendant that by  
being first on his property consideration was made an object of  
remedy which provided it that defendant was not. That this  
is not applicable, since the remedy by suit of law on the property  
and by suit is equally to foreclose the first deed and not of all  
instruments. Ellis v. Brown, 224 Ill. 473; Johnson v. Johnson,  
Board, 225 Ill. 284.

In numerous obscure language before cases the  
principle that equity will in a single suit investigate and determine  
all questions incidental to the enforcement of the same contract  
very well apply all the other remedy to the same object  
and of the same object of the bill. Therefore, the question is  
that the equities as between first and defendant should have  
been settled in this suit. The issues as between first and the  
divisor, however, are not germane to the issues made by the bill  
to foreclose. Ellis v. Brown, 224 Ill. 473; Johnson v. Johnson,  
Board, 225 Ill. 284; Johnson v. Johnson, 225 Ill. 284. As a matter of  
fact, however, notwithstanding defendant's objection, the de-  
fense was heard on the cross bill, and there was a finding that  
the allegations thereof had not been sustained. However, this  
would not have been a proper party to the bill. Ellis v. Brown,  
224 Ill. 473.

The only point made here was the enforcement of right  
is that the plaintiff's form of bill allowed such enforcement.  
However, it was not argued that the charges and allegations in  
view of the nature of such a bill defendant's relief was  
concluded to be proper, but which the former Illinois Supreme  
Court had sustained. The defense is therefore sustained.  
The defense is therefore sustained.

34425

MAX WERTHEIMER,  
Appellee.

vs.

BULLARD & BRETT HARDWARE CO.,  
a Corporation,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 640<sup>4</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries defendant pleaded not guilty and that it did not own, operate or control an opening in the sidewalk through which plaintiff fell and received his injuries.

There was a trial by jury and a verdict of guilty with damages of \$3250. Upon a remittitur of \$1000 defendant's motions for a new trial and in arrest were overruled and a judgment for \$2250 entered, which defendant seeks to reverse by this appeal.

It is urged that the verdict is against the law and the evidence and that the court erred in certain remarks made in the presence of the jury, and in refusing instruction No. 8 requested by defendant. It is also urged that the damages are excessive.

The accident in which plaintiff was injured occurred on January 20, 1928, on the sidewalk in front of the premises known as 77-79 West Lake street, Chicago. These premises were leased by the United Cigar Stores Company of America, No. 77 West Lake street to the Trumbull Safe & Vault Company, which was originally made a co-defendant, and No. 79 to defendant. Both leases provided that the lessees should keep the premises and sidewalks adjacent thereto in repair.

The United Cigar Stores Company was also originally named as a defendant, but at the close of plaintiff's case

34422

MAX BERNARD  
ADVISOR  
V.  
WILLIAM A. BENTLEY  
A CONFESSION  
A CONFESSION

259 I.A. 640

IN RE: BERNARD BENTLEY  
BENTLEY THE SON OF THE ABOVE

It is on record on the case the following information  
testament presented and failing and that it is not true, contrary to  
truth as appearing in the evidence presented which clearly tell and  
received his injuries.

There was a trial by jury and a verdict of guilty  
with damages of \$1000. Then a petition of error followed  
motion for a new trial and it being thereover and a habeas  
corpus for BENTLEY released, which judgment seems to be supported by this  
appeal.

It is urged that the verdict is against the law and  
the evidence and that the court acted in official capacity with in  
the presence of the jury, and in following instructions No. 4 and  
5 which are not correct. It is also urged that the charges are too  
onerous.

The complaint in which plaintiff was injured occurred  
on January 20, 1917, at the residence of the defendant  
known as 17-18 West Lake Street, Chicago. These premises were  
leased by the defendant under lease bearing of record, Vol. 17  
West Lake Street to the defendant under a lease bearing, which was  
originally made a no-rent contract, and Vol. 17 is defendant's copy  
which provided that the defendant should keep the premises and  
allowable repairs to be made in legal.

The defendant under lease bearing was also originally  
made as a no-rent contract, but at the time of plaintiff's case



instructions in its favor and in favor of the Trumbull Safe & Vault Company were directed by the court. Plaintiff's declaration was then amended so as to allege control of both No. 77 and No. 79 West Lake street by defendant.

The evidence shows without dispute that the premises at Nos. 77 and 79 West Lake street consisted of a brick and stone building of five or more stories and a basement, and that the basement extended from the building under the public sidewalk immediately in front of the premises; that there was an opening from the sidewalk into the basement and that this opening was covered by two iron doors which swung upward on hinges when pulled from above or pushed from beneath.

The evidence for plaintiff tends to show that he was employed as a carrier of mail for the United States Government; that at the time of the accident he was 62 years of age; that while he was walking on this sidewalk in the course of his duties, certain servants of defendant negligently pushed up these iron doors from beneath, causing him to fall and to be injured.

The testimony for defendant is to the effect that the doors were not moved or pushed up by defendant's servants. Mr. Brett, the president and general manager, and Mr. Bullard of defendant company, testified denying the testimony of plaintiff to the effect that shortly after plaintiff received the injury Mr. Bullard, in the presence of plaintiff, said to one of the employees, "I told you repeatedly to be careful when you opened these doors," and that the employee replied, "I could not see anybody coming along from where I was standing."

The employees of defendant, however, were not called as witnesses. Defendant makes much of the fact that plaintiff testified that the name of one of the employees was Tuthill and that plaintiff was mistaken in that regard; but the name of the

instructions in the letter and in favor of the Illinois State  
 Valley Company were directed by the court. The Illinois State  
 was then amended so as to allege: control of said Co. by said  
 IT was then amended by defendant.

The evidence shows witness testimony that the premises  
 at 101, 103 and 105 East Lake Street consisted of a brick and stone  
 building of five or more stories and a basement, and that the  
 basement extended from the building under the public sidewalk  
 immediately in front of the premises; that there was an opening  
 from the sidewalk into the basement and that said opening was  
 covered by two iron doors which swung upward on hinges when  
 pulled from above or pushed from below.

The evidence also distinctly shows to show that the  
 employees on a certain or well for the United States Government;  
 that at the time of the accident on the 22nd of April, 1901,  
 while he was working on this sidewalk in the basement of the building,  
 certain servants of defendant negligently pushed on these iron  
 doors from below, causing him to fall and to be injured.

The testimony of defendant is to the effect that the  
 facts were not moved on record as by defendant's counsel, Mr.  
 Pratt, the president and general manager, and Mr. Holland of the  
 Federal company, testified during the testimony of plaintiff in  
 the effect that shortly after plaintiff received the injury he  
 Holland, in the presence of plaintiff, said to one of the em-  
 ployees, "I like you personally to be careful when you speak  
 these facts," and that the employee replied, "I will not say  
 anything until I am told to do so."

The employee of defendant, however, who was called  
 as witness. Defendant names each of the four that plaintiff  
 testified that the name of one of the employees was "Hill" and  
 that plaintiff was mistaken in that regard; but the name of the

employee was not material or controlling. The issue of fact was submitted to a jury, and after a careful consideration of the evidence we think this court would not be justified in setting aside the verdict of the jury.

It is next contended that the court erred in making prejudicial remarks in the presence of the jury. In the course of his argument attorney for plaintiff said:

"The fact that the court directed a verdict for the other two-- it was our contention that everyone would have been liable, because they did not have protection there and it was a condition inherent with danger, but when the court ruled against us on the other two he submits it to you because there is direct evidence here that this man's injury was because of their neglect."

Whereupon, attorney for defendant said, "I object to that, going too far," and the court stated, "The court submits it to the jury for that reason, but they are to weigh the testimony."" There was no objection by defendant to the remarks of the court at that time, and the point is therefore not preserved for our consideration. Chicago City Ry. Co. v. Carroll, 206 Ill. 313.

Again, it is contended that the court erred in refusing to give instruction No. 8 asked by defendant. The instruction, however, erroneously stated the description of the premises as stated in the amended declaration and, apparently by inadvertence, failed to state the substance of the defense of non-ownership and control intended to be presented by the special plea, to which it referred. We cannot hold that the court erred in refusing this instruction as requested.

It is next contended that the amount of the judgment is excessive. As already stated, the court required a remittitur of \$1,000 from the verdict. Defendant did not offer any medical testimony. That for plaintiff showed that he went to a hospital on January 30, 1928; that he was dismissed to go back to work on April 3, 1928; that immediately after the accident he was treated





by his family physician at home; that the charge of the physician for his services was \$18.

Dr. Uterhart testified that when he saw plaintiff on January 21, 1928, plaintiff was suffering from several cuts and lacerations on the right shin bone and small scratches on the left; that the left leg was swollen; that plaintiff complained of pain; that the periostium was edematous around the cuts and was painful on touching; that he put the plaintiff to bed and told him to keep his leg absolutely quiet, to put some hot water dressings on, and to elevate the leg; that during the ten days thereafter in which he treated plaintiff there was little improvement in the infection; that the swelling was still there; that he was suffering from pain and could not use the leg; that there was a little hematoma in the tissue of the left leg; that after plaintiff went to the hospital he did not have anything further to do with plaintiff in the way of treatment.

Plaintiff testified that at the time of his injury he was taken in a taxicab to the first aid station in the Federal building where he received treatment, was bandaged up and taken home in a cab; that at that time he had great pain in both legs; that he had cuts in the right leg and some of the flesh was torn and the leg was bleeding; that the leg swelled up, became so infected and swollen that he thought it would be advisable to have an x-ray taken at the hospital and that he was removed to the Marine hospital for that purpose. He says that the leg was greatly swollen and it looked as if the heel was out of place; that the wounds were open and were running; that while at the hospital the leg was infected; that bandages were put on day and night; that he lay flat on his back and his leg was raised up on pillows; that he was in pain during all that time, and that after

by his family physician at home; that the charge of the physician for his services was \$15.

Dr. Usherant testified that when he saw plaintiff on January 21, 1938, plaintiff was suffering from several other lesions on the right shin bone and small cysts on the left; that the left leg was swollen; that plaintiff complained of pain; that the peritonsils were edematous around the tonsils and were painful on swallowing; that he put the plaintiff to bed and told him to keep his leg absolutely quiet, to put some hot water dressings on, and to elevate the leg; that during the two days thereafter in which he treated plaintiff there was little improvement in the infection; that the swelling was still there; that he was suffering from pain and could not use the leg; that there was a little numbness in the tissue of the left leg; that after plaintiff went to the hospital he did not have any relief further to the left plaintiff in the way of treatment.

Plaintiff testified that at the time of his injury he was taken in a taxicab to the first aid station in the Federal building where he received treatment, was bandaged up and taken home in a cab; that at that time he had great pain in both legs; that he had cuts in the right leg and some of the blood was torn and the leg was bleeding; that the leg swelled up, became so infected and swollen that he thought it would be advisable to have an x-ray taken at the hospital and that he was removed to the Marine hospital for that purpose. He says that the leg was greatly swollen and it looked as if the heel was out of place; that the wounds were open and were running; that while at the hospital the leg was infected; that bandages were put on day and night; that he lay flat on his back and his leg was raised up on pillows; that he was in pain during all that time, and that after



he was discharged from the hospital he was required to go back twice a week for treatments until sometime in April; that after these treatments he did not work full time but worked partial time for a number of days; that this continued until about the first of May; that he then worked quite steadily until the spring of the year, when he again had trouble with his leg; that it again became inflamed and he had to rest for three and a half months; that up to that time when doing work his leg would get tired and the circulation was bad; that he had pain in it all the time.

Dr. Flynn, who took care of plaintiff at the hospital, stated that at the time plaintiff went to the hospital he made a general physical examination and that it was negative except for infected lacerations of the right and left legs; that there was considerable swelling of the right leg and that there was pus from an incision about three inches long on the lower half of the interior surface of the right leg lying above the tibia; that there was a laceration of the left leg which was minor and which healed in a short period of time; that the progress of the laceration of the right leg was very slow, the infection was stubborn and did not heal readily; that when plaintiff was released from the hospital on April 3rd all the lacerations were healed and that on the lower half of the right leg there was considerable scar formation; that the extent of the scar formation, as he recalled, was about three inches long and probably a quarter to a half inch in width. He stated that the scar would not become normal skin again; that this scar tissue might become painful. In response to a hypothetical question, this witness stated that the injuries described would be sufficient to cause the pain and suffering plaintiff experienced after leaving the hospital.

This evidence as to the extent of plaintiff's injuries is uncontradicted, and while we think the damages allowed are

he was discharged from the hospital he was required to go back twice a week for treatment until sometime in April; that after these treatments he did not work full time but worked about one day for a number of days; that his condition until about the first of May; that he then worked quite steadily until the spring of the year, when he again had trouble with his leg; that it again became inflamed and he had to rest for three and a half months; that up to that time when doing work his leg would get tired and the inflammation was bad; that he had pain in it all the time.

Dr. Ryan, who gave the statement at the hearing, stated that at the time plaintiff went to the hospital he was a general physical examination and that it was negative except for infected lacerations of the right and left legs; that there was considerable swelling of the right leg and that there was two two an incision about three inches long in the lower half of the right leg; that the right leg lying above the knee; that there was a laceration of the left leg which was about one inch long in a short period of time; that the progress of the laceration of the right leg was very slow, the infection was slow and it did not heal readily; that when plaintiff was released from the hospital on April 27 all the lacerations were healed and that on the lower half of the right leg there was considerable scar formation; that the extent of the scar formation, as he recalled, was about three inches long and probably a quarter to a half inch in width. He stated that the scar would not become raised again; that this scar tissue was a keloid. In response to a hypothetical question, the witness stated that the injuries described would be sufficient to cause the pain and swelling plaintiff experienced after leaving the hospital.

This evidence as to the extent of plaintiff's injuries is uncontradicted, and while we think the damages allowed are

liberal, they are not so excessive as to make another trial necessary.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.



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34434

ALBERT P. SMITH,  
Appellee,

vs.

HARRY MANDEL,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 641

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

Snite sued Mandel in replevin to recover possession of certain described personal property. The replevin writ was served, but Mandel refused to deliver the chattels when demanded by the officer. Plaintiff thereupon declared in trover. There was a trial by the court and a finding with judgment against defendant for \$380.82.

There is no dispute as to the facts, and the points argued by defendant amount to the assertion that under the law and the evidence plaintiff ought not to have recovered.

It is established by the uncontradicted evidence that plaintiff is a loan broker licensed by the Department of Trade and Commerce under an Act approved June 14, 1917, (Smith-Kurd's Ill. Rev. Stat. 1929, p. 1742). Plaintiff claims title and right of possession to the goods in question under a chattel mortgage made and delivered by Peter and Marie Biron on October 14, 1929, to secure their note of that date for the sum of \$300.

Defendant, Harry Mandel, claims under a bill of sale made by Robert S. Weiss (the assignee of two chattel mortgages made by Peter Biron on September 25, 1928, and February 12, 1929, respectively), whereby the said goods and chattels were conveyed to Alfred Frieder and Edward Frieder, doing business as the Frieder Finance Association. The September mortgage was made to secure a note to

2433

ALBERT J. BATES,

Plaintiff,

vs.

HARRY MANDEL,

Defendant.

CLERK OF THE DISTRICT COURT

IN DISTRICT OF COLUMBIA

259 I.A. 641

THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA  
DOES hereby certify that the following is a true and correct copy of the original of the within.

Under and Mandel is plaintiff in certain possession

of certain essential personal property. The plaintiff with an

order, but Mandel refused to deliver the property and is ordered

by the court. Plaintiff's property is ordered to be delivered to the plaintiff.

A trial by the court and a finding also judgment against defendant

for \$250.00.

There is no dispute as to the facts, and the plaintiff

admitted by defendant as to the evidence that under the law and

the evidence plaintiff is entitled to have recovered.

It is established by the undisputed evidence that

plaintiff is a loan broker licensed by the Department of Trade and

Commerce under an act approved June 14, 1917, (Public Law No. 111).

Nov. 22nd, 1917, p. 1734. Plaintiff claims title and right of

possession in the goods in question under a chattel mortgage made

and delivered by Teter and Marie Simon on October 14, 1917, to secure

their note of that date for the sum of \$200.

Defendant, Harry Mandel, claims under a bill of sale

made by Louis E. Teter (the assigned of the chattel mortgage made

by Teter Simon on September 22, 1917, and February 14, 1918, respec-

tively), whereby the said goods and chattels were conveyed to Alfred

Frieder and Edward Frieder, doing business as the Frieder Finance

Association. The September mortgage was made to secure a bill of



the Frieders for the sum of \$277; the February mortgage was made to secure a note to the Frieders for the sum of \$293.

The evidence shows that these transactions were both usurious, and since the amounts involved were under \$300 and the Frieders were not licensed under the statute, the transactions were illegal. Defendant has prepared and presented an inadequate abstract, but the above facts clearly appear from an examination of the record.

Defendant Mandel purchased the goods and chattels from Weiss at a foreclosure sale and paid therefor \$400. There is evidence in the record which would justify a finding that the value of the property is much more than that sum.

A chattel mortgage in this State transfers the legal title to the mortgagee and the right of possession upon default. Van Zels v. Cleveland, 208 Ill. App. 387. The only question therefore for our determination in this record is whether the mortgages under which defendant claims were binding and enforceable under the facts as above set forth.

The statute in question has been upheld by the Supreme court as constitutional in People v. Stokes, 281 Ill. 159, and Harbison v. Stamer, 281 Ill. 450. In an opinion filed this day in this court in Baming et al. v. Peyser, general number 34279, we have held a chattel mortgage such as these under which defendant claims, to be void. For the reasons there stated these mortgages must also be held void and ineffectual to pass title or right to possession.

The judgment is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

The evidence shows that these transactions were made in the ordinary course of business for the sum of \$1000.

The evidence shows that these transactions were made in the ordinary course of business for the sum of \$1000. The evidence shows that these transactions were made in the ordinary course of business for the sum of \$1000.

The evidence shows that these transactions were made in the ordinary course of business for the sum of \$1000. The evidence shows that these transactions were made in the ordinary course of business for the sum of \$1000.

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The evidence shows that these transactions were made in the ordinary course of business for the sum of \$1000. The evidence shows that these transactions were made in the ordinary course of business for the sum of \$1000.

The evidence shows that these transactions were made in the ordinary course of business for the sum of \$1000. The evidence shows that these transactions were made in the ordinary course of business for the sum of \$1000.

34452

ROSE SMILOVICH,  
Appellant,  
vs.

REN E. COHEN and ARNOLD B. BERGER,  
Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 641<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment for costs in favor of defendants entered after plaintiff had elected to stand by her amended declaration, to which a special demurrer had been sustained.

The amended declaration in two counts indicates the intention of the pleader to state a cause against defendants for alleged malicious prosecution of a criminal action. It sets forth that plaintiff deservedly enjoyed the esteem of her neighbors and other citizens, and defendants knowing this, with the intention to injure her and to cause it to be believed that she was guilty of the crime of larceny, on March 11, 1927, entered into an unlawful agreement "purposely and maliciously" to wrong plaintiff; that pursuant thereto defendant Berger appeared before a judge of the Municipal court and falsely, maliciously and without any reasonable cause charged plaintiff with having stolen \$691.50; that said Berger caused the court to order its warrant for the arrest of plaintiff and procured the plaintiff to be arrested by her body; that a hearing was had on July 19, 1927, when the court held plaintiff to the grand jury and fixed her bond at \$2500; that the grand jury heard the evidence and determined that she was not guilty and acquitted and discharged her, and that the proceedings have been wholly determined.

It is urged in favor of defendants that the declaration does not allege the legal determination of the alleged prosecution in plaintiff's favor. In Gilbert v. Emmons, 42 Ill. 143, proof



JOHN WILLIAMS,

Appellant,

v.

SEN. E. COOK and SEN. W. B. HARRIS,

Appellees.

35 I.A. 641

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA  
 Division of the Court

This is an appeal by plaintiff from a judgment for costs in favor of defendants entered after plaintiff had elected to stand by her counsel selected on, in which a special demurrer had been sustained.

The amended declaration in the second instance was in

violation of the plaintiff's right to a grand jury indictment for alleged malicious prosecution of a criminal action. It was held that plaintiff's demurrer was overruled and the action was to proceed. The plaintiff is injured but not so much as to believe that she was guilty of the crime of larceny, on March 11, 1937, entered into an official agreement "purposely and maliciously" to bring plaintiff's first husband before a grand jury charged with a felony of the first degree and falsely, maliciously and without any reasonable cause charged plaintiff with having committed the same.

When the court so ordered the witness for the defense of plaintiff and produced the plaintiff to be arrested by her body and a warrant was made on July 15, 1937, when the court held plaintiff to the grand jury and fined her \$250.00; that the grand jury found the evidence and returned that she was not guilty and acquitted and discharged her, and that the proceedings have been wholly determined.

It is urged in favor of defendants that the declaration does not allege the legal violation of the plaintiff's constitutional right to a grand jury indictment. In United v. Harris, 22 U.S. 133, 134, 135.

that the grand jury had ignored the bill was held sufficient after verdict. A discharge upon habeas corpus was held sufficient in Miller v. Sellitt, 131 Ill. App. 196; Lebley v. Story, 117 Penn. St. 478, and Lowe v. Wartman, 47 N. J. L. 413.

It is true that the cases cited are distinguishable upon the fact that the question was raised after verdict, but we do not regard that fact as controlling in view of the allegations of the declaration as stated.

It is also urged that the averment that plaintiff was held to the grand jury of the Municipal court amounts to an assertion of probable cause and that the declaration was bad for that reason. Glenn v. Lawrence, 280 Ill. 531, is cited to this point. The case does not sustain the contention, and the contrary has been held by the Supreme court in Lyons v. Kanter, 285 Ill. 336.

It is also urged that the counts are double in that they allege facts showing cause of action for both malicious prosecution and false imprisonment. Watters v. De La Matter, 109 Ill. App. 334; Liogas v. Lowenguth, 215 Ill. App. 216, and Ogren v. Rockford Star Printing Co., 238 Ill. 408, are cited in this connection, but they by no means sustain the point.

It is entirely proper for the pleader in stating a cause for malicious prosecution to allege the imprisonment where such was the fact, in order to lay the foundation for proof of damages. 13 R.C.L., p. 70, sec. 53.

We do not wish to be understood as holding the pleading in this case to be perfect. There is much of surplusage in the declaration, but a motion to strike is the proper method of raising that question. Bowers v. Claxton, 212 Ill. App. 609, and authorities there cited.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and O'Connor, JJ., concur.

that the grand jury had ignored the bill and held no further action  
 verified. A subpoena upon James Y. Harrison was held returned in  
Wright v. Harrison, 111 Ill. 407, 1884, 111 Ill. 408, 1884.  
 408, and Wright v. Harrison, 111 Ill. 409, 1884.

It is true that the court cited the Wright v. Harrison  
 upon the fact that the question was raised there, and so  
 do not regard that fact as controlling in view of the distinction  
 of the question at issue.

It is also urged that the answer to the plaintiff was  
 held to the grand jury of the Wright v. Harrison case as an answer  
 of possible action and that the defendant was not in that position.  
Wright v. Harrison, 111 Ill. 407, 1884, is cited in this regard. The case  
 does not sustain the contention, and the necessary law has been said by  
 the Supreme Court in Wright v. Harrison, 111 Ill. 408.

It is also urged that the case is not decided in that way  
 effect being given to section 12 which contains the following  
 and false implication. Wright v. Harrison, 111 Ill. 407, 1884;  
Wright v. Harrison, 111 Ill. 408, 1884, and Wright v. Harrison, 111 Ill.  
Wright v. Harrison, 111 Ill. 409, 1884, are cited in this connection, but they  
 by no means sustain the point.

It is entirely proper for the Master in making a  
 cause for collection proceedings to assign the appropriate cause  
 was the fact, in order to lay the foundation for proof of liability.  
 111 Ill. 407, 1884, p. 408, 1884.  
 It is not true that the defendant is liable for the plaintiff  
 in this case as he is not. There is no evidence in the case  
 that a claim is made in the proper action of liability and  
Wright v. Harrison, 111 Ill. 407, 1884, and Wright v. Harrison,  
 there cited.  
 For the reasons stated the judgment is reversed and  
 the cause remanded.

REVEREND AND HONORABLE  
Wright v. Harrison, 111 Ill. 408, 1884.



34470

RUTH E. ABBOTT,  
Appellee.

vs.

APPEAL FROM THE MUNICIPAL  
COURT OF CHICAGO.

LOUIS STEIN, Doing Business  
under the Firm Name and Style  
of the Stone Permanent Wave  
System,

Appellant.

253 I.A. 641<sup>3</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment entered in favor of plaintiff for the sum of \$350, entered upon the finding of the court.

Plaintiff in her statement of claim alleged that defendant operated a system of beauty parlors under the firm name and style of Stone Permanent Wave System; that on or about July 24, 1929, she went to a beauty shop located at 6312 Cottage Grove avenue in the city of Chicago, which was owned and operated by defendant as a part of the said System, "for the purpose of getting a realistic permanent wave;" that this was a service regularly sold to the public by defendant in the ordinary course of business; that the process of permanent waving the hair of plaintiff was performed by one of the attendants of the shop; that as a result of the way and manner in which said attendant operated and managed said apparatus in giving plaintiff said realistic permanent wave, great injury was inflicted upon plaintiff, to-wit: "Many severe burns on the plaintiff's scalp; that within a few days thereafter large open sores on and about the scalp of the plaintiff developed from the above said burns, the said sores and burns becoming infected; that said infections spread in due time to glands in plaintiff's neck and shoulders causing plaintiff's body and general physical condition to be greatly weakened, leaving eight

34470

WILLIAM H. HENRY,  
Applicant.

VS.

JOHN HENRY, John Henry  
under the name and style  
of the John Henry  
System.

Plaintiff.

WILLIAM H. HENRY, Plaintiff,  
vs. JOHN HENRY, Defendant.

This is an appeal by defendant from a judgment re-

ferred in favor of plaintiff for the sum of \$100, entered upon the  
finding of the court.

Plaintiff in her statement of claim alleges that de-  
fendant operated a system of patent buttons under the name  
and style of John Henry (hereinafter called "John Henry")  
at St. Louis, who sent to a patent clerk located at St. Louis  
a patent in the city of St. Louis, which was issued and recorded by  
defendant as a copy of the said patent, "for the purpose of selling  
a patent system of buttons, and that this was a device for selling  
a patent system of buttons in the country under a patent of defendant.

That the system of buttons under the name of plaintiff was  
performed by one of the defendants of the company that on a result  
of the way and manner in which said system was operated and managed  
and registered in giving plaintiff said result this patent was  
great injury was inflicted upon plaintiff, to-wit: "HARRY HENRY"  
upon the plaintiff's name; that within a few days thereafter  
plaintiff gave notice to and about the name of the plaintiff located  
from the name said name, the said name and name of the name in-  
ferred; that said defendant upon the name in which in  
plaintiff's name and defendant under plaintiff's name and  
general system of buttons to be generally worked, having said

disfigurements on plaintiff's head preventing permanently<sup>hair</sup> growing in said scars."

Defendant filed an amended affidavit of merits in which he asserted a good defense to the suit upon the merits. He denied that he operated a system of beauty shops under the firm name of Stone's Permanent Wave System and denied that on July 24, 1929, plaintiff herein was at the beauty shop located at 6312 Cottage Grove avenue "which has been owned and operated by this defendant." The affidavit also denied that one of his attendants performed the work; denied that any injury or any severe burns had been inflicted on plaintiff's scalp; that sores developed; that the injury had become infected or that the infection spread as alleged.

It is first contended by defendant that as his affidavit of merits denied that he owned and operated the shop at which plaintiff received her injuries, the burden of proving such ownership and operation was cast upon plaintiff, and that she failed to prove this material fact. Defendant cites to this point Rasmussen v. Meilinger, 207 Ill. App. 21.

There are two answers to this contention. In the first place, the affidavit of merits does not deny that defendant owned and operated the specific shop at which plaintiff testified she was injured. The affidavit only denies that defendant operated a system of beauty shops under the firm name of Stone's Permanent Wave System, but it does not deny the operation and control of the particular shop at which plaintiff testified she received her injuries. In the second place, the testimony of a witness for defendant is to the effect that defendant did own a number of these shops; that plaintiff made complaint as to her injury and was referred to the downtown shop where the help was hired and sent out to the various other shops to do work. At this downtown place of business (the evidence shows) plaintiff was referred to the



[illegible]

It is thus concluded by defendant that on his left-

injury had become infected or that the infection derived an infection  
been inflicted on plaintiff's neck; that cancer developed; that the  
performed the work; denied that any injury or any severe burns had  
defendant. The witness also denied that he or his associates  
Gladstone Grove avenue" which has been owned and operated by him  
1937, plaintiff denied was at the time that he was at this  
name of "Farm's Treatment Home" and denied that on July 14,  
denied that he operated a system of therapy which under the name  
which he executed a good balance in the mind with the world. He  
defendant filed an amended affidavit of denial at another in

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[illegible]

medical expert who testified for defendant in this case and also to the attorneys who represented defendant and tried the case. The court properly found from the evidence that the shop at which plaintiff was treated was operated and controlled by defendant.

It is next urged that there is a variance in that the injuries alleged in the statement of claim are not the injuries proved; but that question was not raised on the trial and cannot, we think, be urged for the first time in this court. Moreover, we think the medical testimony offered in behalf of plaintiff tended to show that she received burns while at defendant's place of business as her statement of claim alleged.

It is next contended that plaintiff was guilty of contributory negligence in that she did not say anything to the operator when her hair, as she testified, was wound so tight by one of defendant's operators that it hurt her, and further in that she did not request another operator who was applying the electricity to turn the same off when her head hurt. The finding of the court is otherwise, and it is not argued that the finding is against the weight of the evidence. Presumably, defendant was licensed to conduct this business, and plaintiff had a right to rely upon the skill of the operators rather than upon her own sensations.

It is further alleged that plaintiff delayed too long before consulting a physician and that she applied boracic acid and bismuth to the wounds when, as a matter of fact, this was not the proper kind of treatment. There was medical evidence, however, tending to show that the acid and bismuth would at least do no harm. Moreover, these matters, if they are to be considered at all, would be material only in determining the amount of damages which should be allowed, and defendant does not argue that the damages are excessive.

In the same connection defendant argues as applicable





the proposition of law that a person who by his own negligence sustains a second injury cannot recover damages for such second injury. Here, again, this proposition, if assumed to be applicable at all, would go only to the amount of damages allowed.

It is further urged that plaintiff was not entitled to recover because it cannot be said, upon the record, that the injuries sustained could have been reasonably anticipated by the servant of defendant. We can hardly believe that this contention is seriously presented. He is dull indeed who is without knowledge that burns are harmful, painful, and may lead to very serious injury.

Complaint is made that the trial Judge took the management of the case out of the hands of the attorney. On this record there is some basis for that complaint; but it does not appear that defendant was prevented thereby from presenting any meritorious defense.

Plaintiff has not appeared in this court to support the judgment which was entered, but an examination of the record discloses no reversible error, and for that reason the judgment of the trial court will be affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

The possibility of law that a person who by his own negligence  
 contains a second injury cannot recover damages for such second  
 injury. Here, again, this question, it seems to be applicable  
 as all, which is only in the amount of damages allowed.

It is further stated that liability was not excluded  
 to recover because it cannot be said, under the facts, that the  
 injuries sustained would have been reasonably anticipated by the  
 servants of defendant. It can hardly be said that this defendant  
 is entirely negligent. He is still liable who is without knowledge  
 that there are certain, possibly, and may lead to very serious in-  
 jury.

Complaint is made that the trial judge took the  
 management of the case out of the hands of the jury. In  
 this regard there is some basis for such complaint; but it does  
 not appear that defendant was prevented from presenting  
 any evidence before the jury.

Defendant has not appeared in this court to dispute  
 the judgment which was entered, nor an execution of the record  
 disclosed no reversible error, and the fact remains the judgment  
 of the trial court will be affirmed.

Reversed.

Reversed and remanded, 11, 1905.

34339

LOUIS FELDMAN, Administrator  
of Estate of Joseph Feldman,  
Deceased,  
Plaintiff in Error,  
vs.  
WILLIAM F. FRANGER,  
Defendant in Error.

WRIT TO SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 641<sup>4</sup>

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover compensation for the death of Joseph Feldman in an automobile accident, upon trial suffered an adverse verdict and judgment. He seeks a reversal.

The accident happened at the intersection of Paulina and Division streets, Chicago. At this point Paulina runs south into but not across Division. Paulina continues south from Division from a point about 100 feet east of the point where it runs into Division from the north. The accident happened November 24, 1927, about 6:00 p. m., when Joseph Feldman, then about 63 years of age, was attempting to cross Division street on the westerly side of the intersection. He had reached the east-bound street car tracks in Division street when he was struck by defendant's automobile which was running eastward in the street car tracks. Feldman died from the injuries received.

The jury could properly believe that defendant was driving his car eastward on Division, going between 15 and 20 miles an hour; that as he approached the intersection at Paulina another car going east was running alongside of him on his left and somewhat ahead of him; that he first saw Feldman as Feldman came past the front of this other car and about 15 feet away from the defendant. Feldman's hands were outstretched, indicating that he was hastening to get by the first car. When he passed from in





front of this automobile he was then in the east-bound street car tracks and in the direct line of defendant's approaching car. Defendant put on both his brakes and sounded his horn, but Felcman was struck.

A witness who was sitting in the front seat with defendant testified that, when he first saw Felcman coming across the east-bound street car tracks, he was about seven feet away from defendant's car; that he was stooped-like, with his head down. There was evidence that defendant's automobile ran approximately 10 feet after striking the man, although a witness for plaintiff placed the distance at about 30 feet. Two witnesses, testifying for plaintiff, said they were going westward on Division near Paulina at the time of the accident and that there were no other automobiles or street cars at this particular point where the accident occurred.

Whether or not there was present another automobile, as stated by defendant and his witness, which interfered with their vision of anyone coming from the north at this point, was a question to be determined by the jury. It evidently believed that the accident was as described by defendant and that it was the too frequent unfortunate occurrence of a pedestrian hurrying to escape one automobile and inadvertently stepping into the pathway of another approaching car, when it is impossible for the driver of the latter to avoid striking him.

Plaintiff complains of statements alleged to have been made by defendant's attorney to the jury at the commencement of the trial. We find the abstract does not show any such statements. Reviewing courts will not examine the record to find grounds for reversing. Beterding v. Central Illinois Public Service Co., 223 Ill. App. 374; People v. Kozlowski, 315 Ill.104.

front of this building he was then in the neighborhood of the  
 street and in the street line of defendant's building was  
 defendant and on both the building and street line was  
 defendant was present.

A witness who was sitting in the street near the  
 defendant testified that, when he first saw defendant coming  
 the defendant entered the building, he was about seven feet away  
 from defendant's car; then he was stopped by the car and  
 him. There was evidence that defendant's building was the  
 property of the defendant and that, although a witness  
 for plaintiff alleged the defendant is about 10 feet, the witness  
 testified for defendant, that they were about 10 feet from the  
 rear building of the line of the building and that there were  
 other witnesses at that time at this building who were  
 the nearest witness.

Whether or not there was a witness who testified  
 as stated by defendant and his witness, which testified that  
 vision of anyone coming from the corner of the street, was a  
 then to be determined by the jury. It is further alleged that  
 defendant was not described by defendant and that it was the  
 defendant's attorney's contention of a defendant's building as  
 one accessible and independent of the building of the  
 another building car, that it is impossible for the driver of  
 the latter to avoid collision with.

Plaintiff's claim of damages alleged to have  
 been made by defendant's attorney in the fact of the  
 of the trial. He then the defendant does not show any  
 and. Defendant's claim will not remain the same as find  
 through the evidence. Defendant's claim is that  
 Service No. 111.111.111. 111.111.111. 111.111.111.



Neither do we find the criticized matter in the bill of exceptions proper. It seems to have been attached to the record preceding the bill of exceptions.

The court, at defendant's request, gave the following instruction:

"If you believe that the defendant was driving east on Division street and that until he observed the deceased he was driving in the manner in which an ordinarily prudent person would have driven under the same or similar circumstances, and that after he observed the plaintiff he acted as an ordinarily prudent person would have acted, you must find the defendant not guilty."

This is criticized for not containing the words, "from the evidence." The omission of such words is not reversible error where in other instructions it clearly appears that the jury had been instructed that its belief must be predicated upon the evidence. Coulter v. I. C. R. R. Co., 264 Ill. 414, and cases there cited. At least two other instructions were given in the instant case which informed the jury that its conclusion must be based upon the evidence, (the third and seventh instructions requested by plaintiff.) The instruction correctly states the law and covers both the time before and after the accident.

It was not error to refuse to give plaintiff's instruction No. 6, which contained the words that a speed in excess of 10 miles an hour "is prima facie evidence" that the vehicle was operated at a speed greater than was reasonable. The instruction embodies the language of paragraph 23, chapter 95a, Motor Vehicle act. The giving of this instruction has been condemned in Johnson v. Pendergast, 308 Ill. 255; Stansfield v. Wood, 231 Ill. App. 586; Harris v. Piggly Wiggly Stores, Inc., 236 Ill. App. 392; Stamas v. Waskow, 250 Ill. App. 364; Kiddle v. Mansager, 254 Ill. App. 68. In the light of these decisions it cannot be said that the refusal to give this instruction was erroneous.

testimony is to the effect that the defendant was not in the room at the time of the shooting. It is stated that the defendant was not in the room at the time of the shooting.

The court, in its opinion, found the following:

Instruction:

"If you believe that the defendant was in the room at the time of the shooting and that he fired the shot which killed the victim, you should find him guilty of murder. If you believe that the defendant was not in the room at the time of the shooting, you should find him not guilty."

This is criticized for not containing the words,

"from the evidence." The omission of such words is not reversible error where, as here, the instruction is clearly correct and the jury

has been instructed that the belief must be based upon the

evidence. People v. L. E. R. No. 11, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

these cases. As stated in the cases cited, the jury

must find that the defendant was in the room at the time of the shooting

based upon the evidence. (The court has previously instructed the jury

guided by the evidence.) The instruction correctly states the law

and does not state the law in any other way.

It was not error to refuse to give the defendant's in-

struction No. 2, which provided that the jury should find the defendant

of 10 miles an hour "in the same way" that the evidence was

presented at a speed greater than was reasonable. The instruction

embodied the language of paragraph 25, chapter 25, Motor Vehicle

act. The giving of this instruction has been condemned in Johnson

Y. 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000.

See; People v. James E. Smith, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000.

People v. Smith, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000.

Ill. App. 2d. In the light of these decisions it cannot be said

that the refusal to give this instruction was reversible.

It is urged that improper remarks were made by the trial court in the presence of the jury which required a reversal. Counsel for plaintiff objected to some statement made in argument by plaintiff's attorney and the court sustained the objection, whereupon plaintiff's attorney said "Exception" in an apparently offensive manner, as indicated by the remarks of the court as follows: "This is very, very embarrassing. \*\* I am very sorry. I believe it was my duty to rule against you. I ruled against you without seeking to offend you in any way. I am sorry you saw fit to give vent to your wounded feelings because it was my duty to rule against you. Proceed and do not do that again, please." Counsel for plaintiff did not object to these remarks but seems to have recognized that he deserved the reproof by replying, "I wish to beg the pardon of the court. It was not for that purpose." Exceptions may be taken in such a manner as to be contemptuous. Objections and exceptions should be made in a dignified manner and should not be an occasion for an exhibition of annoyance or anger. If the jury felt any prejudice against counsel because of this incident, he has only himself to blame.

We find no reversible error in the record, and the judgment is affirmed.

**AFFIRMED.**

Matchett, P. J., and O'Connor, J., concur.



It is urged that improper remarks were made by the  
trial court in the presence of the jury which rendered a verdict.  
Counsel for plaintiff objected to some statement made in argument  
by plaintiff's attorney and the court sustained the objection.  
An objection plaintiff's attorney said "Exception" in an apparently  
offensive manner, as indicated by the remarks of the court as  
follows: "This is very, very objectionable. I am very sorry.  
I believe it was my duty to take exception here. I think against you  
without seeking to offend you in any way. I am sorry you saw this  
to give vent to your vented feelings because if you say that to  
this against you. Proceed and do not be that easily offended."  
Counsel for plaintiff did not object to these remarks and does  
not have recalled that he observed the remark by plaintiff. "I  
wish to put the burden on the court. It was not the duty of  
me." Exception may be taken in such a manner as to be con-  
sidered. Objections and exceptions require to be made in a plain-  
tiff manner and should not be an exception but an objection to  
evidence or error. If the jury find any objection against  
counsel because of this incident, it may only amount to blame.  
We find no reversible error in the record, and the

judgment is affirmed.

THOMAS.

Submitted, E. J., and J. C. 11, 1900.

34353

FRANK BERNARD LADZIKOWSKI, a Minor,  
by Frank A. Ladzikowski, his father  
and next friend,

Defendant in Error,

vs.

FRANK B. KIMIOR,  
Plaintiff in Error.

WRIT TO SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 641

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding under Section 89 of the Practice act, by which the defendant sought the vacation of a judgment against him in the sum of \$7500 in an action in which plaintiff asked compensation for personal injuries alleged to have been caused by defendant's automobile.

Plaintiff commenced his action on June 21, 1929, and defendant was personally served with summons on the same day. Defendant did not file an appearance and on October 8, 1929, he was defaulted. November 22nd the cause was regularly called for trial in the absence of the defendant and the jury returned a verdict finding the defendant guilty and assessing plaintiff's damages in the sum of \$7500 and judgment was entered for this amount. The instant petition to vacate and set aside this judgment was filed by defendant January 7, 1930, at a subsequent term. Plaintiff filed a demurrer thereto which was sustained by the trial court and the prayer of the petition was denied. By this writ of error defendant seeks to have this order reversed.

Defendant presents three points for reversal. The first two relate to alleged errors of law in the original proceedings. It has been settled by numerous decisions that alleged errors of law cannot be corrected after term by Section 89 of the Practice act, but only errors of fact which must be some fact unknown to the court at the time judgment was rendered which, if known, would

THAT THE DEFENDANT'S ALLEGATIONS ARE UNPROVEN AND THAT THE DEFENDANT IS GUILTY OF THE CHARGE.

10.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at New York, New York, this 10th day of June, 1964.

100-100000-100000

THE DEFENDANT'S ALLEGATIONS ARE UNPROVEN AND THAT THE DEFENDANT IS GUILTY OF THE CHARGE.

There is a presumption under Section 16 of the Evidence

Act, by which the defendant's version of the facts is

accepted in the absence of evidence to the contrary. The

defendant's version of the facts is accepted in the absence of

evidence to the contrary.

The defendant's version of the facts is accepted in the absence of

evidence to the contrary. The defendant's version of the facts is

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evidence to the contrary. The defendant's version of the facts is

accepted in the absence of evidence to the contrary. The



have precluded the rendition of the judgment. The error of fact alleged must not be one appearing on the face of the record.

Chapman v. North American Ins. Co., 292 Ill. 179; McCord v.

Briggs & Turivan, 249 Ill. App. 516, and cases therein cited.

The petition alleges a number of appearances in court by the plaintiff without notice to the defendant or his attorneys. Defendant was duly served with summons and never filed an appearance or plea. Where a default has been entered against a defendant, he is not entitled to notice. McHulty v. White, 243 Ill. App. 572. The petition further alleges matters which transpired at the hearings, such as the manner in which the jury was sworn, the instructions and special interrogatories given. Such matters are not material in a proceeding under Section 89 of the Practice act.

The gist of the petition is that defendant, when he received the summons, mailed it to an attorney at law in Chicago in a duly addressed envelope with a proper stamp, but although this service was in June defendant did nothing further in the matter and was not informed that a judgment had been rendered against him until the December term, 1929, of the Superior court, when he immediately communicated with his attorney, who informed him that he had never received the summons in the mail or otherwise and did not know that any suit had been instituted in the above entitled cause. The petition alleged that the petitioner assumed that said attorney had received the summons because it had never been returned to him although the envelope had the correct return address of the petitioner. The failure of defendant to ascertain by inquiry or otherwise whether or not the attorney had received the summons was negligence on his part, such as does not come under the purview of Section 89.



The petitioner further alleges that he was informed that, after the institution of the suit it would not be reached for trial for at least one year, but from whom he received this information is not stated. He further alleges that he was informed by his attorney "during the December term 1929" that he had carefully examined the regular printed Common Law calendar, which is issued once a year at the September 1929 term, containing all cases filed prior to August 1, 1929, and that the case did not appear on this calendar. The petition falls short of alleging that the case did not appear on the regular trial call of the Superior court, and furthermore the alleged examination of the trial calendar seems to have taken place long after default had been entered against defendant and at the term following the term at which judgment was entered.

Defendant was clearly negligent in failing to follow the suit after he had been summoned. Section 89 of the Practice act was not intended to relieve a party from the consequences of his own negligence.

The order of the trial court was proper and it is affirmed.

AFFIRMED.

Matchett, F. J., and O'Connor, J., concur.





34368

MERCANTILE DISCOUNT CORPORATION,  
a Corporation,

Appellant.

vs.

DORSEY R. CROWE,

Appellee.

Appeal from Municipal Court  
of Chicago.

259 I.A. 642<sup>1</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks the reversal of an order denying its motion to vacate a prior order which vacated a judgment against defendant entered by confession for \$5347.

The judgment was entered November 22, 1928, on a note dated May 3, 1928, executed by the defendant, for \$4900, due four months after date, to the order of Harry M. Fisher and by him endorsed. The statement of claim alleged that it had been duly endorsed by Fisher and delivered to plaintiff, the legal owner thereof. January 28, 1929, defendant filed his petition asking that the judgment be vacated and set aside and he be given leave to defend. The matter was set up for hearing in February, when leave was given to file an amended petition. The hearing was then again continued and again defendant was allowed time to file his second amended petition within ten days. This time was further extended to March 18th and again extended, and then again extended. Finally it was set for hearing on April 15th, when, on motion of defendant, the petition to vacate was withdrawn, leaving the judgment in full force and effect. No further move to vacate the judgment was made until about ten months thereafter.

From the petition filed by plaintiff in support of its motion to vacate the order which vacated the judgment, it appears that on April 19, 1929, citation was issued against the defendant and again on May 16th; that at the request of defendant the citation

RECEIVED BY THE SECRETARY OF THE  
TREASURY  
JAN 10 1917  
U.S. DEPT. OF TREASURY  
WASHINGTON, D.C.

253 I.A. 642

RE. JOURNAL OF THE PROCEEDINGS OF THE SENATE

The Senate on January 10, 1917, passed the following resolution: That the Senate do pass the bill (H.R. 11111) entitled "An Act to amend the several Acts relating to the collection of duties on imports of certain goods, and for other purposes." The bill was passed by a vote of 75 yeas and 15 nays. The bill was then sent to the House of Representatives. The House on January 11, 1917, passed the bill by a vote of 219 yeas and 191 nays. The bill was then sent to the President for his signature. The President signed the bill on January 12, 1917. The bill became law on January 13, 1917. The bill is now in force.



proceedings were continued to June 27th and again continued to July 25, 1929, all of which continuances were granted on defendant's representation that the judgment would be settled; that on October 2, 1929, defendant paid on account of said judgment the sum of \$500.

February 11, 1930, defendant presented a motion and petition to vacate the judgment of November 22, 1929, to his Honor Judge Lyle, who on the same date entered the order that the judgment be vacated. February 21st plaintiff presented its motion and petition to expunge this order of February 11th.

The motion to vacate the judgment might well have been denied on the ground that defendant had not shown due diligence in moving to have the judgment vacated. Shortly thereafter defendant knew that the judgment was entered and in January, 1929, moved to have the same vacated. This motion was repeatedly continued until April 15, 1929, when, on defendant's motion, his petition to vacate was withdrawn. This left the judgment in full force and effect. It was not until February of the following year - almost ten months later - that defendant made another move towards having the judgment vacated. In Freeman v. Gounell, 203 Ill. App. 333, it was held that, where the defendant having knowledge of the judgment by confession had taken no steps to vacate the same until about two and a half months after it was entered, the motion should be denied on the ground of laches. See also Tyler v. Ross, 215 Ill. App. 503. While it is true that courts in the interests of justice exercise a liberal discretion in the matter of vacating a judgment entered by confession, yet such discretion must be reasonable. Here, the petition on which the trial Judge acted was not filed until over a year after the judgment was entered and during most of this time defendant did nothing; this delay amounted to laches.

Even if defendant had shown diligence, his petition does not set up any legal defense. It says, in substance, that





defendant was consulted by the brother of Harry M. Fisher, the payee in the note, and informed that he, the brother, was in trouble because of the use of certain trust funds placed in his hands for which he could not account; that the petitioner, being a friend, was urged to aid him financially and was asked to see Harry M. Fisher; that it was agreed between the petitioner and Harry M. Fisher that petitioner should give <sup>a</sup> judgment note on which Fisher could raise enough money to take care of the needs of the brother and that Fisher stated, "as soon as the immediate stress was over he would return said note to your petitioner;" that "on the following day the said payee advised your petitioner that the whole matter had been adjusted and that the note which your petitioner had signed in blank was to be destroyed." The petitioner further alleged that there was no consideration for the note and that plaintiff had full knowledge of the transaction leading up to the signing of said note.

The rule, as stated in Hodges v. Nash, 141 Ill. 391, is that, where a note is executed without consideration and for the accommodation of the payee, to be returned to the defendant later on, and a plaintiff acquires said note in a manner consistent with the purpose for which it was executed by defendant, such plaintiff has a good title. "The fact that a holder for value knows that the instrument is accommodation paper does not affect the liability of the accommodation maker, for the money paid out in the negotiation of the paper is a sufficient consideration to bind the maker." In 3 C. J. 255, the rule is stated that no consideration moving to the accommodating party is necessary to uphold accommodation paper. Accommodation paper is made with the express purpose of selling or negotiating the same for the benefit of the person accommodated, and after it has been sold or negotiated in the usual course of business for value the maker will not be





heard to assert that it was without consideration. This is so although the holder had knowledge, before the paper was transferred to him that it was accommodation paper. Miller v. Larned, 103 Ill. 563; Drum Construction Co. v. Mickel, 225 Ill. App. 520. The instant petition shows that the very purpose of giving the note was to raise funds to be used by the payee's brother to make good the accounts in which he was short. Defendant must have known that this money could be raised only by the sale of the note or by using the same as collateral. So far as appears, the plaintiff may have been the very party with whom the payee, Finkler, was to use the note to raise money, and if so, the want of consideration, as between the original parties to the instrument, was no defense to it in the plaintiff's hands.

No legal ground for vacating the judgment appears from this record. The motion of plaintiff to expunge the order should have been allowed. The order denying this motion will therefore be reversed and the cause remanded for further proceedings consistent with what we have said herein.

REVERSED AND REMANDED.

Ketchett, P. J., and O'Connor, J., concur.





34377

N. SWIAN,  
Appellant,

vs.

JAMES J. MALONEY and  
GLADYS MALONEY,  
Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY

259 I.A. 642<sup>2</sup>

MR. JUSTICE McSURRELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit, seeking to recover a real estate broker's commission, upon trial by the court suffered an adverse finding and judgment. He asks for reversal.

The sole question was whether plaintiff was the procuring cause of the exchange of the respective properties. In the summer of 1928 plaintiff had an interview with defendants and listed their property for sale. The price given him by defendants was \$35,500. At that time he had listed other pieces of property belonging to Anton and Mary Kurylo. Plaintiff sought to bring the parties together to effect an exchange. They were taken to see the respective properties and both seemed willing to make the exchange provided terms could be agreed upon. Defendants testified that they wanted their price of \$35,500, and wanted the Kurylos to assume real estate assessments. Mrs. Kurylo offered the defendants, as part of the exchange, a contract on another building, which she claimed was worth \$2400. The Maloneys were insisting that this contract was not worth its face value. Plaintiff endeavored to bring the parties together with reference to this contract, but without success. He also reported that he could not get the Kurylos to pay more than \$34,500, and they refused to assume the assessments on the property. The efforts of plaintiff to bring the parties to an agreement were unsuccessful and the court could properly find from the evidence that about

24377

AT THE COURT OF THE DISTRICT OF COLUMBIA  
IN AND FOR THE DISTRICT OF COLUMBIA  
IN THE MATTER OF THE ESTATE OF  
JAMES H. HARRIS, DECEASED  
ADMINISTRATOR

OFFICE OF THE CLERK OF THE COURT  
DISTRICT OF COLUMBIA

253 L.A. 642

24. JAMES HARRIS DECEASED THE ESTATE OF THE COURT.

Plaintiff, deceased wife, wishing to transfer a real estate broker's commission, upon which by the court entered an adverse ruling and judgment. He also the property. The sole question was whether plaintiff was the owner of the interest in the property of the deceased. In the summer of 1933 plaintiff was an interest with defendant and listed their property for sale. The value given him by defendant was \$35,000. At that time he had listed other pieces of property belonging to him and his wife. Plaintiff sought to bring the parties together to effect an exchange. They were both to see the respective properties and both seemed willing to make the exchange provided terms could be agreed upon. Defendant testified that they wanted their price of \$35,000, and wanted the Karpis to assume real estate assessments. Mrs. Karpis offered the defendants, as part of the exchange, a contract on a vacant building, which she claimed was worth \$2000. The Karpis were insisting that this contract was not worth the true value. Plaintiff endeavored to bring the parties together with reference to this contract, but without success. He also reported that he could not get the Karpis to pay more than \$10,000. The effort of the court to assume the assessments on the property. The effort of plaintiff to bring the parties to an agreement was unsuccessful and the court could properly find from the evidence that about

September 24th plaintiff gave up his attempts to make the deal. He did not see the parties from that time until sometime in January, 1929, when he discovered that there had been mutual conveyances exchanging the properties upon which he had been working.

Defendants testified that after this last visit from plaintiff in September they listed their property for sale or exchange with Andrew McSherry, a broker, who took hold of the matter and finally in January induced the Kurylos to accept the defendants' terms.

"When two brokers are employed and one of them enters into negotiations with the purchaser which fail and are abandoned, he will not be entitled to a commission because another broker subsequently succeeds, wholly through his own efforts, in making a sale to the same person. *Mechem on Agency*, 2242-2456-2459. *McQuire v. Carlson*, 61 Ill. App. 395."

Sheppard v. Cads, 227 Ill. App. 110.

We are of the opinion that the court was justified in applying this rule to the facts in the present case and that the judgment should be affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.



September 23rd Plaintiff gave up his attempt to make the deal. He did not see the parties from that time until sometime in January, 1930, when he discovered that there had been mutual conversations concerning the proposition upon which he had been waiting.

Plaintiff in September they listed their property for sale on exchange with Andrew Rosenberg, a broker, who was one of the parties and finally in January 1931 the parties to agree to defendant's terms.

"When the parties are satisfied and one of them writes the proposition with the defendant's name and the defendant, he will not be satisfied to a reasonable business man. Plaintiff, who is a broker, would not be satisfied to a reasonable business man. In making a sale to the defendant, he is not satisfied."

Defendant's Answer.

"It was by the parties that the property was listed in April 1931 and it was in the hands of the parties and that the judgment should be affirmed."

Plaintiff's Answer.

Defendant's Answer.

34391

In Re ESTATE OF JOHN A. KELLY,  
Deceased,  
WILLIAM F. DONAHUE,  
Appellee.

vs.

ROSE A. KELLY and FRANCIS J. KELLY,  
as Executors of the Estate of  
J. A. Kelly, Deceased,  
Appellants.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 642<sup>3</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek the reversal of a judgment of \$13,726.67 entered after trial by the court in an action upon two promissory notes alleged to have been executed by John A. Kelly, now deceased, and delivered to the plaintiff.

The claim was originally filed in the Probate court and allowed. Upon appeal to the Circuit court plaintiff had judgment.

The claim is upon two notes dated January 3, 1924, one payable April 13, 1927, after date, and the other April 15, 1928, after date, for the sum of \$6,000 each, signed by John A. Kelly and payable to the order of William F. Donahue, the plaintiff. Although defendants in their brief seem to question the execution of the notes, the point is not seriously argued. Two witnesses testified that they were present and saw Kelly sign these notes so that the execution was clearly proven.

As stated by both counsel, plaintiff's theory is that the notes were executed and delivered by Kelly in payment for legal services rendered to him by plaintiff in connection with income tax matters over which Kelly and the United States Government were in controversy. Defendant asserts that the notes were executed and delivered without consideration and, if upon consideration, said consideration was illegal.

Plaintiff is an attorney at law and for a period prior to 1920 was a Division Chief in the Internal Revenue Department.

IN RE ESTATE OF JOHN A. KELLY,  
Deceased,  
WILLIAM A. KELLY,  
Applicant.

VS.

ROSE A. KELLY and THOMAS A. KELLY,  
as Executors of the Estate of  
J. A. KELLY, Deceased,  
Defendants.

IN COURT REPORT.

IN RE ESTATE OF JOHN A. KELLY

AS TO THE VERDICT OF THE JURY IN THE CASE OF THE ESTATE OF JOHN A. KELLY.

At this report the jury returned a verdict of a bill of \$10,000.00 against the estate of the decedent in the sum of \$10,000.00. The jury also returned a verdict of a bill of \$10,000.00 against the estate of the decedent in the sum of \$10,000.00. The jury also returned a verdict of a bill of \$10,000.00 against the estate of the decedent in the sum of \$10,000.00.

The claim was originally filed in the Probate Court and allowed. Upon appeal to the Circuit Court plaintiff had judgment.

The claim is upon the notes dated January 1, 1924, one payable April 15, 1925, after date, and one dated April 15, 1925, after date, for the sum of \$1,000 each, signed by John A. Kelly and payable to the order of William A. Kelley, the decedent.

Although defendant is liable under the condition of the notes, the point is not seriously argued. Two witnesses testified that they were present and saw Kelly sign these notes at the time the execution was made.

As stated by both counsel, plaintiff's theory is that the notes were executed and delivered by Kelly in payment for legal services rendered to him by plaintiff in connection with the matters over which Kelly and the United States Government were in controversy. Defendant asserts that the notes were executed and delivered without consideration and, if upon consideration, that consideration was illegal.

Plaintiff is an attorney at law and for a period prior to 1924 was a Division Clerk in the United States Department.



He subsequently returned to the practice of law and represented Kelly in various matters. Plaintiff testified that the two notes, for which he was suing, were given to him for services in relation to a claim investigation by the Internal Revenue Department in Chicago in relation to fraudulent schedules filed by Kelly in 1918, 1919 and 1920, and for the failure of Kelly to file any schedules for the years 1913 to 1917, inclusive.

About October, 1921, Kelly came to plaintiff, stating that he was in a very bad predicament, as he was in a serious controversy with the Internal Revenue Bureau. Kelly was worth about \$750,000. Covering nearly fifty pages of the record, plaintiff testified in detail as to his activities and services in these matters, which involved trips to Washington and many negotiations with the officials of the Internal Revenue Department. These seem to have been successful. He testified that he had saved Kelly \$51,000 in taxes and also prevented criminal prosecution growing out of his failure to pay his income taxes.

There is a letter in the record written by Kelly to his wife and son, stating that he has executed the promissory notes in question which "are given to Mr. Donahue for very efficient services rendered in my behalf relative to my failure to file any income tax schedules" for some years. The letter further states: "Mr. Donahue actually effected a saving to me of more than Fifty-one Thousand Dollars and prevented criminal action against me. In the event of my death occurring before the maturity of these notes I direct that you make provision to pay them without any court action."

The only evidence offered tending to question the services was by two witnesses connected with the Income Tax Department. Mr. Arndt testified that he found no records in the Chicago office of the Income Tax Department of any controversy with Kelly, but further stated that such controversies would not be brought to

He subsequently returned to the practice of law and represented Kelly in various matters. Testimony testified that the two notes, for which he was suing, were given to him for services in connection with a claim investigation by the Internal Revenue Department in Chicago in relation to fraudulent deductions filed by Kelly in 1913, 1919 and 1920, and for the failure of Kelly to file any schedules for the years 1913 to 1917, inclusive.

In October, 1921, Kelly came to Chicago, Illinois, stating that he was in a very bad predicament, as he was in a serious controversy with the Internal Revenue Bureau. Kelly was worth about \$750,000. According to the records of the Bureau, Kelly testified in detail as to his activities and services in these matters, which involved trips to Washington and many negotiations with the officials of the Internal Revenue Department. There seem to have been successful. He testified that he had saved Kelly \$1,000 in taxes and also prevented criminal prosecution growing out of his failure to pay his income taxes.

There is a letter in the record written by Kelly to his wife and son, stating that he had executed the promissory notes in question which "are given to Mr. Donahue for very excellent services rendered in my behalf relative to my failure to file my income tax schedules" for some years. The letter further states: "Mr. Donahue actually offered a saving to me of more than \$115,000 and thousands of dollars and prevented criminal action against me. In the event of my death occurring before the maturity of these notes I direct that you make provision to pay them without any legal action. The only evidence offered tending to establish the

services was by two witnesses connected with the Bureau tax department. Mr. Arnold testified that he found no records in the Chicago office of the Income Tax Department of any controversy with Kelly, but further stated that any controversy would not be found in



his attention until the amount was fixed and that such a controversy, as plaintiff testified to, might have occurred without the witness knowing about it or it showing upon the records of his department. Mr. Woodward, the other witness, testified much to the same effect - that there might have been a controversy, but, if there was no assessment made, there would be no record of the same. Plaintiff's counsel very convincingly argues that this testimony tends to support plaintiff, who had succeeded in effecting a compromise without making any record of the controversy which might reflect upon his client, Mr. Kelly.

We are of the opinion that the evidence justified the finding of the court and that there was sufficient consideration for the execution and delivery of the notes.

Defendant's counsel makes some suggestion that, even admitting that the services were rendered, such services were illegal. This is apparently predicated upon the fact that Kelly should have paid his income tax. It would not follow that the services of an attorney in his behalf would be illegal. There is no evidence that any improper means were used by plaintiff. It would be a singular situation that the proper services of an attorney in assisting a client to extricate himself from an illegal position should ipso facto be considered illegal so that the attorney could not recover compensation therefor.

The latter part of defendant's brief states that the court erred in sustaining objections to the following questions. Then follow some twelve questions in the brief with only a general statement that the objections to them should have been overruled. We are not favored with any reason or argument. Mere statements in the brief that these rulings were erroneous are not sufficient. As said in People v. Kozel, 303 Ill. 112:



his attention until the moment was fixed and then with a sudden  
start, he instantly testified that, since then, he had been  
witness knowing about it or he thought that he thought it was the  
particular. At the same time, he testified that he was  
made effect - that there were some other witnesses, but, if  
there was no assessment made, there would be no report of the same.  
His testimony was somewhat very completely stated that this testimony  
looks to support himself, who had testified in this way a very  
gracious without making any record of the testimony which might  
be made with his own, but, really.  
To one of the questions that the witness testified the  
finding of the court and that there was no testimony  
for the execution and delivery of the will.  
Believing that the witness was not competent to testify, and  
stating that the witness was not competent, and stating that he  
feels. This is especially stated from the fact that really  
really have said his testimony. It would not follow that the  
nervous of an attorney in his court would be illegal. There is  
no evidence that any lawyer would be competent to testify. It  
would be a singular situation that the proper evidence of an at-  
torney is needed a client to establish himself from an illegal  
position which is illegal as evidenced illegal as that the at-  
torney could not recover compensation therefor.  
The father and of defendant's father stated that the  
only cited in testimony of defendant in the following testimony.  
That father was having possession in the suit with a contract  
statement that the objection to them should have been overruled.  
We are not favored with any reason of argument. There is no  
in the fact that these things were overruled and not overruled.  
As said in Smith v. Smith, 100 Ill. 110.

"If the counsel do not have sufficient confidence in their position to point out specifically wherein the alleged error exists, we will not explore the record and the authorities to find some grounds on which to reverse the judgment."

City of Benton v. Blake, 289 Ill. 211.

It is the established rule that the conclusions of a trial judge who saw and heard the witnesses should not be disturbed unless it clearly appears that such conclusions are wrong. City of Quincy v. Kemper, 304 Ill. 303, and many other cases.

The judgment was proper and it is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

"It is desired to not have anything published in this paper  
aim to point out especially wherein the alleged errors exist,  
we will not mention the names and the allegations in this case  
except as they are necessary to the case."

THE STATE OF TEXAS, COUNTY OF DALLAS.

It is the statement of the undersigned that the undersigned of a  
trial judge who has heard the evidence should not be allowed  
unless it clearly appears that such evidence was taken. This

of the State of Texas, County of Dallas, 1911.

The undersigned and subject are in the office.

TESTIMONY.

Witnessed by me, J. L. and C. L. 1911.



34400

JOHN E. McELDOWNEY, Administrator  
of Estate of Todd Mosley, Deceased,  
Appellee.

vs.

METROPOLITAN LIFE INSURANCE COMPANY  
OF NEW YORK and LEOLA STRINGER,  
Defendants.

On Appeal of LEOLA STRINGER,  
Appellant.

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

259 I.A. 642<sup>4</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This chancery case involves the question whether the administrator of the estate of Todd Mosley, deceased, complainant, or Leola Stringer, a defendant, is entitled to the benefits of a life insurance policy in the sum of \$2500. The master found for Leola Stringer but the chancellor found for the estate, and Leola Stringer appeals. She is a niece of Mosley, who also left two sisters, Emma White and Frances Nelson; these would receive a portion of the proceeds of the policy if the estate is entitled to the same; otherwise Leola Stringer is entitled to the entire proceeds.

The policy was taken out November 9, 1927, payable upon the death of the insured to his estate. The policy contemplates that a beneficiary may be named with the right of the insured to revoke such designation or without the right of revocation. January 28, 1928, the beneficiary was changed from the estate to Leola Stringer with the right of revocation, and subsequently, in June, 1928, the policy was endorsed, making her the beneficiary without the right of revocation. September 5, 1928, Todd Mosley died and John E. McEldowney was duly appointed administrator by the Probate court of Cook county and thereafter filed his bill of complaint alleging in substance that in March, 1928, Mosley had gone

JOHN E. KELLY, Administrator of Estate of Todd Moeley, Deceased, Appellant.

vs.

ESTHER L. KELLY and LEOA STRINGER, OF NEW YORK and LEOA STRINGER, Defendant.

On Appeal of LEOA STRINGER, Appellant.

IN SENATE, JANUARY 28, 1931.

250 I.A. 643

10. JUDICIAL RECORDS RELATIVE TO THE ESTATE OF THE DECEASED.

This summary case involves the question whether the administrator of the estate of Todd Moeley, deceased, beneficiary, or LEOA STRINGER, a defendant, is entitled to the benefit of a life insurance policy in the sum of \$2500. The master found for LEOA STRINGER but the chancellor found for the estate, and LEOA STRINGER appeals. There is a claim of Moeley, who also left two sisters, Emma White and Frances Holson; these would receive a portion of the proceeds of the policy if the estate is entitled to the same; otherwise LEOA STRINGER is entitled to the entire proceeds.

The policy was taken out November 2, 1927, payable upon the death of the insured to his estate. The policy contained that a beneficiary may be named with the right of the insured to revoke such designation or without the right of revocation. January 28, 1931, the beneficiary was changed from the estate to LEOA STRINGER with the right of revocation, and subsequently, in June, 1931, the policy was assigned, making her the beneficiary without the right of revocation. September 2, 1931, Todd Moeley died and John E. Kelly was duly appointed administrator by the Probate court of Cook county and thereafter filed his bill of complaint alleging in substance that in March, 1930, Moeley had gone



to St. Louis to live with his sisters and there wrote a letter to the Insurance company requesting that the beneficiary be changed from Leola Stringer back to the estate and that the Insurance company consented to such change. The bill charges that Leola Stringer intercepted the correspondence between Mosley and the Insurance company for the purpose of thwarting this intention; that subsequently she fraudulently procured a change of beneficiary to herself without the right to revoke and mailed same from Chicago to the Insurance company at New York City, together with the original policy.

The Insurance company answered, admitting that on or about January 25, 1928, the policy was changed to Leola Stringer as beneficiary with the right of revocation reserved and that subsequently on June 18, 1928, upon receiving a certain request purporting to be the request of Todd Mosley, it complied with the same by endorsing on the policy the appointment of Leola Stringer as beneficiary without the right of revocation. The company stood ready to pay the amount of the policy less costs to the person or persons lawfully entitled to the same.

Leola Stringer answering denied all fraud; denied that the beneficial interest in the policy was ever changed from herself back to the estate and asserts the validity of the change to herself without revocation made in June, 1928.

The cause was referred to a master in chancery, who found that the complainant had not proven the fraud alleged in the bill; that the equities of the case were with the defendant Leola Stringer, and that she was entitled to the proceeds of the insurance policy less costs. Upon hearing before the chancellor the exceptions to the report were sustained and a decree was entered sustaining the allegations of the bill and finding the equities with the complainant and ordering that the proceeds of the policy less



to Mr. Leola in five days and there wrote a letter to the insurance company requesting that the beneficiary be changed from Leola Stricker back to the estate and that the insurance company be notified to such change. The bill charges that Leola Stricker interfered with the correspondence between Leola and the insurance company for the purpose of obtaining this insurance; that subsequently she fraudulently procured a change of beneficiary in her will without the right to revoke and mailed some time before to the insurance company at New York City, together with the original policy. The insurance company answered, admitting that on or about January 22, 1932, the policy was changed to Leola Stricker as beneficiary when the right of revocation expired and that subsequently on June 12, 1932, upon receiving a certain request pertaining to be the request of Leola Stricker, it complied with the same by endorsing on the policy the signature of Leola Stricker as beneficiary without the right of revocation. The company stood ready to pay the amount of the policy then owing to the estate or persons lawfully entitled to the same.

Leola Stricker answered that all these things had happened; that the beneficial interest in the policy was not changed from Leola back to the estate and asserts the validity of the change to herself without revocation made in June, 1932.

The case was referred to a master in equity, who found that the complaint had not stated the facts alleged in the bill; that the evidence of the case was with the defendant Leola Stricker, and that she was entitled to the proceeds of the insurance policy less costs. Upon hearing before the chancellor the evidence to the report were sustained and a decree was entered sustaining the allegations of the bill and finding the evidence with the complaint and stating that the proceeds of the policy had

costs to be paid to the administrator.

Upon considering the record we held that the master's report properly found that the charges of fraud were not proven and that the chancellor erred in sustaining the exceptions to this report.

The facts are obscure in some particulars; we note only the controlling features. Mosley had for some time prior to March, 1928, resided in Chicago with his niece, Leola Stringer. In this month he left for St. Louis to visit his sisters, Mama White and Frances Nelson, and continued to reside in St. Louis until the time of his death. When he left Chicago for St. Louis Leola Stringer was the beneficiary designated in the policy. Undoubtedly the sisters in St. Louis and the niece in Chicago were alert to secure for themselves, respectively, the benefits of the policy. The St. Louis sisters were of a mind to secure this by having the beneficial interest in the policy changed back to the estate, while Leola Stringer's intention was to maintain the beneficial interest in herself.

April 14, 1928, a letter, presumably from St. Louis, was sent to the Insurance company at its home office in New York as follows:

"I am writing to you about my policy, I want my policy fix just like I first sign up for it to my Estate; my policy No. is 4871944 on a \$2,500 policy.

I would like to get a reply as early as possible.

the  
Back of/envelope like this:

Mr. Todd Mosley,  
Care of Mrs. Frances Nelson  
South Kinlock Park."

Although this purports to be written by Mosley, it was written by Phelma Nelson, a niece, the daughter of Frances Nelson. Phelma did not testify but it was stipulated that, if present, she would testify that this letter was written at the direction of Todd

ceased to be sent to the administration.

Upon consulting the records we find that the master's report properly found that the charges of fraud were not proven and that the channeler acted in maintaining the connection in this report.

The facts are obscure in some particulars: we note only the controlled testimony. Healey had for some time prior to March 1933, resided in Chicago with his niece, Anna Healey. In this month he left for St. Louis to visit his sister, Emma Healey and Francis Nelson, and continued to reside in St. Louis until the time of his death. When he left Chicago for St. Louis Louis Stricker was the postmaster designated in the office. Undoubtedly the sisters in St. Louis and the niece in Chicago were about to receive for themselves, respectively, the contents of the package. The St. Louis sisters were of a mind to receive this by having the beneficial interest in the package assigned over to the estate, while Louis Stricker's intention was to withhold the beneficial interest in herself.

April 14, 1933, a letter, presumably from St. Louis, was sent to the Insurance Company at its home office in New York as follows:

"I am writing to you about my policy. I want my policy for cash. I have signed up for it so by sending my policy to the office on a 30-day policy."

I would like to get a reply as early as possible.

Best of envelopes like this:

St. Louis, Mo.  
Care of Mrs. Francis Nelson  
St. Louis, Mo.

Although this purports to be written by Healey, it was written by Francis Nelson, a niece, the daughter of Francis Nelson. Healey did not testify but it was stipulated that, in present, she would testify that this letter was written at the direction of Todd.



Mosley. A letter or letters written by him about this time are in the record and they show that Mosley wrote legibly and without apparent difficulty. No explanation is given as to why Mosley himself did not write this letter of April 14th. This suggests the possibility that it was written without his knowledge.

In response to this the Insurance company prepared its usual form of change of beneficiary, presumably changing the beneficial interest in the policy to the estate. This was addressed to South Kinlock Park, Chicago. South Kinlock Park is in St. Louis, not in Chicago; so the letter was returned by the post office department to the Insurance company, who then re-mailed it to the address of Leola Stringer in Chicago, which was the last address of Mosley. Leola Stringer shortly thereafter went to St. Louis, taking the policy with her; apparently, she knew that the form of beneficiary, if executed by Mosley, would change the beneficial interest from herself to the estate. She says she gave the policy and the form to her uncle which he mailed back to her, and she mailed them to the company in New York. It is a fair inference that this communication was undated and enclosed the change of beneficiary form in which an attempt was made to name Leola Stringer as beneficiary without the right of revocation. This inference is gathered from a letter of May 17, 1938, from the Insurance company, directed to Todd Mosley at his last Chicago address, which is as follows:

"We are in receipt of your recent letter undated together with a change of beneficiary form from which it appears that you wish to designate your niece Leola Stringer without the right of revocation. In your previous letter you informed us that you wished the beneficiary under your policy to be changed to your Estate and form which we sent you was filled out in that manner.

"The present beneficiary is Leola Stringer, your niece, designated revocably and if it is your desire that she be designated without the right of revocation please sign the attached form and return it to us. Upon receipt of the form we will endorse the policy accordingly and return it to you."

Kenley. A letter to Kenley written by his agent this time and in the record and they show that Kenley wrote Kenley and without any further difficulty. An explanation is given as to why Kenley did not call it but write this letter of April 1934. This explains the possibility that it was written without his knowledge.

In response to this the insurance company proposed the usual form of change of beneficiary, presumably making the beneficial interest in the policy to the owner. This was also discussed to Louis Hirschman, Chicago. Louis Hirschman was in St. Louis, not in Chicago; so the letter was returned by the post office department to the insurance company, the then so-called it to the address of Louis Hirschman in Chicago, which was the last address of Kenley. Louis Hirschman's address was to be St. Louis, being the policy with him; however, who knew that the form of beneficiary, it seemed by Kenley, Louis Hirschman and beneficial interest from Kenley to the policy. The fact was that the policy and the fact in the policy was called Louis Hirschman and was called Louis Hirschman in New York. It is a fact that because that this communication was stated and enclosed the change of beneficiary form in which an attempt was made to name Louis Hirschman as beneficiary without the right of revocation. This is because it appeared from a letter of May 17, 1934, from the insurance company, directed to Louis Hirschman at his last Chicago address,

which is as follows:

"We are in receipt of your recent letter containing request with a change of beneficiary form from which it appears that you wish to designate your agent Louis Hirschman as beneficiary of the policy. In your previous letter you indicated you had you wished the beneficiary named your policy to be changed to your estate and form which we have now filled out in that manner."

"The present beneficiary is Louis Hirschman, your agent, designated revocably and it is your desire that you be designated with the right of revocation clause also the enclosed form and return it to us. Upon receipt of the form we will endorse the policy accordingly and return it to you."



The Insurance company was evidently in doubt as to the wishes of Mosley with reference to the beneficial interest of the policy. It refers to his former letter, meaning the one dated April 14th, written by Phelma Nelson, which indicated that he wished the policy payable to his estate, whereas the undated letter with the beneficiary form enclosed indicated that Mosley wished to designate Leola Stringer without the right of revocation. The company enclosed a form in accordance with the apparent last request of Mosley that Leola Stringer be designated irrevocably. No reply was made to this letter and under date of June 11, 1928, the company wrote again asking that the designation form be returned. June 13, 1928, a letter written by Mosley and addressed to the vice-president of the Insurance company was sent and received, in which Mosley makes inquiry about a certain other policy. The question naturally arises, if the letter of April 14th expressed Mosley's wishes to have his estate made the beneficiary, why did he not follow this up? In June he wrote twice to the company apparently about another policy, but said nothing about the beneficiary in the instant policy.

On or about June 13, 1928, the Insurance company received the form which on May 17th it had forwarded; this purported to be signed by Mosley in the presence of a witness, William Anderson. In this Leola Stringer was named as beneficiary without the right of revocation; the company endorsed this on the policy and returned it to her and she thereafter retained possession of the same. Complainant alleges that the execution of this last designation of beneficiary is a forgery constituting a fraud upon complainant's rights.

Leola Stringer testified that in May, 1928, she went to St. Louis to visit her uncle; that he signed his name in pencil



The Insurance Company was established in 1880 as the  
and claims of policy with reference to the beneficial interest of  
the policy. It refers to his letter dated, November 10, 1880, and dated  
April 1881, written by Charles Nelson, which indicated that he  
desired the policy proceeds to his estate, and that he wanted  
letter with the beneficiary form enclosed indicated that Nelson  
desired to designate Charles Nelson as beneficiary with right of reversion.  
The company enclosed a form in accordance with the insurance law  
request of Nelson that Charles Nelson be designated beneficiary.  
No reply was made to this letter and under date of June 11, 1881,  
the company wrote again asking that the designation form be re-  
turned. June 11, 1881, a letter written by Nelson was returned  
to the vice-president of the Insurance Company was not returned,  
in which Nelson asked property about a certain policy. The  
designation was not returned. In the letter of April 1881 enclosed  
Nelson's request to have his estate make the beneficiary, and the  
he not follow this up. In June he wrote twice to the company  
regarding about another policy, but said nothing about the first  
policy in the instant policy.  
On or about June 11, 1881, the Insurance Company re-  
turned the form which on May 17th it had received; this designation  
to be signed by Nelson in the presence of a witness, William Nelson  
son. In this letter Nelson was asked to designate beneficiary with  
right of reversion; the company enclosed with it the policy and  
returned it to him and the beneficiary returned designation of the  
same. Complaint was made that the designation of this last policy  
designation of beneficiary is a policy constituting a trust upon the  
policy's estate.  
Nelson's designation was not returned until 1882, and was  
to be made to that date; 1882 he signed his name to another

to this form, naming her as beneficiary without revocation, and under his direction she wrote over his signature in ink. Hand-writing experts testified that there were graphite marks in connection with certain of the ink letters of the signature which may have been made by a lead pencil. The witness Anderson testified that he was present at the time the paper was executed and saw Mosley and talked with him; that he knew Mosley for some time in Chicago and that he saw him sign the paper and that he, Anderson, signed the same as a witness; that he saw Mosley sign this paper with a pencil.

The story told by these witnesses as to the execution of this form is not impossible and there is no well founded reason for rejecting it. The master, who saw and heard them testify, expressed in his report his belief in this testimony. We cannot say from this virtually uncontradicted evidence that the facts as to the signing of the paper are not as narrated. Certainly, the charge in complainant's bill that this signature is a forgery is not proven in the face of this evidence. We conclude that the master was justified in finding that complainant had failed to establish the allegations of his bill in respect to forgery and fraud.

The Insurance company is a New York corporation. By the New York Code, of which we take judicial notice (chapter 81, paragraph 57, Cahill's Illinois Statutes), and in the policy and in the form of change of beneficiary it is provided that no change of beneficiary shall take effect until the same is endorsed on the policy by the company. In Fraund v. Fraund, 218 Ill. 189, similar provisions were held to be a binding contract between the company and the insured and were applied. There was no endorsement on the

to this fact, making her an absolutely reliable witness, and under his direction she wrote over his signature in ink. When writing experts testified that there were duplicate marks in connection with certain of the ink letters of her signature which may have been made by a hand pencil. The witness testified that she was present at the time the paper was signed and saw Seely and talked with him; that he knew Seely for some time in Chicago and that he saw him sign the paper and that he, Seely, signed the same as a witness; that he saw Seely sign this paper with a pencil.

The story told by these witnesses as to the execution of this form is not impossible and there is no well founded reason for rejecting it. The matter, the law and facts being as expressed in his report are correct in this regard. It should be from this vitally important witness that the facts as to the signing of the money are not to be derived. Seely, the change in circumstances of his life and situation is a tragedy in not proven in the face of all evidence. He admitted that the money was furnished to him and that he was told to sign the affidavit of his will in regard to the money and to sign.

The interest of money is a fact that is not to be denied. The New York State, at which we have looked before (Volume 11, paragraph 27, Seely's Illinois statement), but in the policy and in the fact of money of Seely, that it is provided that no change of Seely's will shall be made until the same is certified on the policy of the money. In Seely's statement, his will, which provisions were held to be a binding contract between the money and the insured and were applied. There was no agreement on the



policy changing the beneficiary from Leola Stringer to the estate, hence these provisions would apply except in a clear case of fraud which operated to prevent such an endorsement. The record fails to show such fraud. Indeed, in our opinion the alleged request of April 14th to change the beneficiary to the estate is, to say the least, of doubtful origin.

If no endorsement was made on the policy making the estate the beneficiary, and there is no fraud which prevented such endorsement, Leola Stringer would be entitled to the proceeds either under the designation of January 25, 1928, or the one in June, 1928.

We hold that the record did not justify the decree of the chancellor. It is therefore reversed and the cause remanded with instructions to enter a finding and decree in accordance with the recommendations of the master.

REVERSED AND REMANDED  
WITH DIRECTIONS.

Matchett, F. J., concurs.  
O'Connor, J., dissents.

policy changing, the Committee from being obliged to the state, hence these provisions which would be a great deal of trouble which seemed to prevent such an amendment. The second bill to show what I mean. Indeed, in our opinion the bill is proposed of April 14th to change the Committee in the whole lot, to say the least, at least in spirit.

If no amendment was made on the policy making the estate the Committee, and there is no time with respect to the amendment, I am afraid would be obliged to the committee either under the deadline of January 12, 1917, or the 15th, 1917.

We hope that the report will not be lost in the hands of the Committee. It is a long and somewhat and the same somewhat with instructions to enter a finding and device in accordance with the recommendations of the committee.

RECEIVED AND RECORDED  
JAN 12 1917

RECEIVED  
JAN 12 1917

34410

A. GOLDSTEIN, Doing Business as  
DOUGLASS CONSTRUCTION COMPANY, for  
use of COLUMBIA CASUALTY COMPANY,  
a Corporation,

Appellant,

vs.

THOMAS ELEVATOR OPERATING COMPANY,  
a Corporation, and THOMAS ELEVATOR  
COMPANY, INC., a Corporation,  
Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 643'

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit seeking to recover approximately \$2400 as reimbursement for compensation paid out under the Workmen's Compensation act to plaintiff's employee, John E. Hodges. At the close of plaintiff's case the court directed the jury to find for the defendants, and from the judgment plaintiff appeals.

The declaration alleged that Hodges was injured February 28, 1927, while working on premises in Chicago as an employee of Goldstein, plaintiff; that he was injured during the course of his employment, while he was in the exercise of due care, by defendants' negligence in furnishing and installing an improperly constructed hoist with cages and equipment; that by reason of plaintiff's and defendants' business operations they were automatically bound by section 3 of the Workmen's Compensation act; that the facts of the case bring it within the provisions of section 29 of the act, which provides that an employer who has paid compensation under the act to an injured employee shall be subrogated to the employee's rights against a third party, whose injury was caused under circumstances creating a liability for damages against the third party. The declaration alleges a policy of insurance between the Columbia Casualty Company, usee, and Goldstein, plaintiff, whereby the former agreed to pay any compensation which



W. B. BROWN, JR.,  
SPECIAL AGENT IN CHARGE,  
U. S. DEPARTMENT OF JUSTICE,  
WASHINGTON, D. C.

Dear Sir:

Re:

THOMAS EDWARD BROWN, JR.,  
a fugitive, and THOMAS EDWARD  
BROWN, JR., a fugitive,  
known aliases.

THOMAS EDWARD BROWN, JR.

is now being

353 I.A. 643

Re: THOMAS EDWARD BROWN, JR., a fugitive, and THOMAS EDWARD BROWN, JR., a fugitive.

THOMAS EDWARD BROWN, JR., a fugitive, and THOMAS EDWARD BROWN, JR., a fugitive, are being sought by the United States Marshal at New York.

Information has been received from the New York office that THOMAS EDWARD BROWN, JR., a fugitive, and THOMAS EDWARD BROWN, JR., a fugitive, are being sought by the United States Marshal at New York.

The following information was received from the New York office:

On May 23, 1937, while en route to New York, a fugitive was arrested at New York. The fugitive was identified as THOMAS EDWARD BROWN, JR., a fugitive, and THOMAS EDWARD BROWN, JR., a fugitive.

Information was received from the New York office that THOMAS EDWARD BROWN, JR., a fugitive, and THOMAS EDWARD BROWN, JR., a fugitive, are being sought by the United States Marshal at New York.

It was stated that the fugitive was arrested at New York. The fugitive was identified as THOMAS EDWARD BROWN, JR., a fugitive, and THOMAS EDWARD BROWN, JR., a fugitive.

The following information was received from the New York office: On May 23, 1937, while en route to New York, a fugitive was arrested at New York. The fugitive was identified as THOMAS EDWARD BROWN, JR., a fugitive, and THOMAS EDWARD BROWN, JR., a fugitive.

Information was received from the New York office that THOMAS EDWARD BROWN, JR., a fugitive, and THOMAS EDWARD BROWN, JR., a fugitive, are being sought by the United States Marshal at New York.

plaintiff became obligated to pay under the act. Payment of compensation is then alleged under an award handed down in proceedings brought by Hodges before the Industrial Commission and under a settlement contract; such payments aggregated approximately \$2372.62. The declaration sets forth the Columbia Casualty Company's right of subrogation to the rights of the assured, Goldstein, under the provisions of the policy.

Respective counsel agree that the only question involved is one of fact, namely, whether, as claimed by plaintiff, Hodges received his injuries through the negligence of the defendants in installing an engine connected with a hoist, or, as claimed by defendants, it was physically impossible for the accident to happen as described by plaintiff's witnesses.

As there must be another trial, we narrate the facts very briefly. At the time of the accident plaintiff was constructing a building in Chicago, using a hoist to elevate his materials which he had leased from the defendant Thomas Elevator Operating Company. The lease described it as an automatic brick and mortar hoist with complete double cages. The control and operation of the hoist were under the authority of plaintiff, but the defendant was to make necessary repairs. The hoist was of the type customarily used in constructing buildings. The elevator was raised and lowered by means of a cable operating from an engine on the ground. Attached to this engine was a wheel, around which the wire cable runs. There is a brake on the top frame so that, when the upper cage ascends to the top floor, it strikes a handle or bar that automatically locks it. The floors of the two cages were about six by four feet. Plaintiff was using the hoist to raise bricks and mortar to the laborers. The engine which it is alleged was the seat of the trouble was 12 to 15 feet away from the bottom of the shaft. It was set in place by the defendant and generally it was nailed to planks.

plaintiff became obliged to pay under the bill. Payment of such  
provision is then alleged under the second count to be a discharge  
of the bill. The defendant denies the plaintiff's contention and under a  
plea of non assent; such payment being a discharge of the bill.  
The defendant also denies the plaintiff's contention that the  
of payment is the bill of the plaintiff, defendant, under the  
provision of the bill.

Defendant's second plea is that the only person in-  
volved is one of the plaintiff, namely, the plaintiff's agent,  
Hodges received his bill from the plaintiff through the plaintiff's agent,  
and is liable to the plaintiff on the bill. The plaintiff denies  
by affidavit that it was received from the plaintiff's agent,  
as alleged by the plaintiff's agent.

In these cases the plaintiff's bill, or receipt for the  
very bill. At the time of the plaintiff's receipt the plaintiff  
has a bill in Chicago, and a bill in Chicago. The plaintiff  
which he has passed from the plaintiff's agent to the plaintiff's agent,  
Chicago. The bill received is an original bill, and the  
bill is a bill for the plaintiff's agent. The plaintiff's agent  
has the bill in Chicago, and the plaintiff's agent has the bill in  
to make necessary payment. The bill is the bill of the plaintiff.

used in the plaintiff's bill. The plaintiff's bill is  
lowered by means of a bill received from the plaintiff's agent,  
attached to this bill is a bill, having with the bill  
case. There is a bill in the bill in the bill, and the bill  
case is a bill in the bill, and the bill is a bill in the bill,  
materially in the bill. The bill of the bill is a bill in the bill,  
bill. The plaintiff's bill is a bill in the bill, and the bill is a bill in the bill,  
to the plaintiff. The bill is a bill in the bill, and the bill is a bill in the bill,  
trouble was in it that was the bill of the plaintiff. It was  
not in place by the plaintiff, and the bill is a bill in the bill.



In this instance, two or three planks were put flat on the ground and the engine was set on the planks and attached by some clamps and spikes. On the morning of the day of the accident in question, while the workmen were drawing up one of the stones used for coping around the top of the building, the cage slipped and fell down and it was ascertained that the engine had moved while the stone was being raised and the wire cable had slipped off the wheel. Work was stopped and the defendant company was notified and its repair men came and moved the engine back into position and replaced the wire cable.

Later the same day Hedges and three other employees of plaintiff were on the roof of the four story building when the foreman gave the call that it was quitting time. One of these workmen then went to the hoist and was standing on it with some tools. As they were putting their tools on the floor of the cage Hedges put his tool bag down with one hand and at the same time started to put down his level on the floor of the cage, and in doing so put his left foot on the floor of the cage, with his weight on his left foot. He testified that at that moment the cage of the hoist fell, taking him with it. He says: "I was in this position with my left foot on there and suddenly the cage descended; it snatched loose and fell; it fell like a torrent; I went down with the cage." It was then ascertained that the engine had pulled completely off the platform on which it had been placed and was pulled toward the base of the shaft a distance of three or four feet.

Counsel for plaintiff argues that this and other evidence in the case tend to prove that the engine was so improperly anchored or fastened that, when the weight was put on the upper cage, it fell, dragging the engine off its platform. The weight capacity of the hoist was about 550 pounds and the evidence shows



that there was much less than this weight upon the hoist at the time of the accident.

On the other hand, it is argued by defendants' counsel that it was impossible for the hoist to fall, as Hodges testified, and that the cage could only be moved by one of the men operating the control levers; that when a cage comes to the top a key stops it automatically so that it cannot be operated until these brakes are released by moving the lever. However, a witness testified that, while ordinarily the cage could not be moved except by releasing the lever, it can also be started by placing enough weight on the cage; that he had seen weight enough put on the cage so that it started without moving the lever. Defendants' counsel stressed the point that the laborers intended to ride down in the cage, which was contrary to the rules, and boarded it for this purpose.

It is axiomatic that in considering a motion to instruct for the defendant at the close of plaintiff's case all the evidence offered by plaintiff must be taken as true. Morgan v. New York Central R. R. Co., 327 Ill. 359. And not only the facts testified to must be taken as true, but all reasonable inferences therefrom must be admitted. Giddings v. Williams, 336 Ill. 482; Libby, McNeill & Libby v. Cook, 222 Ill. 206.

In view of the admitted fact that in the accident the engine was pulled some considerable distance out of place, we do not see how it can be said, as a matter of law, that the accident would have happened whether or not the engine was securely fastened. The situation after the accident tends to lead to the conclusion that the movement of the engine from its place had some causal connection with the falling of the hoist. In any event, these questions of fact should have been submitted to the jury.

Whether or not after verdict the trial court would



first stage was completed when the weight of the

size of the audience.

On the other hand, it is argued by the

company that it was impossible for the price to fall, as the

possibility, and that the price could only be moved by one of the two

causes, the demand for the product, and when a price move in one way

the other is automatically in the opposite direction. It is argued that the

company was released by moving the price. However, a witness testi-

fied that, while the price was being moved, it was not moved by the

company, it was also moved by the market.

weight of the price; that the price was being moved by the market

on that it moved in the opposite direction. However, a witness testi-

fied that the price was being moved by the market, and that it was

also, that the price was being moved by the market, and that it was

being moved.

It is also argued that in the market a price is in-

fluenced by the demand for the product, and that the price is

being moved by the market, and that the price is being moved by the

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price is being moved by the market, and that the price is being moved by the

market, and that the price is being moved by the market, and that the

be justified in setting the verdict aside as contrary to the weight of the evidence is not involved upon the present appeal. Shannon v. Nightingale, 321 Ill. 168.

We are of the opinion that the peremptory instruction to find for the defendant was erroneous. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, F. J., and O'Connor, J., concur.

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RECEIVED THE DIRECTOR,  
BUREAU OF INVESTIGATION,  
WASHINGTON, D. C.  
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... ..



34428

NEW MECHANICS SUPPLY & LAUNDRY  
COMPANY, a Corporation,  
Appellee.

vs.

WEARPROOF MANUFACTURING COMPANY,  
a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 643<sup>2</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment of \$251.05 entered upon trial by the court in an action to recover for a bale of khaki cloth alleged to have been delivered to defendant.

Both parties in their briefs and abstracts have incorrectly entitled this case in violation of the statute (paragraph 99, chapter 110, Cahill's Statutes) and of the rules of this court, thus causing additional labor for us. Cases brought to this court should be entitled as they were in the trial court.

The only question involved is one of fact. Plaintiff, New Mechanics Supply & Laundry Company, a corporation, is engaged in the business of furnishing coveralls to gasoline stations and the defendant, Wearproof Manufacturing Company, a corporation, manufactures such articles. Plaintiff for a considerable time before the controversy in question had purchased goods for the coveralls from the National Fabric & Finishing Company and would send bales of such goods to the defendant to be manufactured.

January, 1929, plaintiff ordered five bales of cloth from the National Fabric Company. Four of these bales were shipped and delivered by plaintiff to defendant, which manufactured the articles and returned them to plaintiff. There is no controversy concerning these. In May, 1929, the National Fabric Company notified plaintiff that the fifth bale had been shipped

NEW HAMPSHIRE SUPPLY & LUMBER CO.,  
INCORPORATED,  
Plaintiff,  
vs.  
NEW HAMPSHIRE MANUFACTURING CO.,  
INCORPORATED,  
Defendant.

259 I.A. 643

1. THE COURT HEREBY FINDS THAT THE DEFENDANT

By this appeal defendant seeks the reversal of a judgment of \$250.00 entered upon trial by the court in an action to recover for a sale of goods which alleged to have been delivered to defendant.

Both parties in their briefs and arguments have incorrectly entitled this case in violation of the rules (Chapter 110, Chapter 110, Civil's Statutes) and of the rules of this court, thus causing additional labor for the court. Cases brought to this court should be entitled as they were in the first court.

The only question involved is one of fact, viz., whether New Hampshire Supply & Lumber Company, a corporation, is engaged in the business of purchasing goods for resale to general retailers and the defendant, Hampshire Manufacturing Company, a corporation, manufactures such articles. Plaintiff for a considerable time before the controversy in question had purchased goods from the defendant from the National Fabric & Lumber Company and sold such goods to the defendant to be manufactured.

Plaintiff alleged that the goods were shipped and delivered by plaintiff to defendant, which manufacture the articles and returned them to plaintiff. There is no controversy concerning these. In May, 1930, the defendant fabric company notified plaintiff that the fabric goods had been shipped

to it. Plaintiff had already received a bale of similar cloth three or four days before this, and not having any use for this fifth bale attempted to dispose of it to some other company. A Mr. Klein, vice-president of plaintiff, took up the matter with a Mr. Briggs, salesman for the Fabric company, who suggested that possibly the defendant company, to whom the bale in the meantime had been delivered and which used the same kind of goods and was a customer of the Fabric company, could use the same. Mr. Briggs then spoke to Mr. Reith, the manager of defendant company, as to whether it could use this bale. This witness testifying said, in substance, that he did not remember what Reith replied.

Klein, testifying on behalf of plaintiff, said that he also took up the matter and that Reith told him that the defendant could use the bale because it was completely out of that particular material; that Reith further told him to send the defendant the bill for this bale which plaintiff had received from the Fabric company, and that the defendant company would remit directly to the Fabric Company. This conversation was about May 20, 1936. It is admitted that defendant company did not manufacture any goods for plaintiff company from this bale.

Reith testified for defendant, admitting the conversation with reference to this bale but saying that he did not tell Klein that the defendant would buy the goods in question. His version is that he told Klein: "We have all the material we need and are not in a position to buy more at this time." There were subsequent conversations between the two men, Klein insisting that defendant had bought the bale and Reith denying that defendant had purchased it. Reith further testified that about the first week in July plaintiff's driver called with plaintiff's truck at defendant's place of business and took the bale away.



to the plaintiff and already received a copy of similar order  
three or four days before this, and not having any use for this  
fifth date attempted to dispose of it to some other company. A  
Mr. Allen, vice-president of plaintiff, took up the matter with  
Mr. Briggs, salesman for the third company, who suggested that  
possibly the defendant company, to whom the date in the meeting  
had been delivered and which used the name kind of Goods and was  
a customer of the third company, would use the name. Mr. Briggs  
then spoke to Mr. Keller, the manager of defendant company, as to  
whether it would use this date. This officer hesitating still,  
in substance, that he had not remembered what Keller replied,  
Keller, testifying on behalf of plaintiff, said that he  
also took up the matter and told Keller that the defendant  
could not use the date because it was completely out of their jurisdiction  
material; that Keller further told him to send the defendant the  
bill for this date which plaintiff had received from the third  
company, and that the defendant company would send plaintiff its  
the third company. This conversation was about May 15, 1905.  
It is admitted that defendant company did not remember any  
Goods the plaintiff company from this date.  
Keller testified for defendant, admitting the conversation  
then with reference to this date but saying that he did not tell  
Keller that the defendant would use the name in question. The  
version is that he told Keller. He says all the material he used  
and was not in a position to buy more at this time. He says that  
subsequent conversations between the two men, Keller testifying  
that defendant had bought the date and Keller saying that defendant  
not had purchased it. Keller further testified that about the  
time was in July plaintiff's lawyer called upon plaintiff's  
from the defendant's place of business and took the date away.

This is denied by Klein. On cross-examination Reith said the defendant took no receipt from plaintiff's driver when this bale was delivered to him and that he did not know his name.

Frances Schwartz, a forelady employed by defendant, testified that she remembered that some time in July plaintiff's driver came to defendant's place of business; that Reith gave the driver the bale; that the driver wore a suit of coveralls bearing plaintiff's name on his back; that they called the driver "Red" and that she thought his name was Collins and that he came frequently to their place of business.

Defendant asks why the driver, Collins, was not called upon to testify. In reply plaintiff stresses the fact that no receipt was taken by defendant for the bale and that Frances Schwartz did not testify until the case was nearing its end when it was too late to procure the employee, Collins, as a witness. Klein also testified that he has charge of the drivers, giving them instructions where to go and that he did not send Collins to defendant's place of business to pick up this bale of goods. A driver named Fuller testified for plaintiff that he was the one who called for goods from defendant and that he made no call on this company in July; that his duties were to get goods from the defendant. Attention is also called to Miss Schwartz's testimony that while she saw a man by the name of Collins there, she did not see plaintiff's truck.

The parties ceased doing business with each other some time in May, 1929. Klein testified that he heard nothing further about this particular bale until July 10th, when he received a letter from the Fabric company calling plaintiff's attention to its indebtedness to the Fabric company for this bale. Klein then called Reith to inquire whether or not the bill had been paid. It is admitted

This is denied by Klein. On cross-examination Klein said the defendant took no receipt from plaintiff's driver when this was delivered to him and that he did not know his name. Thomas Bennett, a tavern keeper at defendant's place, testified that she remembered that some time in July plaintiff's driver came to defendant's place at defendant's place at defendant's place; that the driver was a man of middle age, called plaintiff's name on his back; that he called the driver "Tom" and that she thought his name was William and that he came frequently to their place of business.

Defendant asks why the driver, William, was not called upon to testify. In reply plaintiff answers the fact that no receipt was taken by defendant at the time and that Thomas Bennett did not testify until the case was reaching its end and when it was too late to procure the employee, William, as a witness. Klein also testified that he has charge of the driver, giving them instructions where to go and that he did not know William or defendant's place of business to give up this bill of goods. A driver named Miller testified for plaintiff that he was the one who called for goods from defendant and that he had no call on this company in July; that his duties were to get goods from the defendant. Defendant is also called to show Bennett's testimony that William saw a man by the name of Collins there, and did not see plaintiff's truck.

The parties ceased taking business till about May 1, 1920. Klein testified that he never received further about this particular date until July 1921, when he received a letter from the Public Company calling plaintiff's attention to the indebtedness to the Public Company for this date. Klein then called Klein to inquire whether or not the bill had been paid. It is admitted



that this bale was received some time in May, 1939, and the parties had ceased their business relations at this time. It is, at least, a little singular that the bale should have remained in the possession of the defendant, as it admits, until July, when, as defendant claims, it was re-delivered to plaintiff. Under these circumstances the fact that Reith took no receipt for this alleged re-delivery throws some doubt upon his version of the transaction.

In any event, it is solely a question as to which witness gives the correct version of the conversation in May with reference to this bale. It is axiomatic that in such a case a reviewing court will not reverse unless convinced that the trial court is manifestly wrong. The appearance of the witnesses while testifying and their demeanor on the stand, which may be observed by the trial court, give it an advantage in determining the credibility of the witnesses which we do not have. The record does not disclose sufficient grounds to justify a reversal and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

that this date was received some time in May, 1918, and the parties  
had agreed that business relations at this time, it is, at least,  
a little earlier than the date which was mentioned in the agree-  
ment of the testimony, as it is, while, while later, when, as before-  
mentioned, it was re-delivered in January. Under these circum-  
stances, the fact that the date was received for this alleged re-  
delivery shows some doubt as to the accuracy of the testimony.  
In my opinion, it is highly probable as to when the  
date given the correct version of the conversation is the right  
reference to this date. It is estimated that in such a case a  
revising court will not choose unless satisfied that the trial  
court is manifestly wrong. The government in the present case  
testified and their testimony on the point, which may be accepted  
by the trial court, give it an advantage in determining the  
exactness of the witness who is in the case. The result  
does not disclose sufficient evidence to justify a reversal and  
the judgment is affirmed.

AFFIDAVIT

Witness, R. E., and J. C. ...

34446

H. M. HALL COAL COMPANY,  
a Corporation,  
Appellee,

vs.

DICKINSON FUEL COMPANY,  
a Corporation,  
Appellant.

87  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 643<sup>3</sup>

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for coal claimed to be sold by it to defendant and upon trial by the court had judgment for \$671.20, from which defendant appeals.

Plaintiff is engaged in selling and shipping coal in Chicago. The defendant is a West Virginia corporation with headquarters in Charleston. It owns mines and sells not only its own coal but coal from other mines at a commission. The coal in question is claimed to have been ordered by the Marine Coal Company through James C. Hoskins, its manager. This company is in the coal business in Chicago. It had a contract with defendant under which it was obligated to purchase all of its coal from the defendant company, but Hoskins could call the defendant company and tell Dickinson the kind of coal he could get elsewhere and the prices, and if the defendant company could not make a better price, defendant would allow Hoskins to purchase coal from outside sources and Hoskins paid defendant company 4% on any outside coal so purchased by him. Plaintiff company had had a great many transactions with defendant during the course of several years, all of the coal being purchased through Hoskins for the Marine Coal Company and when plaintiff received an order from Hoskins it would send an acknowledgment of the order to the defendant company and also to the Marine Coal Company. Payments were made by defendant company for such coal to the plaintiff.



24448

R. M. COAL COMPANY,  
a corporation,  
appellee.

vs.

WILLIAM W. HARRIS,  
a corporation,  
appellant.

WILLIAM W. HARRIS, PLAINTIFF,

vs.

253 L.A. 643

WILLIAM W. HARRIS, PLAINTIFF, vs. R. M. COAL COMPANY, DEFENDANT.

WILLIAM W. HARRIS, PLAINTIFF, vs. R. M. COAL COMPANY, DEFENDANT.

WILLIAM W. HARRIS, PLAINTIFF, vs. R. M. COAL COMPANY, DEFENDANT.

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WILLIAM W. HARRIS, PLAINTIFF, vs. R. M. COAL COMPANY, DEFENDANT.

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WILLIAM W. HARRIS, PLAINTIFF, vs. R. M. COAL COMPANY, DEFENDANT.

WILLIAM W. HARRIS, PLAINTIFF, vs. R. M. COAL COMPANY, DEFENDANT.

March 9, 1929, Hall called Hoskins by 'phone and offered him eight cars of coal from what is called the Wood mine at \$1.65 a ton. Hoskins accepted and these cars were delivered and paid for. There is no controversy about these. Plaintiff claims that on the same day - March 9 - Hoskins ordered another shipment of nine cars from the Ralco mine. One car of this latter lot was diverted by agreement; three cars were delivered to the Marine Coal Company and, according to Hoskins, were unloaded without his knowledge and were paid for. The controversy is over the remaining five cars, Hoskins claiming that he had not ordered the nine cars of Ralco coal and that when the balance of five cars came on this shipment he notified plaintiff that he had not ordered them and would not take them. Plaintiff insisted that he had ordered them. The result was that the five cars remained on the railroad tracks and were finally sold by the railroad company for demurrage charges.

The case turns upon the fact as to whether Hoskins ordered these nine cars of Ralco coal on March 9, 1929. As plaintiff says in its brief: "This is the only real controversy." The trial court was of the opinion that plaintiff had proven that the order was given and entered judgment accordingly. After examination of the record we are not inclined to agree with this conclusion.

Hall on behalf of plaintiff company testified as to the orders of March 9th, that Hoskins ordered the eight cars from the Wood mine and subsequently the nine cars of Ralco coal; that on the same day a copy of the order for the nine cars was sent to the defendant company, which it received.

Hoskins was first called as a witness under Section 33 of the Municipal Court act, but upon objection he was called by plaintiff as its own witness. He had no connection with the

March 9, 1915, said called on him by phone and offered him eight acres of land then what is called the Wood Mine as \$1.25 a ton. He then accepted and those were delivered and said for. There is no controversy about those. He then said that on the same day - March 9 - he then accepted delivery of nine cars from the Bates mine. One car of this latter lot was diverted by agreement; those nine were delivered to the Bates Coal Company and, according to records, were delivered to him. His knowledge and was said for. The controversy is over the remaining five cars, because claiming that he had not ordered the nine cars of Bates coal but that when the balance of five cars came on this shipment he notified plaintiff that he had and ordered them and would not have them. Plaintiff claimed that he had ordered them. The result was that the five cars remained on the railroad tracks and were finally sold by the railroad company for domestic freight.

The case turns upon the fact as to whether plaintiff ordered those nine cars of Bates coal on March 9, 1915, as plaintiff says in the brief. "There is no controversy." The trial court was of the opinion that plaintiff had ordered the five cars and ordered delivery immediately. After examination of the records we are not inclined to agree with this conclusion.

Only on basis of plaintiff's weighty evidence as to the orders of March 9th, that evidence offered the eight cars from the Wood Mine and subsequently the nine cars of Bates coal; that on the same day a copy of the order for the nine cars was sent to the defendant company, which is correct.

Plaintiff was first called on a witness called in evidence is of the Bates Coal Co., but when questioned he was called by plaintiff as his own witness. He had no conversation with the



defendant company and was not at the time of the trial connected with the Marine Coal Company, but was running his own coal company and was a disinterested witness. Testifying as a witness for the plaintiff and repeated when called as a witness on behalf of defendant, he states categorically that he did not order nine cars of Balco coal on March 9th, but did place an order for eight cars of Wood mine coal on this date.

Hoskins had been ordering Balco coal once a week for sometime previous to this in quantities varying from nine to twelve cars a week. The week before March 9th he had ordered nine cars of Balco coal. He would usually call Hall at the end of each week and order his supply of Balco coal for the following week. He told Hall that he would buy whatever he needed - from nine to twelve cars a week - and would order at the end of each week. On March 9th, Hoskins says that he ordered the eight cars of Wood mine coal for the purpose of filling his requirements for the following week. He says positively that he did not and would not order an additional number of cars on the same day which would overstock his yards. He testifies that, when he learned that the first of this nine car shipment came in, he notified Hall by 'phone and Hall admitted that he had over-shipped to the Marine Coal Company. Hall denies this. Under the circumstances it would be reasonable to conclude that the order for eight cars on the 9th was the only order given by Hoskins to plaintiff on that date, and it is also reasonable to suppose that plaintiff, probably through inadvertence, sent the additional nine cars of coal from the Balco mine, in accordance with what had been Hoskins' previous weekly requirements.

There is evidence that the Balco coal was in transit at the time the usual weekly order for coal was given, which would bring the coal to Hoskins' yard the following week. The

[illegible]

Wood mine coal ordered on March 9th was not in transit and apparently was ready for immediate delivery.

Another circumstance tending to support Hoskins' testimony is that it was customary for him, whenever he ordered coal, to write to defendant company reporting the same. No such letter was sent <sup>to</sup> or received by defendant company.

Subsequently, on March 26th, defendant wrote plaintiff that its account showed, as advised by the Marine Coal Company, that it had purchased thirty-nine cars of the Balco coal, whereas, according to the invoices sent by plaintiff, the Marine Company had received shipments of forty-six cars, an over-shipment of seven cars. Then followed a number of letters between the parties, in which defendant insisted that, as it had been advised by Hoskins that he had never ordered the last nine cars on March 9th, it would not pay for the five cars of this shipment which were unused. The parties seem to have been determined not to compromise and this litigation followed.

Other points have been raised, but as we have indicated, the decisive point to be answered is whether or not Hoskins ordered the additional nine cars on March 9th. We repeat that, in view of his previous order on the same day for enough to meet his weekly requirements, it is highly improbable that he would virtually duplicate this order on the same day, knowing it would overstock his yard. The evidence rather tends to show that the additional nine cars were sent in the usual routine of previous shipments and not pursuant to any order from Hoskins.

For the reasons indicated the judgment is reversed and as the case was tried by the court, judgment for the defendant will be entered here.

REVERSED AND JUDGMENT HERE  
FOR THE DEFENDANT.

Matchett, P. J., concurs.



Good news about the trial on March 15th was that it was held in private and confidentially.

and ready for immediate delivery.

Another circumstance leading to the trial was the fact that the

already in that it was necessary for him, however, to be released soon.

It was in fact the fact that the trial was held in private and confidentially.

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55-  
34455

RUBY DOBERT,  
Appellee,

vs.

LUBLINER & TRINZ THEATRES, INC.,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 643<sup>4</sup>

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff claims that while a patron of one of the defendant's theatres she was unlawfully ejected therefrom. She brought suit for assault and battery and upon trial had a verdict and judgment for an amount about which the abstract gives no information. We infer from the briefs that the judgment was for \$1250. Defendant seeks a reversal.

As there must be another trial we refer only briefly to the testimony. Defendant, the owner of the Crawford theatre in question, had received complaints from its patrons as to misconduct of patrons in the rear seats of the theatre. A woman usher was instructed to watch for such offenders and identify them. A little after 7:30 on the evening of May 22, 1926, plaintiff and her husband attended the Crawford theatre. They purchased their tickets and were about to drop them in the ticket box when they were admonished by the ticket taker to behave properly while in the theatre. Plaintiff demanded an explanation, claiming that the remarks of the ticket taker were addressed to the wrong party. The ticket taker called the woman usher, who confirmed the identification, claiming to have seen them on the last seat of the lounging hall and that they "were doing something besides holding hands." Plaintiff replied that she was a respectable married woman and had always acted properly and that this must be a case of mistaken identity and demanded an apology from the usher. She was highly indignant and apparently was demanding an apology in a loud tone of voice which attracted the attention

WYLLIE, JAMES

WY

WYLLIE & SONS, LTD.,  
Glasgow.

2521 A. 643

RE. JAMES WYLLIE & SONS LTD. (INC. IN SCOTLAND).

Plaintiff claims that while a partner of the late James WYLLIE & SONS LTD. (INC. IN SCOTLAND) the plaintiff was not entitled to share in the profits of the business of the late James WYLLIE & SONS LTD. (INC. IN SCOTLAND) after the death of the late James WYLLIE & SONS LTD. (INC. IN SCOTLAND) and that the plaintiff is entitled to a share of the profits of the business of the late James WYLLIE & SONS LTD. (INC. IN SCOTLAND) after the death of the late James WYLLIE & SONS LTD. (INC. IN SCOTLAND).

It is the case that the plaintiff was not entitled to share in the profits of the business of the late James WYLLIE & SONS LTD. (INC. IN SCOTLAND) after the death of the late James WYLLIE & SONS LTD. (INC. IN SCOTLAND) and that the plaintiff is entitled to a share of the profits of the business of the late James WYLLIE & SONS LTD. (INC. IN SCOTLAND) after the death of the late James WYLLIE & SONS LTD. (INC. IN SCOTLAND).



of other patrons entering the theatre. The manager appeared to inquire as to the nature of the trouble. He heard the statements both of plaintiff and of his employee, the usher.

Plaintiff testified that the manager said that they were disturbing the patrons; that he pushed her and her husband out of the door and asked for their tickets, took them and went to the cashier, got the money back and threw it at them and that her husband caught the money. Her version of the affair is supported by the testimony of her married sister and her husband, who were attending the entertainment at the same time.

The manager testified that he told plaintiff that she and her husband should not misbehave; that they became indignant and demanded their money back; that he went over to the cashier, got the money and returned it to the plaintiff and her husband; that while he spoke in a quiet tone, they spoke in loud, belligerent tones and wanted to fight, exclaiming that they were insulted and wanted an apology. He says that he did not touch or even approach the plaintiff or her husband; that he did not lay hands on her or her husband and did not help them out nor request them to leave the theatre; that they requested their money back, saying they would not attend the entertainment; that they asked for their money back and got it. The manager says he did not ask them to leave but merely told them they would have to behave if they wanted to see the show. About four hours later that same evening plaintiff and her husband came back and again demanded an apology.

Respective counsel have argued at some length as to the rights of an owner of a theatre to revoke the license to enter the same as evidenced by an admission ticket. There are many cases holding, as a general proposition, that the proprietor of a theatre exercises absolute control over the theatre and the audience, as the theatre is his private property and that he has

of other persons entering the theatre. The manager appeared to  
insist on the nature of the trouble. He heard the statements  
made of Glavin and of his associates, the police.

Glavin testified that the trouble with this man  
were disturbing the persons; that he had been told that  
one of the men had asked for some friends, and that he was  
the manager, and the money had been given to him and that he  
had been told the money. The manager of the theatre is reported  
by the testimony of the manager that he had been told, and was  
attending the performance of the same time.

The manager testified that he had been told that the  
and had been told that he had been told that the manager  
and had been told that he had been told that the manager  
and the money and testimony is to the Glavin and his manager;

that while he was in a police car, they were in the  
house and wanted to find out what was going on and  
wanted to see him. He says that he did not know of any of  
persons and Glavin and his manager; that he did not know  
of him or his manager and did not know that he was going  
to leave the theatre; that they were going to leave the theatre  
they would not allow the manager to leave the theatre for  
money and did it. The manager says he did not know of any of

leave but would not allow him to leave the theatre in any  
wanted to see him. He says that he did not know of any of  
Glavin and his manager and did not know that he was going  
to leave the theatre; that they were going to leave the theatre

Glavin and his manager and did not know that he was going  
to leave the theatre; that they were going to leave the theatre  
wanted to see him. He says that he did not know of any of  
Glavin and his manager and did not know that he was going  
to leave the theatre; that they were going to leave the theatre

the right to decide who shall be admitted to witness an entertainment. There are some cases holding that a ticket of admission may be revoked at any time, either before or after admission. There is some discussion as to whether in this case the ticket taker accepted plaintiff's ticket and she had entered the theatre or whether the occurrence complained of happened before the ticket was taken and before she was technically inside the theatre. We do not think it important to pass upon this point.

It seems to be conceded by both counsel that managers have a duty to maintain proper order in and about a theatre and while people are assembling and leaving the same, and that if they have good reason to believe some one in the audience has been guilty of improper conduct calculated to alarm or disturb the audience, they are justified in taking such reasonable steps as will be necessary to end the disturbance, even, if necessary, to the extent of ejecting the offender. But the exercise of such duty must be based upon reasonable grounds and in a reasonable manner. In the instant case, while there may have been a mistake as to the identity of the plaintiff and her husband as the parties who had misconducted themselves at a prior time, yet the manager was acting in good faith in accepting the statement of his employee, the usher. Plaintiff and her husband insisted in demanding an apology and doubtless were rather belligerent in manner. However this may be, the only question for a jury to determine was whether or not the force, if any, in ejecting the parties from the theatre was unreasonable or unnecessary.

There is a partial conflict as to whether the manager ordered them to leave the theatre or whether they did so voluntarily. If, however, we accept plaintiff's version that the manager placed his hand upon her shoulder and ordered her and her husband out of the theatre, we are of the opinion that the compen-





satory damages to which she would be entitled are not large. The amount allowed, \$1250, seems to us excessive. We have considered whether or not this can be cured by a remittitur; but we are of the opinion that this cannot be done.

Counsel for defendant makes some comment upon the rulings of the court upon instructions, but the abstract does not show that any instructions were requested or given.

For the reason that the verdict is excessive the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatchett, P. J., and O'Connor, J., concur.

every person to whom the words "admission" are not large.  
The amount allowed, \$1000, seems to be excessive. It may be  
that the person or persons to whom it is given by a committee, but we are  
of the opinion that this cannot be done.

Second: The defendant seems to have been the  
recipient of the money from the defendant, and the defendant's  
and some other very important were included in it.  
But the reason that the words "admission" is excessive is

because it is excessive and the words "admission".

RECEIVED AND RETURNED.

RECEIVED, N. Y., and O'CONNOR, N. Y., 1900.



34464

MYRTLE CLAREUS,  
Appellee,

vs.

SAMUEL H. ROSENTHAL,  
Appellant.

89  
APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 643<sup>5</sup>

MR. JUSTICE McSURRELY DELIVERED THE OPINION OF THE COURT.

Upon the trial of an action to recover damages for personal injuries received in an automobile accident plaintiff had a verdict for \$1500, upon which judgment was entered, from which defendant appeals.

The only point presented in defendant's brief relates to the preponderance of the evidence. The accident happened about ten o'clock p. m. November 17, 1937. Plaintiff was riding in the rear seat of an automobile driven by her father and the mother was in the front seat. The jury could properly believe that, as they were driving north on Western avenue, the automobile driven by defendant came up from behind and bumped the car in which plaintiff was riding so hard as to cause it to swing around and collide with a car parked at the curb. The forward car at the time was going about eighteen or twenty miles an hour. The street was slippery. The force of the collision threw plaintiff forward and the upper part of her body went through the glass door, from which she received the injuries in question. Defendant knew the slippery condition of the street. He claims he was driving at about fifteen to sixteen miles an hour and that he must have been about three or four carlengths behind. His version is that he noticed the forward car skidding and put on his brakes, causing his car to skid, and that it just touched the forward car, but that car continued to skid towards the east curb. After the collision defendant's car ran about twenty feet before stopping.

MYRTLE BEACH, MISSISSIPPI  
JANUARY 1, 1937  
BY  
SAMUEL E. BARNETT, JR.  
Attorney.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSISSIPPI  
VS.  
JOHN J. BARNETT, JR.  
Defendant.

250 I.A. 643

THE JURY VERDICT FOLLOWS THE DECISION OF THE COURT.

Upon the trial of an action to recover damages for personal injuries received in an automobile collision with a vehicle for \$1000, upon which judgment was entered, from which defendant appeals.

The only point presented in defendant's brief relates to the propriety of the evidence. The accident happened about ten o'clock p. m. November 17, 1936. Plaintiff was riding in the rear seat of an automobile driven by her father and the mother was in the front seat. The jury would believe that, as they were driving north on Highway No. 1, the automobile driven by defendant came up from behind and struck her car in which plaintiff was riding as hard as it could to swing around and collide with a car parked at the curb. The father was at the time was riding about fifteen or twenty miles an hour. The father was driving. The force of the collision threw plaintiff forward and the upper part of her body went through the glass door, from which she received the injuries in question. Defendant knew the Mississippi condition of the street. He claims he was driving at about fifteen to sixteen miles an hour and that he must have been about fifteen feet carlength behind. His version is that he noticed the lights and hitting and got on his brakes, causing his car to stop, and that it just touched the forward car, but that car continued to slide towards the east curb. After the collision defendant's car ran about twenty feet before stopping.

The jury could properly conclude that the cause of the accident was the failure of defendant, considering the darkness and the slippery street, to keep at a proper distance behind the other car. It was his duty to keep his car under such control and at such speed that it would not strike the forward car. The jury was the proper judge of the facts as to whether defendant was so managing and operating his car that, if he had been in the exercise of reasonable care, the accident would not have happened. One of defendant's occurrence witnesses testified that the first car was going a little slower than the rear car which "coming up could not slacken its speed enough and then the impact came." This clearly establishes defendant's negligence.

Defendant in his argument - not in his brief proper - criticizes an instruction which contains only part of the statute as to speed on highways. (Paragraph 23, chapter 95a, Motor Vehicle act.) The portion of the statute held to be objectionable in Johnson v. Pendergast, 308 Ill. 255, is not in the instant instruction.

There is no good reason to reverse and the judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.



The jury could possibly conclude that the cause of the accident was the failure of defendant, exercising the business and the ordinary care, to keep at a proper distance behind the other car. It was his duty to keep his car under control and at such speed that it would not strike the forward car. The jury was the proper judge of the facts as to whether defendant was so managing and operating his car that, in the event of an emergency, he could stop in time to avoid collision with the other car. The jury was to determine whether defendant was negligent in not keeping a little slower than the car which "coming up" could not stop in time to avoid collision with the forward car.

This clearly established defendant's negligence. Defendant in his opinion - was in the right of way - exercised an invasion which would have put him in the right of way as to speed on highway. (Defendant's car, moving 20, 25, 30, 40, 50, 60, 70, 80, 90, 100, 110, 120, 130, 140, 150, 160, 170, 180, 190, 200, 210, 220, 230, 240, 250, 260, 270, 280, 290, 300, 310, 320, 330, 340, 350, 360, 370, 380, 390, 400, 410, 420, 430, 440, 450, 460, 470, 480, 490, 500, 510, 520, 530, 540, 550, 560, 570, 580, 590, 600, 610, 620, 630, 640, 650, 660, 670, 680, 690, 700, 710, 720, 730, 740, 750, 760, 770, 780, 790, 800, 810, 820, 830, 840, 850, 860, 870, 880, 890, 900, 910, 920, 930, 940, 950, 960, 970, 980, 990, 1000, 1010, 1020, 1030, 1040, 1050, 1060, 1070, 1080, 1090, 1100, 1110, 1120, 1130, 1140, 1150, 1160, 1170, 1180, 1190, 1200, 1210, 1220, 1230, 1240, 1250, 1260, 1270, 1280, 1290, 1300, 1310, 1320, 1330, 1340, 1350, 1360, 1370, 1380, 1390, 1400, 1410, 1420, 1430, 1440, 1450, 1460, 1470, 1480, 1490, 1500, 1510, 1520, 1530, 1540, 1550, 1560, 1570, 1580, 1590, 1600, 1610, 1620, 1630, 1640, 1650, 1660, 1670, 1680, 1690, 1700, 1710, 1720, 1730, 1740, 1750, 1760, 1770, 1780, 1790, 1800, 1810, 1820, 1830, 1840, 1850, 1860, 1870, 1880, 1890, 1900, 1910, 1920, 1930, 1940, 1950, 1960, 1970, 1980, 1990, 2000, 2010, 2020, 2030, 2040, 2050, 2060, 2070, 2080, 2090, 2100, 2110, 2120, 2130, 2140, 2150, 2160, 2170, 2180, 2190, 2200, 2210, 2220, 2230, 2240, 2250, 2260, 2270, 2280, 2290, 2300, 2310, 2320, 2330, 2340, 2350, 2360, 2370, 2380, 2390, 2400, 2410, 2420, 2430, 2440, 2450, 2460, 2470, 2480, 2490, 2500, 2510, 2520, 2530, 2540, 2550, 2560, 2570, 2580, 2590, 2600, 2610, 2620, 2630, 2640, 2650, 2660, 2670, 2680, 2690, 2700, 2710, 2720, 2730, 2740, 2750, 2760, 2770, 2780, 2790, 2800, 2810, 2820, 2830, 2840, 2850, 2860, 2870, 2880, 2890, 2900, 2910, 2920, 2930, 2940, 2950, 2960, 2970, 2980, 2990, 3000, 3010, 3020, 3030, 3040, 3050, 3060, 3070, 3080, 3090, 3100, 3110, 3120, 3130, 3140, 3150, 3160, 3170, 3180, 3190, 3200, 3210, 3220, 3230, 3240, 3250, 3260, 3270, 3280, 3290, 3300, 3310, 3320, 3330, 3340, 3350, 3360, 3370, 3380, 3390, 3400, 3410, 3420, 3430, 3440, 3450, 3460, 3470, 3480, 3490, 3500, 3510, 3520, 3530, 3540, 3550, 3560, 3570, 3580, 3590, 3600, 3610, 3620, 3630, 3640, 3650, 3660, 3670, 3680, 3690, 3700, 3710, 3720, 3730, 3740, 3750, 3760, 3770, 3780, 3790, 3800, 3810, 3820, 3830, 3840, 3850, 3860, 3870, 3880, 3890, 3900, 3910, 3920, 3930, 3940, 3950, 3960, 3970, 3980, 3990, 4000, 4010, 4020, 4030, 4040, 4050, 4060, 4070, 4080, 4090, 4100, 4110, 4120, 4130, 4140, 4150, 4160, 4170, 4180, 4190, 4200, 4210, 4220, 4230, 4240, 4250, 4260, 4270, 4280, 4290, 4300, 4310, 4320, 4330, 4340, 4350, 4360, 4370, 4380, 4390, 4400, 4410, 4420, 4430, 4440, 4450, 4460, 4470, 4480, 4490, 4500, 4510, 4520, 4530, 4540, 4550, 4560, 4570, 4580, 4590, 4600, 4610, 4620, 4630, 4640, 4650, 4660, 4670, 4680, 4690, 4700, 4710, 4720, 4730, 4740, 4750, 4760, 4770, 4780, 4790, 4800, 4810, 4820, 4830, 4840, 4850, 4860, 4870, 4880, 4890, 4900, 4910, 4920, 4930, 4940, 4950, 4960, 4970, 4980, 4990, 5000, 5010, 5020, 5030, 5040, 5050, 5060, 5070, 5080, 5090, 5100, 5110, 5120, 5130, 5140, 5150, 5160, 5170, 5180, 5190, 5200, 5210, 5220, 5230, 5240, 5250, 5260, 5270, 5280, 5290, 5300, 5310, 5320, 5330, 5340, 5350, 5360, 5370, 5380, 5390, 5400, 5410, 5420, 5430, 5440, 5450, 5460, 5470, 5480, 5490, 5500, 5510, 5520, 5530, 5540, 5550, 5560, 5570, 5580, 5590, 5600, 5610, 5620, 5630, 5640, 5650, 5660, 5670, 5680, 5690, 5700, 5710, 5720, 5730, 5740, 5750, 5760, 5770, 5780, 5790, 5800, 5810, 5820, 5830, 5840, 5850, 5860, 5870, 5880, 5890, 5900, 5910, 5920, 5930, 5940, 5950, 5960, 5970, 5980, 5990, 6000, 6010, 6020, 6030, 6040, 6050, 6060, 6070, 6080, 6090, 6100, 6110, 6120, 6130, 6140, 6150, 6160, 6170, 6180, 6190, 6200, 6210, 6220, 6230, 6240, 6250, 6260, 6270, 6280, 6290, 6300, 6310, 6320, 6330, 6340, 6350, 6360, 6370, 6380, 6390, 6400, 6410, 6420, 6430, 6440, 6450, 6460, 6470, 6480, 6490, 6500, 6510, 6520, 6530, 6540, 6550, 6560, 6570, 6580, 6590, 6600, 6610, 6620, 6630, 6640, 6650, 6660, 6670, 6680, 6690, 6700, 6710, 6720, 6730, 6740, 6750, 6760, 6770, 6780, 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8450, 8460, 8470, 8480, 8490, 8500, 8510, 8520, 8530, 8540, 8550, 8560, 8570, 8580, 8590, 8600, 8610, 8620, 8630, 8640, 8650, 8660, 8670, 8680, 8690, 8700, 8710, 8720, 8730, 8740, 8750, 8760, 8770, 8780, 8790, 8800, 8810, 8820, 8830, 8840, 8850, 8860, 8870, 8880, 8890, 8900, 8910, 8920, 8930, 8940, 8950, 8960, 8970, 8980, 8990, 9000, 9010, 9020, 9030, 9040, 9050, 9060, 9070, 9080, 9090, 9100, 9110, 9120, 9130, 9140, 9150, 9160, 9170, 9180, 9190, 9200, 9210, 9220, 9230, 9240, 9250, 9260, 9270, 9280, 9290, 9300, 9310, 9320, 9330, 9340, 9350, 9360, 9370, 9380, 9390, 9400, 9410, 9420, 9430, 9440, 9450, 9460, 9470, 9480, 9490, 9500, 9510, 9520, 9530, 9540, 9550, 9560, 9570, 9580, 9590, 9600, 9610, 9620, 9630, 9640, 9650, 9660, 9670, 9680, 9690, 9700, 9710, 9720, 9730, 9740, 9750, 9760, 9770, 9780, 9790, 9800, 9810, 9820, 9830, 9840, 9850, 9860, 9870, 9880, 9890, 9900, 9910, 9920, 9930, 9940, 9950, 9960, 9970, 9980, 9990, 10000, 10010, 10020, 10030, 10040, 10050, 10060, 10070, 10080, 10090, 10100, 10110, 10120, 10130, 10140, 10150, 10160, 10170, 10180, 10190, 10200, 10210, 10220, 10230, 10240, 10250, 10260, 10270, 10280, 10290, 10300, 10310, 10320, 10330, 10340, 10350, 10360, 10370, 10380, 10390, 10400, 10410, 10420, 10430, 10440, 10450, 10460, 10470, 10480, 10490, 10500, 10510, 10520, 10530, 10540, 10550, 10560, 10570, 10580, 10590, 10600, 10610, 10620, 10630, 10640, 10650, 10660, 10670, 10680, 10690, 10700, 10710, 10720, 10730, 10740, 10750, 10760, 10770, 10780, 10790, 10800, 10810, 10820, 10830, 10840, 10850, 10860, 10870, 10880, 10890, 10900, 10910, 10920, 10930, 10940, 10950, 10960, 10970, 10980, 10990, 11000, 11010, 11020, 11030, 11040, 11050, 11060, 11070, 11080, 11090, 11100, 11110, 11120, 11130, 11140, 11150, 11160, 11170, 11180, 11190, 11200, 11210, 11220, 11230, 11240, 11250, 11260, 11270, 11280, 11290, 11300, 11310, 11320, 11330, 11340, 11350, 11360, 11370, 11380, 11390, 11400, 11410, 11420, 11430, 11440, 11450, 11460, 11470, 11480, 11490, 11500, 11510, 11520, 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12960, 12970, 12980, 12990, 13000, 13010, 13020, 13030, 13040, 13050, 13060, 13070, 13080, 13090, 13100, 13110, 13120, 13130, 13140, 13150, 13160, 13170, 13180, 13190, 13200, 13210, 13220, 13230, 13240, 13250, 13260, 13270, 13280, 13290, 13300, 13310, 13320, 13330, 13340, 13350, 13360, 13370, 13380, 13390, 13400, 13410, 13420, 13430, 13440, 13450, 13460, 13470, 13480, 13490, 13500, 13510, 13520, 13530, 13540, 13550, 13560, 13570, 13580, 13590, 13600, 13610, 13620, 13630, 13640, 13650, 13660, 13670, 13680, 13690, 13700, 13710, 13720, 13730, 13740, 13750, 13760, 13770, 13780, 13790, 13800, 13810, 13820, 13830, 13840, 13850, 13860, 13870, 13880, 13890, 13900, 13910, 13920, 13930, 13940, 13950, 13960, 13970, 13980, 13990, 14000, 14010, 14020, 14030, 14040, 14050, 14060, 14070, 14080, 14090, 14100, 14110, 14120, 14130, 14140, 14150, 14160, 14170, 14180, 14190, 14200, 14210, 14220, 14230, 14240, 14250, 14260, 14270, 14280, 14290, 14300, 14310, 14320, 14330, 14340, 14350, 14360, 14370, 14380, 14390, 14400, 14410, 14420, 14430, 14440, 14450, 14460, 14470, 14480, 14490, 14500, 14510, 14520, 14530, 14540, 14550, 14560, 14570, 14580, 14590, 14600, 14610, 14620, 14630, 14640, 14650, 14660, 14670, 14680, 14690, 14700, 14710, 14720, 14730, 14740, 14750, 14760, 14770, 14780, 14790, 14800, 14810, 14820, 14830, 14840, 14850, 14860, 14870, 14880, 14890, 14900, 14910, 14920, 14930, 14940, 14950, 14960, 14970, 14980, 14990, 15000, 15010, 15020, 15030, 15040, 15050, 15060, 15070, 15080, 15090, 15100, 15110, 15120, 15130, 15140, 15150, 15160, 15170, 15180, 15190, 15200, 15210, 15220, 15230, 15240, 15250, 15260, 15270, 15280, 15290, 15300, 15310, 15320, 15330, 15340, 15350, 15360, 15370, 15380, 15390, 15400, 15410, 15420, 15430, 15440, 15450, 15460, 15470, 15480, 15490, 15500, 15510, 15520, 15530, 15540, 15550, 15560, 15570, 15580, 15590, 15600, 15610, 15620, 15630, 15640, 15650, 15660, 15670, 15680, 15690, 15700, 15710, 15720, 15730, 15740, 15750, 15760, 15770, 15780, 15790, 15800, 15810, 15820, 15830, 15840, 15850, 15860, 15870, 15880, 15890, 15900, 15910, 15920, 15930, 15940, 15950, 15960, 15970, 15980, 15990, 16000, 16010, 16020, 16030, 16040, 16050, 16060, 16070, 16080, 16090, 16100, 16110, 16120, 16130, 16140, 16150, 16160, 16170, 16180, 16190, 16200, 16210, 16220, 16230, 16240, 16250, 16260, 16270, 16280, 16290, 16300, 16310, 16320, 16330, 16340, 16350, 16360, 16370, 16380, 16390, 16400, 16410, 16420, 16430, 16440, 16450, 16460, 16470, 16480, 16490, 16500, 16510, 16520, 16530, 16540, 16550, 16560, 16570, 16580, 16590, 16600, 16610, 16620, 16630, 16640, 16650, 16660, 16670, 16680, 16690, 16700, 16710, 16720, 16730, 16740, 16750, 16760, 16770, 16780, 16790, 16800, 16810, 16820, 16830, 16840, 16850, 16860, 16870, 16880, 16890, 16900, 16910, 16920, 16930, 16940, 16950, 16960, 16970, 16980, 16990, 17000, 17010, 17020, 17030, 17040, 17050, 17060, 17070, 17080, 17090, 17100, 17110, 17120, 17130, 17140, 17150, 17160, 17170, 17180, 17190, 17200, 17210, 17220, 17230, 17240, 17250, 17260, 17270, 17280, 17290, 17300, 17310, 17320, 17330, 17340, 17350, 17360, 17370, 17380, 17390, 17400, 17410, 17420, 17430, 17440, 17450, 17460, 17470, 17480, 17490, 17500, 17510, 17520, 17530, 17540, 17550, 17560, 17570, 17580, 17590, 17600, 17610, 17620, 17630, 17640, 17650, 17660, 17670, 17680, 17690, 17700, 17710, 17720, 17730, 17740, 17750, 17760, 17770, 17780, 17790, 17800, 17810, 17820, 17830, 17840, 17850, 17860, 17870, 17880, 17890, 17900, 17910, 17920, 17930, 17940, 17950, 17960, 17970, 17980, 17990, 18000, 18010, 18020, 18030, 18040, 18050, 18060, 18070, 18080, 18090, 18100, 18110, 18120, 18130, 18140, 18150, 18160, 18170, 18180, 18190, 18200, 18210, 18220, 18230, 18240, 18250, 18260, 18270, 18280, 18290, 18300, 18310, 18320, 18330, 18340, 18350, 18360, 18370, 18380, 18390, 18400, 18410, 18420, 18430, 18440, 18450, 18460, 18470, 18480, 18490, 18500, 18510, 18520, 18530, 18540, 18550, 18560, 18570, 18580, 18590, 18600, 18610, 18620, 18630, 18640, 18650, 18660, 18670, 18680, 18690, 18700, 18710, 18720, 18730, 18740, 18750, 18760, 18770, 18780, 18790, 18800, 18810, 18820, 18830, 18840, 18850, 18860, 18870, 18880

34067

J. HUTCHINSON et al.,  
Appellees,

vs.

METROPOLITAN FIRE INSURANCE  
COMPANY et al.,  
Appellants.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 644'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Complainants, who were creditors of the Auburn State Bank of Chicago, which was in the process of being dissolved by the Auditor of Public Accounts of this State on account of its insolvency, filed their bill on behalf of themselves and other creditors of the Bank against certain stockholders of the Bank to enforce the liability imposed on such stockholders by Section 6 of Article 11, of the Constitution of this State. The case was referred to a master who recommended that a decree be entered fixing the liability of a number of stockholders of the Bank, including the defendant, the Metropolitan Life Insurance Company, whose liability was fixed at \$8,000. A decree was entered as recommended by the master, and the Metropolitan Life Insurance Company prosecuted this appeal.

The record discloses that in 1914 the Auburn State Bank was incorporated under the laws of this State with an authorized capital of \$200,000 to be divided into 2,000 shares of stock of the par value of \$100 a share, and a surplus of \$20,000; that upon its organization it began carrying on a general banking business in Chicago and continued to do so until May, 1917, when suit was filed by the Auditor of Public Accounts for the dissolution of the Bank on account of its insolvency. It further appears from the record that in March, 1914, the Hibernia Fire Insurance Company, now the defendant Metropolitan Fire Insurance

W. H. HARRISON et al.,  
Appellants,

v.

WILLIAMSON TRUST COMPANY  
et al.,  
Appellees.

IN SENATE,  
JANUARY 11, 1911.

2591A.644

MR. JUSTICE O'BRIEN DELIVERED THE OPINION OF THE COURT.

Complainants, who were creditors of the defunct State Bank of Chicago, which was in the process of being dissolved by the Auditor of Public Accounts of this State on account of its insolvency, filed their bill on behalf of themselves and other creditors of the bank against certain stockholders of the bank to enforce the liability imposed on such stockholders by Section 8 of Article II, of the Constitution of this State. The case was referred to a master who recommended that a decree be entered imposing the liability of a number of stockholders to the bank, including the defendant, the Metropolitan Life Insurance Company, whose liability was fixed at \$1,000. A decree was entered so recommended by the master, and the Metropolitan Life Insurance Company presented this appeal.

The record discloses that in 1911 the defunct State Bank was incorporated under the laws of this State with an authorized capital of \$1,000,000 and no dividend later than amount of the par value of \$100 a share, and a surplus of \$100,000. That upon its organization it began carrying on a general insurance business in Chicago and continued to do so until May, 1917, when suit was filed by the Auditor of Public Accounts for the dissolution of the bank on account of its insolvency. It appears from the record that in March, 1918, the Illinois Fire Insurance Company, now the defendant Metropolitan Life Insurance



Company, was in process of incorporation as a fire insurance company under the laws of this State, and through its promoters subscribed for 80 shares of the capital stock of the Auburn State Bank, for which it paid \$10,000 to the Bank, the stock at that time being taken in the name of M. J. Haghten, trustee. A certificate for 40 shares of this stock was issued in April, 1914, and another for 40 shares on September 29, 1914; that afterwards, April 17, 1917, these certificates were surrendered to the Bank and a new certificate for the 80 shares of the par value of \$8,000 was issued and delivered to the defendant Metropolitan Life Insurance Company, and these shares of stock stood in defendant's name until May 31, 1917, the date the suit was brought by the Auditor of Public Accounts to dissolve the Bank.

The evidence further shows that during the time the stock was held by the defendant Insurance company liabilities of the Bank of more than \$600,000 accrued.

In the suit brought by the Auditor of Public Accounts a receiver was appointed and claims of creditors of the Bank were filed with the receiver. The defendant Insurance company filed its claim for the \$10,000 it had paid for the stock, contending that it had no authority to invest its money in the stock of the Bank and that its act in attempting to do so was ultra vires. In that suit the receiver filed a petition wherein he represented that the question of the validity of the Insurance company's claim for the \$10,000 had not been determined but that he thought it was for the best interest of all that the claim be compromised and settled for \$5,000, and an order was entered accordingly, the claim of the Insurance company being allowed for \$5,000 as a general creditor of the defunct Bank. There is other evidence in the record, some of which will be hereinafter

Company, was in process of incorporation on a five hundred share  
basis under the laws of the State, and through the promoter ad-  
vised for 50 shares of the capital stock of the United States  
Bank, for which it paid \$10,000, but in the bank, the shares of stock  
then being taken in the name of E. L. Higgins, trustee, a cer-  
tificate for 50 shares of this stock was issued in April, 1914,  
and entered the 50 shares on September 25, 1914; that afterwards,  
April 17, 1917, these certificates were surrendered to the bank  
and a new certificate for the 50 shares of the new value of  
\$2,000 was issued and delivered to the defendant International Life  
Insurance Company, and these shares of stock were in defendant's  
name until May 27, 1917, the date the suit was brought by the  
Auditor of Public Accounts to dissolve the bank.  
The evidence further shows that during the time the  
stock was held by the defendant Insurance company identification of  
the bank of more than \$200,000 appeared.  
In the suit brought by the Auditor of Public Ac-  
counts a receiver was appointed and a list of creditors of the  
bank was filed with the receiver. The defendant Insurance  
company filed its claim for the \$2,000 it was said to be due  
stock, contending that it had no authority to issue the money  
in the stock of the bank and that the suit in claiming to be a  
creditor was void. In that suit the receiver filed a petition  
wherein he represented that the question of the validity of the  
Insurance company's claim for the \$2,000 had not been determined  
but that he thought it was the best interest of all that the  
claim be compromised and satisfied for \$1,000, and an order was en-  
tered accordingly. The claim of the Insurance company being ab-  
solved for \$1,000 as a general creditor of the National Bank. There  
is some evidence in the record, some of which will be hereinafter



referred to.

The constitutional provision of this State which is the basis of this suit provides: "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder."

The defendant contends that the decree is wrong and should be reversed for three reasons: (1) That the Insurance company could not, under the law, subscribe for stock in a State bank and therefore its act in attempting to do so was ultra vires. (2) That the stock issued to it was void because the Bank was authorized to issue but 2,000 shares of stock and that there was outstanding on May 22, 1917, 2819 shares of the capital stock and that the evidence fails to prove that the 80 shares of stock held by it was part of the authorized 2,000 shares. (3) That the allowance of the claim filed with the receiver in the suit brought by the Auditor of Public Accounts and allowed by the court in that case is res judicata.

(1) Was the act of the Insurance company in purchasing the 80 shares of stock without warrant of law an ultra vires? The defendant contends that it was and in support of this quotes from section 3 of the Fire Insurance act, as follows: "for the purpose of investing its capital, surplus and other funds or any part thereof (a fire insurance company) may purchase and hold \*\*\*\*\* the capital stock\*\*\* or evidence of indebtedness created by any corporation or corporations organized under the laws of the United States or of this or of any other state.\*\*\*\*\* No investment or loan shall be made by any such insurance company unless the same shall first have been authorized by the board of directors, or by a



referred to.

The constitutional provision of this State which is the basis of this suit provided: "Every stockholder in a corporation or institution shall be individually responsible and liable for the debts, over and above the amount of stock by him or her held, in an amount equal to his or her respective shares held, for all the liabilities existing while he or she remains such stockholder."

The defendant contends that the debt is a debt and should be reversed for three reasons: (1) That the insurance company could not, under the law, subscribe for stock in a State bank and therefore its act in attempting to do so was ultra vires. (2) That the stock issued to it was void because the law was then directed to issue not 2,000 shares of stock but that there was outstanding on May 22, 1917, 2,000 shares of the capital stock and that the evidence fails to prove that the 20 shares of stock held by it was part of the authorized 2,000 shares. (3) That the allowance of the claim filed with the receiver was not binding by the auditor of public accounts and allowed by the court in that case is the ruling.

(1) Was the act of the insurance company in subscribing the 20 shares of stock ultra vires? The defendant contends that it was not in violation of this statute from section 2 of the fire insurance act, as follows: "The purpose of investing the capital, surplus and other funds of any fire insurance company (a fire insurance company) may be to invest the same in any kind of real estate or in any other manner provided that any corporation or corporation organized under the laws of the United States or of this or of any other state, shall not invest or loan shall be made by any such insurance company unless the same shall first have been authorized by the board of directors, or by a

committee thereof, charged with the duty of supervising such loan." Sec. 8, chap. 73, page 1514, Cahill's 1929 Statutes. And the contention is made that there is no evidence in the record that the directors or a committee thereof, authorized the purchase of the 80 shares of stock. A sufficient answer to this is that no such question was raised under the pleadings, nor was any such contention made before the master, nor is there any evidence in the record touching the question whether the investment was authorized by the Board of Directors. The evidence shows that the stock certificate was issued and delivered to the Insurance company and paid for out of its funds, and if the purchase was unauthorized the burden was upon the defendant to adduce evidence of this fact. A further argument is made that Article 11 of the Constitution of 1870 in the first four sections refers to corporations and the next four sections refer to banks, and that therefore the Constitution does not treat a bank as an ordinary corporation. It is further contended that the Fire Insurance act above quoted, authorizing the investment by a fire insurance company of its funds in stock of a corporation, does not include the stock of a State bank. We think the argument is refined and unwarranted. Section 8 of the Fire Insurance act provides that a fire insurance company may invest its capital or surplus in the stock of any corporation. There is no limitation as to any particular kind of corporation and we think we would not be warranted in holding that stock of State banks were excluded. Section 8 being clear and unambiguous, there is no ground for construction.

(2) Were the 80 shares of stock purchased by the defendant part of the over-issue of the stock by the Bank, and if so, was such stock void? In the instant case the complainants do not seek to recover against all of the stockholders of the Bank



committee thereof, charged with the duty of investigating such  
 loan. Sec. 8, chap. 78, page 1814, Galloway's 1909 Statutes.  
 And the contention is made that there is no evidence in the re-  
 cord that the directors or a committee thereof, authorized the  
 purchase of the 80 shares of stock. A sufficient answer to this  
 is that no such question was raised under the pleadings, and no  
 any such contention made before the master, nor is there any  
 evidence in the record bearing the question whether the investment  
 was authorized by the Board of Directors. The evidence shows that  
 the stock certificate was issued and delivered to the defendant  
 company and sold for out of the funds, and it is the purpose of the  
 defendant to show that the purchase was upon the defendant's evidence  
 of this fact. A further argument is made that Article 11 of the  
 Constitution of 1870 for the first time requires that a written  
 vote and the next year section 10 of the Code, and that there-  
 fore the Constitution does not stand as a bar to the purchase of  
 stock. It is further contended that the defendant's  
 above quoted, authorizing the investment by a five per cent  
 fund of its funds in stock of a corporation, does not limit the  
 stock of a bank. We think the argument is without merit and  
 warranted. Section 8 of the Code requires that the purchase of  
 the defendant company may invest its capital or surplus in the  
 stock of any corporation. There is no limitation as to the  
 kind of corporation, and we think we must not be restricted  
 in holding that stock of a bank is not excluded. Section 8  
 being clear and unambiguous, there is no ground for construction,  
 (3) With the 80 shares of stock purchased by the  
 defendant part of the proceeds of the stock of the bank, and it  
 so, we must hold that the defendant's case was prejudicially  
 not to be reversed and all of the proceedings of the bank



because it appears that liability was claimed only against the owners of 1400 $\frac{1}{2}$  shares of the stock. It is conceded that there was an over-issue of stock. We think complainants made a prima facie case under the Constitution, so far as the point now under consideration is involved, when they proved that the Bank had issued stock to the several stockholders and that if the shares of stock issued to the defendant in the instant case were an over-issue, the burden was upon the defendant to show this fact. Commissioner of Banks v. Cosmopolitan Trust Co., 253 Mass, 205 - 218. Moreover we are of the opinion that the evidence is to the effect that the 80 shares were not part of the over-issue of stock, although this is not clear. The evidence tends to show that the 80 shares of stock were issued shortly after the Bank was incorporated, and before the 2,000 shares had been issued.

(3) Was the allowance of the Insurance company's claim for the \$10,000 it had paid for the 80 shares of stock by the Circuit court of Cook county, in the suit brought by the Auditor of Public Accounts res judicata? We think it was not. The evidence shows that the Insurance company filed its claim with the receiver for the \$10,000, in which it set up that it had no right or power to purchase the stock and asked that its claim be allowed; that the receiver in that case filed a petition in which he set up the Insurance company's claim and its contention, and stated that the liability had not been determined; that it was proposed that the \$10,000 claim be compromised and allowed for \$5,000 as of a general creditor of the Auburn Bank; that the receiver believed it was for the best interest of the creditors of the Bank that the claim be compromised and allowed for \$5,000. The record further discloses that an order was entered on the prayer of the petition of the receiver in which the court found that it was for the best interests of the creditors of the

because it appears that liability was claimed only against the owners of 1,000 shares of the stock. It is suggested that there was an over-issue of stock. The claimants themselves were a little late under the Constitution, so far as the point now under consideration is involved, when they proved that the Bank had issued stock to the several shareholders and that in the return of stock issued to the defendant in the instant case were an over-issue. The burden was upon the defendant to show that fact. Johnson v. Johnson is a case where the defendant is in the effort that the evidence is to the effect that 30 shares were not part of the over-issue of stock, although this is not clear. The evidence tends to show that the 30 shares of stock were issued shortly after the Bank was incorporated, and before the 2,000 shares had been issued.

(2) For the avoidance of the instant company's

claim for the \$10,000 it was said that the 30 shares of stock by the directors of Cash Company, in the suit brought by the directors of Public Accounts Inc. The claim is not clear. The evidence shows that the instant company filed its claim with the receiver for the \$10,000, in which it was said that it was not or gave to purchase the stock and said that the claim is not clear. That the receiver is that case filed a petition in which he set up the instant company's claim and the receiver, who stated that the liability had not been determined; that it was expressed that the \$10,000 claim be considered and allowed the \$10,000 as of a general creditor of the instant Bank; and the

receiver believed it was for the best interest of the creditors

of the Bank that the claim be considered and allowed for \$10,000. The receiver further stated that no other was entered on the prayer of the petition of the receiver in which the court found that it was for the best interests of the creditors of the



Bank that the claim of the Insurance company be allowed for \$8,000 and disallowed as to the balance. So that it clearly appears without dispute that the matter was not adjudicated by the court but was compromised by the parties, and an order was entered by the Circuit court accordingly.

A further point is made that the master erred in not sustaining the Insurance company's motion to strike out complainants' exhibit 2, being a compilation made by one of complainants' witnesses from the bank stock certificate books. The evidence shows that the books and records of the Bank were voluminous and could not conveniently be taken to the master's office and that complainants' witness made a written summary as to the ownership of the stock. On a number of occasions on the hearings before the master, it was stated by counsel for the complainants where the books and records of the Bank were located and that counsel for the defendant could examine them, but apparently this offer was not availed of by defendant's counsel. In cases of this character it has often been held that where the facts to be proved are a general result of the examination of books and records, evidence may be given by any competent person who has examined the books provided the result is capable of being ascertained by calculation, and that this is often the only feasible way. People v. Gerold, 265 Ill. 448; North American Life Ins. Co. v. Colonial Trust & Savings Bank, 236 Ill. App. 464; People v. Munday, 204 Ill. App. 24. We think the evidence was competent.

Counsel for complainants contends that the chancellor should have included in the decree interest on the \$8,000 from the date of the filing of the master's report. But we think this question is not properly before us. If counsel desired to raise this contention he should have assigned cross-errors. Sec. 107,



Bank that the claim of the insurance company be allowed for \$2,000 and disallowed as to the balance. He said it clearly appeared from the dispute that the matter was not adjourned by the court but was continued by the parties, and an order was entered by the Circuit Court accordingly.

A further point is made that the matter arose in New Orleans, the insurance company's action to strike out complicity, Exhibit 2, being a compilation made by one of the witnesses from the bank's own records. The evidence was that the books and records of the bank were voluminous and could not conveniently be taken to the master's office and that complicity was made a written summary as to the contents of the books. On a number of occasions on the hearings before the master, it was stated by counsel for the plaintiffs where the books and records of the bank were located and that counsel for the defendant could examine them, but apparently this offer was not availed of by defendant's counsel. In case of this offer it has been held that where the facts to be proved are a general result of the examination of books and records, evidence may be given by any competent person who has examined the books provided the result is capable of being ascertained by calculation, and that this is often the only feasible way. Levy v. Levy, 205 Ill. 443; North American Life Ins. Co. v. Colonial Trust & Savings Bank, 205 Ill. 449.

444; Levy v. Levy, 205 Ill. 443. We think the evidence was competent.

Counsel for defendant's witnesses said the calculation should have included in the deposit interest on the \$2,000 from the date of the filing of the master's report. But we think this question is not properly before us. It cannot be shown as to this matter that we should have included interest thereon. Dec. 1917.

chap. 110, Revised Statutes; McCreery v. Burnemier, 203 Ill. 43. Moreover, so far as appears from the record this question was not called to the attention of the chancellor.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.





34371

SCHMIDT CONSTRUCTION COMPANY,  
a Corporation,

Appellant,

vs.

MYRON DOWNIE and NATHAN CERF,  
Doing Business as Myron Downie  
& Company,

NATHAN CERF,

Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 644<sup>2J</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants, Myron Downie and Nathan Cerf, doing business as Myron Downie & Company, to recover \$1300 claimed to be due plaintiff for paving the alley in the rear of certain lots owned by the defendants in accordance with a contract entered into between the parties. Downie was not served. The case was tried before the court without a jury, there was a finding and judgment in favor of the defendant Cerf and plaintiff appeals.

The evidence is to the effect that Downie and Cerf owned certain lots in Chicago and that plaintiff was a corporation engaged in paving alleys under contracts entered into between it and the owners of property abutting on alleys; that in 1927 plaintiff solicited the defendants for the paving of an alley in the rear of certain lots owned by the defendants, and a written contract was entered into between the parties. The work was done by plaintiff but defendants paid nothing. The defendant Cerf filed an affidavit of merits and gave testimony to the effect that he did not own the lots in question and that he acted only as a representative of Downie and possibly other parties in the making of the contract for the paving of the alley.

We think there was sufficient evidence to warrant the

DONALD L. BROWN, Plaintiff,  
 vs.  
 RYAN BROWN and LARRY GALT,  
 Doing Business as Ryan Brown  
 & Company,  
 Defendants.  
 Appeal from the Circuit Court of Cook County.  
 2531 A. 044

MR. JUSTICE BROWN delivered the opinion of the court.  
 Plaintiff brought suit against the defendants, Ryan Brown and Larry Galt, doing business as Ryan Brown & Company, to recover \$1200 claimed to be due plaintiff for having the alloy in the rear of certain cars owned by the defendants in accordance with a contract entered into between the parties. Plaintiff was not served. The case was tried before the court without a jury, there was a finding and judgment in favor of the defendant Galt and plaintiff appeals.

The witness is to the effect that Brown and Galt owned certain cars in Chicago and that plaintiff was a corporation engaged in having alloys under contract entered into between it and the owners of property situated on alloy; that in 1927 plaintiff collected the defendants for the having of an alloy in the rear of certain cars owned by the defendants, and a written contract was entered into between the parties. The work was done by plaintiff but defendants paid nothing. The defendant Galt filed an affidavit of merits and gave testimony to the effect that he did not own the cars in question and that he used only as a representative of Brown and possibly other parties in the making of the contract for the having of the alloy.

We think there was sufficient evidence to warrant the

court to find for the plaintiff against defendant Cerf. An examination of the record fails to disclose the theory on which the court decided the case, and defendant Cerf has filed no brief in this court. The evidence is to the effect that Cerf entered into the contract with the plaintiff and that he was liable for the work, and this, too, although Downie was not before the court.

Plaintiff offered in evidence a written document dated April 20, 1927, addressed to it by defendants and signed by Cerf, which it is conceded was part of the contract. It states: "We accept your proposition dated April 15th covering the paving of the alleys backing lots 78 to 80 inclusive, 82 and 83 and lots 96 to 100 inclusive, and hope you will get started on the work immediately." When this was offered in evidence the court called the attention of counsel for the plaintiff to the fact that the written document showed an acceptance of plaintiff's proposition of April 15th, and since the evidence showed that proposition to be in writing, the writing must be produced, or secondary evidence in case it could not be produced. There was some discussion on this question but the case then apparently erroneously turned on another theory. It appearing from the evidence that the proposition made by plaintiff to defendants for paving the alley was in writing which, with the acceptance by defendants, would constitute the contract, the case could not properly be decided unless the contract was before the court.

We are reversing the judgment so that the facts may all be adduced. Plaintiff's statement of claim is based on a quantum meruit. Of course, if the contract is in writing and the price specified, the pleading would have to be amended.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.



... to find for the plaintiff against defendant. In an oral-  
 action of the court this is to discuss the theory on which the court  
 decided the case, and defendant's case was tried in this court.  
 The evidence is to the effect that defendant entered into the contract  
 with the plaintiff and that he was liable for the work, and this,  
 too, although plaintiff was not before the court.

Plaintiff offered in evidence a written document  
 dated April 20, 1907, addressed to it by defendant and signed by  
 defendant, which is in evidence as part of the contract. It states:  
 "We accept your proposition dated April 18th covering the paving  
 of the alley backing lots 72 to 80 inclusive, 82 and 83 and 100  
 to 100 inclusive, and hope you will get started on the work  
 immediately." When this was offered in evidence the court called  
 the attention of counsel for the plaintiff to the fact that the  
 written document showed an acceptance of plaintiff's proposition  
 of April 18th, and since the evidence showed that proposition to  
 be in writing, the writing must be produced, or secondary evidence  
 in case it could not be produced. There was some discussion on this  
 question but the case then apparently erroneously turned on a  
 theory. It appearing from the evidence that the proposition was  
 by plaintiff to defendant for paving the alley was in writing  
 when the acceptance by defendant, which constituted the con-  
 tract, the case could not properly be decided unless the con-  
 tract was before the court.  
 We are reversing the judgment so that the facts may all be  
 stated. Plaintiff's statement of claim is based on a written  
 contract, if the contract is in writing and the facts  
 stated, the plaintiff would have to be sustained.  
 The judgment of the Municipal Court of Chicago is reversed  
 and the case is remanded for a new trial.

REVEREND AND HONORABLE

Roberts, J. J., and Roberts, J. J., concur.

34382

STANISLAW KASPRZYK and  
AGNIESZKA KASPRZYK,  
Appellees,

vs.

WLADYSLAW SAKOWSKI and  
BERTHA SAKOWSKI,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 644<sup>3</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs as landlords brought suit against the defendants, their tenants, to recover possession of certain premises in Chicago. The case was tried before the court without a jury and there was a finding and judgment in plaintiffs' favor and the defendants appeal.

The record discloses that on February 5, 1925, the parties entered into a written lease whereby plaintiffs leased to defendants certain premises in Chicago for a period of five years beginning on February 1, 1925, and ending January 31, 1930. The lease having by its terms expired on January 31st, plaintiffs on February 5, 1930, brought this suit in forcible detainer against defendants to recover possession of the premises. On the trial of the case one of the defendants testified that in August, 1929, he had a conversation with the two plaintiffs, and the fact that defendants' lease would expire on January 31st following was discussed, and that plaintiffs at that time told him that after the expiration of the lease he could continue to occupy the premises as a tenant from month to month. One of the plaintiffs denied that there was any such conversation. About January 2, 1930, plaintiffs served a written notice on defendants advising them that their lease expired on February 1, 1930, and demanding possession.

It seems to be conceded that defendants having interposed an affirmative defense, the burden was upon them to prove



34382

RECEIVED  
FEBRUARY 1, 1930  
FEBRUARY 1, 1930

VS.

WILLIAM W. BARNETT and  
JAMES S. BARNETT  
Appellants.

WILLIAM W. BARNETT and  
JAMES S. BARNETT

vs.

34382

RE. JAMES S. BARNETT'S WILLINGNESS TO SUE FOR THE COURT.

PLAINTIFFS AS INDICATED BY THE COURT.

Defendants, their tenants, to recover possession of certain premises in Chicago. The case was tried before the court without a jury and there was a finding in plaintiffs' favor and the defendant's appeal.

The record discloses that on February 5, 1928, the parties entered into a written lease whereby plaintiffs leased to defendants certain premises in Chicago for a term of five years beginning on January 1, 1928, and ending January 31, 1933. The lease having by its terms expired on January 31, 1930, plaintiffs on February 8, 1930, brought this suit in Chicago to recover possession of the premises. In the trial of the case one of the defendants testified that on January 1, 1930, he had a conversation with the two plaintiffs, and the two plaintiffs' lease would expire on January 31, 1930, following which the case, and that plaintiffs at that time called him and that the expiration of the lease he would continue to occupy the premises as a tenant from month to month. One of the plaintiffs testified that there was any such conversation. About January 8, 1930, plaintiffs served a written notice on defendants advising them that their lease expired on February 1, 1930, and demanding possession. It seems to be conceded that defendants having information as to the facts, the parties are now to have



such defense by a preponderance of the evidence. The court having found the issues for the plaintiffs, we would not be authorized in disturbing the finding and judgment in plaintiffs' favor unless such finding was against the manifest weight of the evidence. The trial court observed on the trial that the defense as testified to by one of the defendants was entirely too indefinite, and found the issues for the plaintiffs. A careful consideration of all the evidence leads to but one conclusion- that we would not be warranted in holding that the finding of the trial Judge in favor of the plaintiffs was against the manifest weight of the evidence. On the contrary we are clearly of the opinion that the finding was the only one that could reasonably be entered from the evidence adduced.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

such taken by a proponent of the evidence. The court having found the issues for the plaintiffs, we would not be surprised in distorting the finding and judgment in plaintiffs' favor unless such finding was against the manifest weight of the evidence. The trial court observed on the trial that the defense was satisfied by one of the defendants was entirely free intention, and found the issues for the plaintiffs. A careful consideration of all the evidence leads to but one conclusion- that we would not be warranted in holding that the finding of the trial judge is favor of the plaintiffs was against the manifest weight of the evidence. On the contrary we are clearly of the opinion that the finding was the only one that could reasonably be arrived from the evidence adduced.

The judgment of the Municipal Court at Chicago is

affirmed.

ATTORNEYS.

McIntosh, P. J., and McIntosh, J., concur.

34394

PETER TREBILLAS,  
Appellee,

vs.

JAMES A. WALSH,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 644<sup>4</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 9, 1929, complainant filed his bill to foreclose a trust deed dated June 27, 1928, given to secure an indebtedness of \$13,500 as a part of the purchase price of certain real estate that day purchased by the defendant, Walsh, from complainant. The note was due three years after date, with interest at 6 per cent per annum, payable semi-annually, as evidenced by six interest coupon notes. The first coupon became due and payable by its terms December 27, 1928, and complainant contended that there was default in the payment of this coupon which warranted him in declaring all of the indebtedness due and payable. On the other hand, the defendant's position was that there was no default because he had given a check for the amount of the coupon to complainant's representative, a Chicago bank. After the issues were made up the cause was referred to a master in chancery, who took the evidence, made up his report, and recommended a decree in accordance with the prayer of the bill. Objections and exceptions of the defendant were overruled and a decree entered awarding foreclosure. The amount found due by the decree, which included the master's fee of \$291.70 and solicitors' fees of \$1250, was \$16,477.10. There was no controversy as to the making of the note or trust deed. Substantially all the matters alleged in the bill were admitted in the answer except the default, so that the only point in controversy was whether there was a default in payment of the interest coupon, \$405, which became due by its



PETER T. BROWN

Attorney

vs.

JOHN A. BROWN

Appellant

IN SENATE

OF THE STATE

1934

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 8, 1934. Rehearing denied May 14, 1934.

Close a trust fund (April 17, 1934). Given to account to the  
 defendant of \$12,500 as a part of the purchase price of certain  
 real estate that day purchased by the defendant, which, then con-  
 sidered. The note was the first of two notes, the second  
 as a part of the purchase price, payable semi-annually, or otherwise by  
 the interest on the note. The first note was given to the wife  
 by the defendant on December 17, 1931, and contained a provision that  
 there was to be in the payment of this note which was to be  
 him in discharging all of the indebtedness and obligations. In the  
 other hand, the defendant's condition was that when the bill was  
 because he had given a check for the amount of the money to the  
 defendant's representative, a Chicago bank. When the bill was  
 paid up the money was to be a credit to the defendant, and when  
 the balance, made up his account, was to be credited to the bill in  
 accordance with the terms of the bill. The defendant and his representative  
 of the defendant were to be a credit to the defendant, and when the  
 representative. The money was to be paid to the defendant, which included  
 the master's fee of \$100.00 and the defendant's fee of \$100.00, and  
 \$12,477.10. There was no testimony as to the receipt of the  
 note or that it was. The defendant's bill was not admitted in the  
 the bill was admitted in the master's account the defendant, so that  
 the only bill in the master's account was the bill which was a bill in  
 payment of the master's account, and which became due by the

terms December 27, 1928. The defendant tendered payment in his answer.

Complainant alleged in his bill that on January 7, 1929, he elected to declare and did declare the whole indebtedness due on account of defendant's failure to pay the first interest coupon. The Master in his report found that there was default in the payment of interest "and because of such default the complainant \*\*\* elected to declare and did, by the filing of his bill of complaint, on January 9, 1929, declare the entire indebtedness" due and payable. And the decree found that by the terms of the note and trust deed, the legal owner of them might, in case of default for three days in the payment of interest, elect to declare the entire indebtedness due and that, on account of the default in the payment of interest, complainant did, on January 9, by the filing of his bill, declare the entire indebtedness due and unpaid.

The evidence shows that in June, 1928, defendant, Walsh, purchased the premises mentioned in the trust deed from the complainant through one Wilson, a real estate agent, the transaction being carried on between Wilson and the defendant. The purchase price of the property is not disclosed by the evidence but the trust deed states that the \$13,500 evidenced by Walsh's note was given in part payment of the purchase price.

It further appears that the complainant lived in Calumet City, Illinois, which lies immediately west of Hammond, Indiana; that about December 22, 1928, complainant delivered interest coupon note No. 1 to a Hammond bank for collection; that the Hammond bank forwarded the coupon to its correspondent in Chicago, The Continental National Bank and Trust Company; that upon receipt of the coupon by the latter bank, which was about December 24, it notified defendant Walsh in writing that it held

James December 27, 1933. The defendant's testimony is as follows:

Answer.

Defendant alleged in his bill that on January 7,

1933, he elected to declare and was declared the sole interest.

There was no account of defendant's bill in any law firm in

1933. The matter in his report shows that there was

defendant in the payment of interest "and because of this he said

the complaint was elected to declare and was, by the filing of

his bill of complaint, on January 8, 1933, declare the entire

defendant, the said plaintiff. And the action taken by the

court at the time and trial was, the legal action of that night,

in case of default for three days in the payment of interest,

order to declare the entire defendant was and was, in answer

of the bill in the payment of interest, defendant was, on

January 8, by the filing of his bill, declare the entire defendant.

And the bill was filed.

The witness then said in 1933, 1934, defendant,

Wain, returned the witness' testimony in the court room from

the defendant's bill, and witness, a bill was filed against the

defendant being served on between Wain and the defendant.

The defendant bill of the property is not disposed of the bill.

Since the first bill filed with the bill was evidenced by

Wain's wife was given in full payment of the purchase price.

It further appears that the complaint filed in

Colman City, Illinois, which was substantially that of defendant,

initial; that James December 27, 1933, defendant's bill was

filed against James No. 1 as a defendant from the defendant; that

the defendant then forwarded the action in the defendant in

Chicago, The defendant's bill was filed with the court; that

upon receipt of the bill of the first bill, which was filed

December 27, it was filed against James in which bill it was



the coupon for collection. The evidence also shows that an officer of the bank talked with defendant Walsh on the 'phone and asked whether the bank should send the note to Walsh and receive payment or whether Walsh would pay the note at the bank and that Walsh stated he would send a check to the bank. The principal note provided that "in case of default for three days in the payment of any installment of interest" the legal holder, at his election, without notice, might at the expiration of the three days, declare the entire indebtedness due. A similar provision is contained in the trust deed. On December 31st, the Chicago bank not having received payment of the coupon and the complainant apparently being apprised of this fact, the Hammond bank wrote the Continental bank to return the coupon at once, and the Chicago bank accordingly returned the coupon to the Hammond bank on January 2nd. On January 3rd the collection department of the Chicago bank received from its mailing department the defendant Walsh's check for \$405 in payment of the note. Walsh enclosed with the check the written notice he had received from the Chicago bank that it held the note for collection. Upon receipt of the check by the note teller in the collection department of the Chicago bank, he telephoned the Hammond bank advising it of the receipt of the check and asking for instructions. Thereupon the Hammond bank stated it would later notify the Chicago bank as requested. The Hammond bank was apparently trying to get in touch with its customer, the complainant, and on January 4th the Hammond bank advised the Chicago bank to return the check to Walsh. The Chicago bank did this on the same day, writing Walsh a letter in which it stated: "This note has been returned to our correspondent and they have requested us to return the check to you." Walsh received his check the next day. All of the foregoing evidence is undisputed.

The coupon for collection. The evidence also shows that on or about the 1st of the month of January 1934, the bank failed with defendant Walsh on the phone and asked whether the bank should send the note to Walsh and receive payment or whether Walsh would pay the note at the bank and that Walsh stated he would send a check to the bank. The witness also provided that "in case of default for three days in the payment of any installment of interest" the legal holder, at his election, without notice, might at the expiration of the three days, declare the entire indebtedness due. A similar provision is contained in the first deed. On December 31st, the Chicago bank had received the coupon and the coupon and the installment apparently being received at this time, the Chicago bank wrote the Continental bank to return the coupon at once, and the Chicago bank accordingly returned the coupon to the Hammond bank on January 2nd. On January 2nd the collection department of the Chicago bank received from the making department the note and Walsh's check for \$100 in payment of the note. Walsh advised that the bank had received the note and received from the Chicago bank the \$100 in note for collection. Upon receipt of the check by the note holder in the collection department of the Chicago bank, he returned the Hammond bank advising it of the receipt of the check and asking for instructions. Thereupon the Hammond bank stated it would later notify the Chicago bank as requested. The Hammond bank was apparently trying to get in touch with its customer, the Continental, and on January 3rd the Hammond bank advised the Chicago bank to return the money to Walsh. The Chicago bank did this on the same day, without delay. It is noted: "This note has been returned to our correspondence and they have requested us to return the check to you." Walsh received the check on the 3rd. All of the foregoing evidence is uncontradicted.



Walsh testified that he placed the check in a drawer in his desk, assuming that the owner of the note would call to receive payment within a few days; that he called up Wilson, the real estate agent through whom the purchase of the property was made, in an endeavor to communicate with the complainant, whom he had met only once, but was unable to locate complainant and did not know where the note was made payable; that he did not locate complainant until after the suit was brought.

The evidence shows that Walsh had ample funds to pay the note and that his check was good. There is further evidence to the effect that complainant knew that Walsh was considered a man of means and financially responsible. Complainant testified that on January 3rd he went to the Hammond bank, obtained the coupon which had been returned to it by the Chicago bank, and on the same day came to Chicago and gave the notes and trust deed to his solicitor with directions to institute foreclosure. The evidence also shows that Walsh, at the time the coupon was sent to Chicago for collection, was employed by the Twelfth Street Store at 12th and Halsted streets, Chicago. Walsh testified that on December 26th, when he was notified by the Chicago bank that it held the coupon for collection, he requested a young lady, who also worked for the Twelfth Street store, to make out a check; that she thereupon made out the check, payable to the order of the Chicago bank for \$455, which he signed and which he requested her to mail to the bank. She gave testimony to the same effect and further testified that she mailed the check on December 26th; that later on, Walsh having left the employ of the Twelfth Street Store, she destroyed the check book containing the check stub in question. The master made no special finding as to whether the check had been made out and mailed on December 26th, but we must assume that he found against the defendant, and we are clearly of the opinion that we would not be



Walter testified that he placed the check in a drawer

in his room, and that the money in the drawer would still be  
positive payment within a few days; that he called on Wilson, who  
told him that he would come to the house of the woman, and  
made, in an endeavor to communicate with the woman, who he  
had not only seen, but was unable to locate immediately and did not  
know where the note was kept; that he did not locate any-  
where until after the trial was over.

The witness also told that he had seen Wilson in pay-  
ing the note and that his name was good. There is further evidence as to  
the effect that complaint made that Walter was furnished a man  
of means and financially responsible. On January 1st, 1911, on  
January 1st he was in the woman's room, and on the same  
date had been returned to it by the Chicago police, and on the same  
day came to Wilson and gave him the note and told him to take it  
and with directions to locate the woman. The witness also  
admits that Wilson, at the time the woman was sent to Chicago for  
collection, was employed by the Chicago Police at that time  
and that Wilson, after collecting the note on December 21st,  
then he was notified by the Chicago Police that it had been  
for collection, he returned a young lady, who also worked for the  
Twelfth Street Club, in case that a check, was the collection made  
and the check, signed by the owner of the Chicago Club, was  
which he signed and which he represented was in fact in his hand.  
The witness also told that he had been notified that  
the woman had been on December 21st; that later on, after having  
left the office of the Twelfth Street Club, and having the check  
back containing the money with it. The witness also told  
evidence that he had been the first to hear that the woman had been  
on December 21st, but he was not certain because he was not the  
first, and he was directly in the office that he would not be

warranted in disturbing his finding.

On the question of the amount of complainant's solicitors' fees, one of complainant's counsel testified that he put in 20 days time on the case. He kept no memorandum of his services, and he further gave testimony to the effect that the time taken before the master and in court would not be more than two or three days.

Where a note and trust deed provide that upon any default in the payment of interest when due, the owner of them may at his option declare the whole amount due, the rule is that a tender of payment of the overdue "interest before the option to declare the whole debt due has been exercised, cuts off the right to exercise the option, and this is so because the debt does not become due on the mere default in payment, but some affirmative action is necessary by which the creditor makes it known to the debtor that he intends to declare the whole debt due." 25 R.C.L., 653.

In discussing this same question it is said in Jones on Mortgages, vol. 2. p. 998: "The whole debt does not in fact become due upon default, but the mortgagee has a mere option which he may exercise or waive, and if the mortgagor makes the overdue payment or tenders the overdue payment before the option is exercised, the right to declare the entire indebtedness due is lost."

The foregoing rule is sound in principle and has long been firmly established. In the instant case, the evidence shows that the defendant tendered payment of the interest at the latest on January 3rd by sending his check to the Chicago bank. This was four days before complainant claims to have elected to declare the entire indebtedness due. Complainant, in his bill, alleged that on January 7th he had elected to accelerate the payment of the entire indebtedness, which had 2½ years to run. The master and the chancellor both found that complainant had elected to declare and did declare the entire indebtedness due on January 9th, the date

represented in this regard.

In the question of the amount of compensation to which  
 the plaintiff is entitled, the court has found that the  
 plaintiff has been injured in the amount of his services, and  
 he has been injured in the amount of his services, and  
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 plaintiff has been injured in the amount of his services.

It is in the payment of interest that the court has found  
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In discussing this case, the court has found that the  
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 plaintiff has been injured in the amount of his services.



of the filing of the bill, so that under the rule of law above stated, the tender cut off complainant's right to declare the entire indebtedness due. Moreover, a court of equity is a court of conscience and will not always literally enforce the provisions of a trust deed where to do so would be oppressive and unconscionable. Bagley v. Ill. Tr. & Sav. Bank, 199 Ill. 76; Bothman v. Lindstrom, 221 Ill. App. 262; Althausen v. Kohn, 222 Ill. App. 324; Davis v. Blair, 252 Ill. App. 417.

In the Bagley case a bill was filed to foreclose a trust deed and a receiver was appointed during the pendency of the suit to collect rents in accordance with the terms of the trust deed. The court held there was no error in appointing a receiver under the facts in that case, but said <sup>(p. 79)</sup>: "It is not meant, however, to be said that a court of equity will appoint a receiver simply because such appointment is stipulated for in the mortgage. The court is not bound to enforce such a provision where it is not necessary to enforce the lien on the rents and profits for the payment of the mortgage debt. But it has been held that such an agreement in the mortgage is entitled to weight in determining whether the power of the court to make the appointment should be exercised or not."

In the Bothman case, in considering a similar question, we said (p. 270): "And indeed it has been held that even where the trust deed expressly pledges the rents as security for the debt and authorizes the appointment of a receiver, the court will not make such appointment where it would be inequitable to do so. Bagley v. Illinois Trust & Savings Bank, 199 Ill. 76. And in the case of Aetna Life Ins. Co. v. Broker, 166 Ind. 576, it was held that the provision in the trust deed authorizing the appointment of a receiver to collect the rents would not be enforced in a court of chancery except where the equities of the case required that it



be done." And we held that a provision of a trust deed providing for the appointment of a receiver upon default was not always controlling, but that a receiver would be appointed or the appointment withheld upon a consideration of all the equities of the case.

And in the Davis case another division of this court said (p. 422): "Despite the provisions of the usual trust deed authorizing the appointment of a receiver without notice and without complainant's bond, interested parties are entitled to equitable consideration in a court of chancery."

Under the facts disclosed by the evidence, we think it would be oppressive and unconscionable in the instant case to allow a foreclosure, require defendant to pay large costs and solicitors' fees, and permit complainant to declare the \$13,500 due at once although by the terms of the note it was not due for two and a half years. Walsh had but six months before bought the property from complainant, and the evidence shows that complainant knew that Walsh was financially responsible. He also knew that Walsh was willing to pay the coupon, because it not only appears from the evidence that Walsh told the representative of the Continental bank, when he was notified on December 26th that the bank held the note for collection, that he would send a check, but it also appears that before any costs were incurred by the complainant on January 3rd he was advised by the bank that it had received Walsh's check for the amount of the coupon. A court of equity will not permit oppression.

The decree of the Superior court of Cook county is reversed and the cause remanded with directions to dismiss the bill.

REVERSED AND REMANDED.

Matchett, P. J., concurs.  
McSurely, J., dissents.





34413

THE FOREMAN STATE TRUST  
& SAVINGS BANK, a Corpora-  
tion, as Trustee,  
vs. Appellant,  
FRANK S. DEMETER,  
Appellee,

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 645'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On December 6, 1929, plaintiff, landlord, caused judgment by confession to be entered against the defendant, the tenant, for \$8025, the amount plaintiff claimed was due for rent at \$1,000 a month, under a written lease for the months of May to December, both inclusive. Afterwards, on motion of defendant, the judgment was opened up and he was given leave to defend. The case was then tried before a Judge and a jury and there was a verdict and judgment in defendant's favor, and plaintiff appeals.

Prior to the entry of the judgment in the instant case plaintiff had a judgment by confession entered against defendant on the same lease for \$1000, claimed as rent for January, 1929, which judgment was opened up and evidence heard, and at the close of all the evidence there was a directed verdict in favor of the plaintiff. On appeal to this court the judgment was reversed and the cause remanded. (Foreman State Trust & Savings Bank, a corporation, as Trustee, v. Demeter, No. 33550. That judgment was reversed, as appears from the opinion filed January 6, 1930, principally for the reason that the facts involved were not fully adduced. The facts in reference to the making of the lease were set forth in the opinion then filed and will not be repeated here. It is sufficient to say that the lease did not, by its terms, expire until November 30, 1934, but the tenant vacated the premises on December 28, 1928, claiming that he was authorized to do so by the

24413

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

vs.

2591A.645

THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA  
vs.  
FRANK A. WHITMAN, Appellee

Appellee

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On December 8, 1933, plaintiff, defendant, entered judgment by confession to be entered against the defendant, the amount for \$3088, the amount plaintiff claimed was due for rent at \$1,000 a month, under a written lease for the month of May to December, both inclusive. Afterwards, on motion of defendant, the judgment was opened up and he was given leave to defend. The case was then tried before a judge and a jury and there was a verdict and judgment in defendant's favor, and plaintiff appeals.

Prior to the entry of the judgment in the instant case plaintiff had a judgment by confession entered against defendant on the same lease for \$1000, claimed as rent for January, 1934, which judgment was opened up and evidence heard, and at the close of all the evidence there was a directed verdict in favor of the plaintiff. On appeal in this court the judgment was reversed and the case remanded. (District Court Trial Term, A. 2591A.645)

Also, as stated, the judgment was reversed, as appears from the opinion filed January 6, 1935, which held for the reason that the facts involved were not fairly stated. The facts in volume in the making of the lease were not set forth in the opinion then filed and will not be repeated here. It is sufficient to say that the issue did not, by the facts, require until November 20, 1934, but the tenant vacated the premises on December 22, 1933, claiming that he was authorized to do so by the



landlord, that the lease was terminated and therefore there was no liability under the lease after he vacated and surrendered up the premises.

On the other hand, plaintiff's position was and is that defendant vacated the premises of his own accord and without authority of the landlord.

It appears from the evidence that there were nine buildings covered by the lease which were being used and occupied by the defendant for rooming house purposes; that there were three fires in the premises which damaged part of them, the last one occurring December 23, 1928, a few days before defendant vacated; that on December 26, 1928, the owner of the premises met the tenant and the question of the repair of the damage done by the fire was discussed, the tenant taking the position that under the lease and the understanding between the parties it was the duty of the landlord to repair the damage done, and that the money to pay for such repairs was to be derived from the insurance money collected; and that the landlord there stated that the property was not insured because plaintiff was unable to procure insurance on account of the two previous fires. Plaintiff's version of the matter was that the duty of repairing the buildings after the fire was upon the tenant. It appears that the parties got into a controversy on this question, the defendant taking the position that unless the repairs were made by plaintiff he would vacate the premises and terminate the lease, and that the landlord refused to make the repairs and agreed that the defendant might vacate the premises. Plaintiff denied that there had been any such agreement and denied that plaintiff had been unable to procure insurance, but on the contrary gave testimony to the effect that the property was insured and that some few months afterwards the insurance company

landlord, that the lease was terminated and no liability under the lease after its termination and extinguishment up the premises.

On the other hand, Plaintiff's position was and is that defendant vacated the premises at his own choice and without authority of the landlord.

It appears from the evidence that there were also buildings covered by the lease which were being used and occupied by the defendant for retail house purposes; that there were three fires in the premises which damaged part of them, the last one occurring December 25, 1928, a few days before defendant vacated; that on December 26, 1928, the owner of the premises met the defendant and the question of the repair of the damage done by the fire was discussed, the tenant taking the position that under the lease and the understanding between the parties it was the duty of the landlord to repair the damage done, and that the money to pay for such repairs was to be deducted from the leasehold money collected; and that the landlord there stated that the property was not insured because Plaintiff was unable to procure insurance on account of the two previous fires. Plaintiff's version of the matter was that the duty of repairing the buildings after the fire was upon the tenant. It appears that the parties had into a controversy on this question, the defendant taking the position that unless the repairs were made by Plaintiff he would vacate the premises and terminate the lease, and that the landlord refused to make the repairs and asked that the defendant might vacate the premises. Plaintiff denied that there had been any such agreement and denied that Plaintiff had been unable to procure insurance, but on the contrary gave testimony to the effect that the property was insured and that some few months afterwards the insurance company



paid the loss to plaintiff. This controverted question of fact was submitted to the jury. They found in favor of the defendant, and after a careful consideration of all the evidence we are unable to say that such finding is against the manifest weight of the evidence.

Complaint is made by plaintiff of a number of instructions given by the court; but the instructions were oral and under the rule of the Municipal court it is the duty of counsel to point out any claimed defects in such instructions. This was not done, therefore the question of the propriety of the instructions is not saved for review. Complaint is also made that the premises were not surrendered by the defendant when he vacated them December 28 because there were two sub-tenants occupying a part of them, and the undisputed evidence is that they did not vacate until February 5. But there is evidence to the effect that after the first of the year they remained in possession under a tentative arrangement they made with the landlord.

Under the terms of the lease the tenant was required to pay all taxes and other charges levied or assessed against the property, and another paragraph of the lease provided that the tenant should insure the buildings, pay the premiums and turn over the policies to the landlord. Afterwards the lease was modified in writing so that the tenant might pay the taxes and insurance in twelve monthly installments in advance, commencing the first day of March, 1926, and thereafter. The evidence shows that after the execution of this amendment the tenant paid \$308 monthly to the landlord in addition to the \$1000 rent. There is also evidence tending to show that after this amendment the landlord attended to procuring the insurance, and that this was according to the oral agreement made between the parties. The defendant contends that this oral evidence was inadmissible as



held the fact to be established. This notwithstanding, the fact was admitted by the jury. They found in favor of the defendant, and after a careful consideration of all the evidence we are able to say that there is no doubt as to the manifest weight of the evidence.

Defendant is made by a number of witnesses, some given by the state; but the defendant's case was not under the rule of the defendant's case it is the duty of the court to point out any material defects in the evidence. This was not done, therefore the question of the admissibility of the evidence is not even for review. Defendant is also made that the premises were not occupied by the defendant when he was arrested from December 22 because there were two sub-tenants occupying a part of them, and the defendant's evidence is that they did not vacate until January 2. But there is evidence to the effect that after the first of the year they remained in possession under a tentative arrangement they made with the landlord. Under the terms of the lease the tenant was required to pay all taxes and other charges levied or assessed against the property, and another paragraph of the lease provided that the tenant should insure the buildings, pay the premiums and turn over the policy to the landlord. Afterwards the lease was modified in writing so that the tenant might pay the taxes and insurance in twelve monthly installments in advance, commencing the first day of March, 1926, and thereafter. The evidence shows that after the execution of this amendment the tenant paid this rent to the landlord in addition to the \$1000 rent. There is also evidence tending to show that after this amendment the landlord attended to procuring the insurance, and that this was not owing to the oral agreement made between the parties. The defendant contends that this oral evidence was inadmissible as

tending to vary the terms of the written lease as modified; but this was not the objection made on the trial when evidence was offered by the defendant on this point. It was objected to on the ground that such question was not raised by the affidavit of merits.

Upon a careful consideration of the entire record, while it is not free from error, we are of the opinion that we would not be warranted in disturbing the judgment so that a better record might be made on a re-trial of the case.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

of notice. The ground that such question was not raised by the affidavits offered by the defendant on this point. It was objected to on this was not the objection made on the trial when evidence was offered to vary the terms of the affidavit based on a motion; but

When a certain commission was made, it was found that while it is not known exactly, we are of the opinion that we would not be surprised in thinking the balance of that a good record might be made on a re-bill of the case.

The balance of the balance was not of course in all cases.

[illegible]



34422

DOUGLAS LUMBER CO., a  
Corperation,

Appellant,

vs.

I. LAZOVSKY and B. KAPPEL,  
Appellees.

APPEAL FROM MUNICIPAL COURT

OF CHICAGO.

2-  
259 I.A. 645

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

On June 13, 1928, plaintiff, the payee of a promissory note, caused a judgment by confession for \$2195 to be entered by the Municipal court of Chicago in its favor and against I. Lazovsky and B. Kappel, the makers of the note. Afterwards, on July 6, 1928, Kappel moved the court to open up the judgment and to give him leave to defend. The motion was allowed, and thereafter the cause came on for hearing before a judge and a jury. The jury found the issues against the plaintiff, judgment was entered on the verdict and plaintiff appeals.

The defense interposed by Kappel was that the note had been paid.

The record discloses that plaintiff was engaged in the lumber business in Chicago; that defendant Lazovsky was a general contractor and desired to construct an apartment building on real estate in Chicago which he was then purchasing. Lazovsky had no money to pay for the real estate, and an agreement was entered into between plaintiff and defendants whereby plaintiff would lend Lazovsky \$2000 to be used in payment of the real estate on which the building was to be constructed, provided defendant Kappel would sign Lazovsky's note for the \$2000, and on May 19, 1926, the \$2,000 note in suit was executed by the two defendants, payable to the plaintiff and due 100 days after date.

The evidence further shows that it was agreed between

DOUGLAS LUMBER CO., a  
corporation,  
Appellant,  
vs.  
I. LASHOVSKY and H. KAPPEL,  
Appellees.

259 I.A. 645

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On June 11, 1932, plaintiff, the owner of a piece of property, caused a judgment by confession for \$100 to be entered by the Municipal Court of Chicago in its favor and against I. Lashovsky and H. Kappel, the makers of the note. Afterward, on July 6, 1932, Kappel moved the court to open up the judgment and to give him leave to defend. The motion was allowed, and thereafter the cause came on for trial before a jury and a jury. The jury found the makers against the plaintiff, but no verdict was entered on the verdict and plaintiff's appeal. The referee interviewed by Kappel was that the note had been paid.

The record discloses that plaintiff was engaged in the lumber business in Chicago; that defendant Lashovsky was a General contractor and desired to construct an apartment building on real estate in Chicago which he was then purchasing. Lashovsky had no money to pay for the real estate, and an agreement was entered into between plaintiff and defendant whereby plaintiff would loan Lashovsky \$2000 to be used in payment of the real estate on which the building was to be constructed, provided defendant Kappel would sign Lashovsky's note for the \$2000, and on July 15, 1932, the \$2,000 note in suit was executed by the two defendants, payable to the plaintiff and the 100 days after date. The witness Kappel swore that it was agreed between



the parties that upon the purchase of the lot by Lozovsky he would obtain a building loan to enable him to construct the apartment building and that he was to buy the lumber for the building from plaintiff; that he would obtain enough money from the party who would make the building loan to enable him to repay the \$2000. Lozovsky made the building loan, started to construct the building, and when he had it partially completed, which was during the early days of August, 1926, he obtained \$3,500 from the Loan company, which he turned over to plaintiff. At that time Lozovsky owed plaintiff about \$1,200 or \$1,300 for lumber and he testified that he told plaintiff to apply \$2,000 of the \$3,500 in payment of the \$2000 note in suit, and that plaintiff replied that this would be done and the note cancelled when it became due a few weeks thereafter, and that plaintiff would then surrender the note.

It further appears from the evidence that Lozovsky was constructing other buildings and buying his lumber from plaintiff. Plaintiff admits that he received the \$3,500 but claims to have applied the money on other indebtedness owed it by Lozovsky, and that the note was still unpaid. The evidence as to whether the note was paid is sharply conflicting. Some of the testimony in the record was false. We have carefully examined all of the evidence in the record and think it would serve no useful purpose to discuss it here. To do so would not be to the credit of either of the parties. We are unable to say where the truth lies, and unless we can say that the finding of the jury is against the manifest weight of the evidence we are not warranted, under the law, in disturbing the verdict in favor of the defendant, approved as it was by the trial Judge.

The court instructed the jury that the defense interposed was that the note had been paid and that the burden of proving this fact was on defendant Kappel. No complaint is made,



the parties then upon the purchase of the lot by recovery he would  
obtain a building loan to enable him to construct the apartment  
building and that he was to pay the lumber for the building from  
plaintiff; that he would obtain enough money from the party who  
would make the building loan to enable him to repay the \$2000.  
Lansbury made the building loan, started to construct the building,  
and when he had it partially completed, which was during the early  
days of August, 1936, he obtained \$2,000 from the party who  
which he turned over to plaintiff. At that time Lansbury owed  
plaintiff about \$1,000 or \$1,200 for lumber and he testified that  
he told plaintiff to repay \$2,000 to him by the 15th of the  
\$2000 note in suit, and that plaintiff repaid him this would be  
done and the note cancelled when it became due a few weeks later-  
after, and that plaintiff would then surrender the note.  
It further appears from the evidence that Lansbury was  
constructing other buildings at that time and that plaintiff  
testified that he received the \$2,000 but claims to have ap-  
plied the money on other indebtedness owed to by Lansbury, and that  
the note was still unpaid. The evidence as to whether the note was  
paid is sharply conflicting. Some of the testimony in the party  
was false. We have carefully examined all of the evidence in the  
record and it is would serve no useful purpose to discuss it  
here. To do so would not be in the interests of justice.  
We are unable to say where the truth lies, and unless we can say  
that the finding of the jury is against the weight of the  
evidence we are not warranted, under the law, in disturbing the  
verdict in favor of the defendant, especially as it was by the trial  
judge.

The next question is the fact that the balance in the  
passed was that the note had been paid and that the burden of  
proving this fact was on defendant counsel. No evidence is made,

and indeed none could be made, that the instruction was improper. The issue in the case was simple and it was particularly one for a jury under our law. The jury found in favor of the defendant and therefore the judgment must be affirmed.

Complaint is made that the court admitted improper evidence on behalf of the defendant Kappel as to conversations that took place between the parties before and at the time of the execution of the note. We think there was no error in the ruling. The evidence was not offered to vary the terms of the written note, and it did not tend to do so. "The law is that whenever there is a conflict in the evidence relevant to the issue, evidence of collateral facts which have a direct tendency to show that the evidence of the one side is more reasonable and therefore more credible than that of the opposite side is admissible." Standard Brewery Co. v. Healy, 209 Ill. App. 272. The evidence complained of was admitted for the sole purpose of determining whether the note had been paid.

Other evidence was received, over plaintiff's objection, as to the number of feet of lumber used in the construction of the apartment building. We think plaintiff's objection might well have been sustained; but we are also of the opinion that any error in this respect did not at all mislead or confuse the jury.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

and indeed none could be made. That the identification was improper. The issue in the case was as to who it was who actually saw the body under the law. The jury found in favor of the defendant and therefore the judgment must be affirmed.

Complaint is made that the court admitted improper evidence on behalf of the defendant. It is contended that that fact alone between the parties before and at the time of the execution of the note. It is said that there was no error in the ruling.

The evidence was not offered to vary the facts of the witness' note, and as his note is in no way. The law is that whenever there is a conflict in the evidence relevant to the issue, evidence of collateral facts which have a direct tendency to show that the

evidence of the one side is more reasonable and trustworthy than evidence that that of the opposite side is unreliable. People v. ... Between ... and ... The evidence admitted of was admitted for the sole purpose of establishing whether the

note had been paid. Other evidence was received, but plaintiff's objection, as to the number of feet of lumber used in the construction of the defendant's building. It is said that plaintiff's objection with

well have been sustained; but as the facts of the evidence that may error in this respect did not at all affect the outcome of the case. The testimony of the principal party of this case is affirmed.

...  
... and ...



34431

FRED DANZIGER,  
Appellant,  
vs.  
ALBERT GROSBY,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 645<sup>3</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the plaintiff, Fred Danziger, seeks to reverse a judgment of the Municipal court of Chicago finding the issues in favor of the garnishee, Albert Grosby, and entering judgment on the finding.

The record discloses that on April 5, 1926, plaintiff brought an action of attachment against Annie Hewitt, claiming that there was due him \$749.30. Afterwards plaintiff filed an amended statement of claim, to which Annie Hewitt filed an affidavit of merits denying liability. The case was pending in the Municipal court until October 26, 1929, when judgment for \$721.20 was entered in favor of plaintiff and against Annie Hewitt, the defendant. The judgment contains the following: "Now come the parties to this cause and thereupon by stipulation between the parties hereto made in open Court, the Court enters the following finding, to-wit: 'The Court finds the issues against the defendant, Annie Hewitt, assesses the plaintiff's damages at the sum of Seven Hundred and Twenty-one and 20/100 Dollars (\$721.20.)'" Afterwards plaintiff took out an execution on this judgment, demand was made on Annie Hewitt and the bailiff returned the execution wholly unsatisfied. Following this, on January 2, 1930, the defendant filed an affidavit in the cause for garnishee summons, wherein Albert Grosby was named as garnishee. The garnishee was served and on January 11, 1930, filed his answer denying that he

CHIEF OF POLICE  
CITY OF CHICAGO

ALBERT GROSVENOR  
vs.  
JAMES HARRISON  
Appellant.

2291 A. 645

THE CHIEF OF POLICE RECEIVED THE ORDER OF THE COURT.

By this order the plaintiff, James Harrison, was  
to reverse a judgment of the defendant, Albert Grosvenor, and  
the issue in favor of the plaintiff, James Harrison, was  
judgment on the finding.

The record discloses that on April 2, 1926, plaintiff  
brought an action of assumpsit against James Harrison, claiming  
that there was due him \$750.00. The record further discloses  
that a statement of claim, in which James Harrison filed an  
affidavit of service, was filed in the court on April 2, 1926.  
Multiple count writs were issued on April 2, 1926, when judgment for \$750.00  
was entered in favor of plaintiff and against defendant. The  
judgment was entered on the roll. The judgment was entered on the  
roll in this case and judgment by stipulation between the  
parties. The record further discloses that the court entered the following  
finding, to-wit: "The court finds the issues against the defendant  
and, James Harrison, against the plaintiff's judgment of the court."

Seven hundred and twenty-one and 00/100 Dollars (\$721.21).  
Afterwards plaintiff took an execution on this judgment. An  
order was made on James Harrison and the plaintiff returned the order.  
The record further discloses that on January 2, 1926, the  
defendant filed an affidavit in the cause for enforcement of the  
wherein Albert Grosvenor was named as defendant. The return was  
served on January 11, 1926, filed in the cause for enforcement and no

was indebted to Annie Hewitt, and on February 10th following the matter came on for hearing before the court without a jury. Evidence was offered on behalf of Danziger and Grosby, the court found the issues in favor of the defendant, the garnishee, judgment was entered on the finding, and this appeal followed.

It appears from the evidence that Grosby was the owner of premises known as 477-479 Deming place, Chicago, and had entered into a written lease demiseing the premises to Hiram A. Hewitt for a period beginning May 1, 1923, and ending April 30, 1933, at a rental of \$625 a month. The premises were to be occupied as a rooming house. There were nine apartments. Afterwards on March 4, 1924, the lease was assigned to Annie Hewitt, who took possession of the premises and conducted a rooming house until about the first of the year 1929. At that time she was in arrears \$3500 for unpaid rent. On January 18, 1929, she executed a bill of sale conveying the furniture and fixtures located in the premises to her landlord Grosby. The consideration expressed was \$1700. At the same time and as a part of the transaction Annie Hewitt and Grosby executed another written document which provided in substance that Grosby was to employ Annie Hewitt to conduct the rooming house for him, collecting the rent from the roomers and turning it over to him, and she was to be allowed the use of two rooms in the premises and be paid a salary. Annie Hewitt agreed to reimburse Grosby for all sums he expended over and above the rental of \$625 a month. The agreement then provided that "Anything remaining after the rent and expenses are deducted to belong to Mrs. Hewitt, to be held in trust by Mr. Grosby as long as this agreement is in effect. \*\*\*

"Mrs. Hewitt can cancel this agreement at any time provided she pays up all back rents, plus any amount expended by



was intended to Anna Hewitt, and on January 19th following the  
 matter came on for hearing before the court which is held. This  
 done was offered on behalf of Benjamin and George, the court found  
 the issue in favor of the defendant, the defendant, judgment was  
 entered on the finding, and this appeal followed.

It appears from the evidence that George was the owner  
 of premises known as 417-419 South 4th St., Chicago, and had en-  
 tered into a written lease with the premises to Anna A.  
 Hewitt for a period beginning July 1, 1911, and ending April 30,  
 1912, at a rental of \$200 a month. The premises were to be used  
 as a rooming house. There were also certain alterations  
 on March 4, 1911, the lease was assigned to Anna Hewitt, who took  
 possession of the premises and conducted a rooming house until  
 about the first of the year 1912. At that time she was in arrears  
 \$3800 for unpaid rent. On January 18, 1912, she executed a bill of  
 sale conveying the premises and fixtures located in the premises  
 to her husband George. The consideration expressed was \$1000.  
 At the same time and as a part of the transaction Anna Hewitt  
 and George executed another written document which provided in  
 substance that George was to assign Anna Hewitt in certain the  
 rooming house for him, relieving her from the terms and  
 paying it over to him, and was to be allowed the use of two  
 rooms in the premises and he paid a salary. Anna Hewitt agreed  
 to surrender George for all rent he expended over and above the  
 rental of \$200 a month. The agreement then provided that "any  
 thing remaining after the rent and expenses are deducted to belong  
 to Mrs. Hewitt, to be paid in trust by Mr. George as long as this  
 agreement is in effect. And  
 "Mrs. Hewitt can assign this trust at any time  
 provided she pays to all bills due, and this was subject to the

Mr. Grosby on said premises."

Thereafter Mrs. Hewitt continued to conduct the rooming house until about August, 1939, and was paid her salary by Grosby. On August 1st Grosby caused a five days notice to be served on Mrs. Hewitt, notifying her that there was \$3,529 due for rent of the premises and that unless she paid the same within five days "your lease of said premises will be terminated." The evidence further shows that shortly after the expiration of the five days Grosby brought forcible detainer and obtained a judgment against Mrs. Hewitt for the possession of the premises.

The stipulation entered into between Danziger and Mrs. Hewitt, which is recited in the judgment order of October 26, 1939, is in the record. That stipulation provides: "Defendant, Annie Hewitt, hereby agrees that judgment be entered in above cause in the sum of seven hundred twenty-one dollars and 20/100 dollars (\$721.20) and hereby waives all defenses thereto, and further agrees to pay within a reasonable time herefrom sixty dollars (\$60) of the custodian fees for a levy heretofore made at 477-79 Deming place, said city, and in said cause.

"Plaintiff, Fred Danziger, by David Lipman, his attorney, in consideration of the aforesaid agreements of defendant, hereby agrees that he will not enforce the said levy or any other levy against any property at 477-79 Deming place, Chicago, Illinois, which said defendant may own or in which she may have an interest, in and upon said premises, from the date hereof, nor will he in any manner interfere with the removal of any property from said 477-79 Deming place, which she may own, or in which she may have an interest."

Plaintiff makes two contentions why the judgment, discharging the garnishee, should be refused: (1) that Mrs. Hewitt, when she executed the bill of sale conveying the furniture and fixtures in the premises in question to Grosby, made no attempt to



Mr. Grooby on said premises."

Thereafter Mrs. Hewitt continued to occupy the

rooming house until about August, 1933, and was paid her salary

by Grooby. On August 1st Grooby caused a five days notice to be

served on Mrs. Hewitt, notifying her that there was \$2,500 due

for rent of the premises and that unless she paid the same within

five days "your lease of said premises will be terminated." The

evidence further shows that shortly after the expiration of the

five days Grooby brought forcible detainer and obtained a judgment

against Mrs. Hewitt for the possession of the premises.

The stipulation entered into between defendant and Mrs.

Hewitt, which is recited in the judgment order of October 12, 1933,

is in the record. That stipulation provided: "That Mrs. Hewitt

Hewitt, hereby agrees that judgment be entered in above cause in

the sum of seven hundred twenty-one dollars and 00/100 dollars

(\$721.00) and hereby waives all defense, counter, and further agrees

to pay within a reasonable time herefrom sixty dollars (\$60) of the

custodian fees for a levy hereafter made at 477-79 Belmont Street,

said city, and in said cause.

"That Mrs. Hewitt, by her attorney, do hereby agree, in and to the effect,

in consideration of the aforesaid agreement of defendant, hereby

agrees that he will not enforce the said levy or any other levy

against any property at 477-79 Belmont Street, Chicago, Illinois, which

said defendant may own or in which she may have an interest, in and

upon said premises, from the date hereof, nor will he in any manner

interfere with the removal of any property from said 477-79 Belmont

Street, which she may own, or in which she may have an interest."

That Mrs. Hewitt agrees to acknowledge why the judgment, dis-

charging the premises, should be returned: (1) That Mrs. Hewitt,

when she executed the bill of sale conveying the furniture and

fixtures in the premises in question to Grooby, made no attempt to



comply with the Bulk Sales law of this State, and therefore the sale is void as to Danziger and the chattels may be reached by garnishment; and (2) that even if this first contention is not sustained, yet since it appears from the evidence that Grosby had in his possession \$4200 belonging to Mrs. Hewitt, and since she was indebted to Grosby in the sum of only \$3500, the balance of \$700 was subject to garnishment.

If we assume that the sale of the furniture and chattels by Mrs. Hewitt to Grosby was void as to Danziger for failure to comply with the Bulk Sales law, (LaSalle O. H. Co. v. LaSalle Amusement Co., 239 Ill. 194) yet we think it would avail plaintiff nothing because of the stipulation entered into between him and Mrs. Hewitt above referred to, as the judgment plaintiff obtained against Mrs. Hewitt was predicated upon the stipulation, and the stipulation expressly provided that plaintiff would not attempt to enforce the payment of the judgment against the furniture and chattels located in the premises in question. Plaintiff having obtained his judgment on that stipulation ought not now be permitted to say that his judgment should stand and he be allowed to enforce it against the furniture and chattels, which he expressly stipulated he would not do.

Plaintiff's argument on this phase of the case seems to be that he was not legally or morally bound by the stipulation because he had been deceived by Mrs. Hewitt in making the stipulation in this - that Mrs. Hewitt represented that she was, at the time of the making of the stipulation, in possession of the said furniture and chattels, while the facts show that she had sold them to Grosby several months before the stipulation was made. There is no evidence on this question except the stipulation and we cannot construe it as plaintiff contends it should be construed. The stipulation provides that plaintiff will not enforce the judg-



ment against the chattels located in the premises "which said defendant may own or in which she may have an interest."

We think all of the evidence shows that Mrs. Hewitt did have an interest in the chattels. While she went through the form of giving a bill of sale to Grosby, yet all the evidence shows that her furniture would be restored to her if she paid up the back rent to Grosby. The document executed by Mrs. Hewitt and Grosby at the time of the execution of the bill of sale shows this to be the fact, and while Grosby testified that he terminated the lease in January, 1929, the evidence clearly shows that this was not done, because the following August he served her with a five day notice, saying that if she did not pay the back rent within five days her lease would be terminated. Nor do we think plaintiff was entitled to recover the excess over the \$3500, which plaintiff claimed was \$700, because from what we have said we think it appears that there was no sale of the chattels by Mrs. Hewitt to Grosby. Moreover, whether Grosby was entitled to retain the \$2500 which had been deposited with him by Mrs. Hewitt and the former tenant, under the lease above mentioned, is so uncertain from the record before us, that we think garnishment would not lie.

Shrivers Mfg. Co. v. Boston Ins. Co., 246 Ill. App. 196. We do not stop to refer to the provisions of the lease concerning the deposit of this money as no discussion of this question has been made by counsel for either party; but we think that it cannot be said that the indebtedness, if any, from Mrs. Hewitt to Grosby was liquidated so that garnishment would lie.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.



went against the evidence in the previous section and the

testimony may not be as reliable as it appears.

We shall all of the evidence in the previous section

and have an interest in the evidence. While the evidence in

form of giving a bill of sale to Groby, yet the evidence

shows that her husband would be entitled to the bill of

the bill of sale to Groby. The evidence is given by the

and Groby at the time of the execution of the bill of sale when

this is the fact, and while Groby testified that he

the issue in January, 1930, the evidence clearly shows that

was not true, because the following facts are given by the

five day notice, saying that if she did not pay the bill

in five days her husband would be entitled to the bill

bill was entitled to receive the money over the bill, which

bill amounted was \$700, because from what we have said in

section that there was no sale of the property by the

Groby. However, whether Groby was entitled to receive the

which had been assigned with him by the husband and the

fact, when the issue arose, it was decided that the

section before us, that we have found that the

section before us, that we have found that the

also in order to the provisions of the law concerning the

of this money as an assignment of the property was made by

section for a bill of sale; but we think that it would be

the assignment, if any, then the bill of sale was

as that assignment was the

The assignment of the property was made by the

assignment.

ASSIGNED

34449

LAWRENCE & BERNARD BUILDING  
COMP., a Corporation,  
Appellee,

vs.

DIVERSEY STORE FIXTURE  
COMPANY, a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 645<sup>4</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$674 claimed to be due by reason of the fact, as claimed by plaintiff, that the defendant wrongfully entered into, took possession of and occupied a certain store in the premises known as 3438 Lawrence avenue, from June 15, 1929, to September 25, 1929, the claim being based on the reasonable rental value of the premises for the use and occupation of them by the defendant. The defendant denied liability. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for \$600, and defendant appeals.

It appears from the record that the plaintiff owned the premises on Lawrence avenue, which contained a number of apartments and stores, including the store in question, which, prior to June 15th was occupied by David Singer under a written lease from the plaintiff, the period covered by the lease being from May 1, 1929, to April 30, 1934. Although the evidence in many particulars is uncertain and indefinite, counsel for both parties seem to agree that Singer was occupying the premises under a written lease and was conducting a delicatessen store; that in June 1929, there was a foreclosure of a chattel mortgage on the stock and fixtures and a sale to the defendant for \$350. The fixtures and small stock of goods remained in the store until some time in September as testified to by witnesses for plaintiff, or until some time during August, as testified to by a witness for defendant.





Plaintiff's theory of the case is that it was entitled to the reasonable rental value of the premises for their use and occupation by defendant from the time defendant purchased the property at the sale under the foreclosure of the chattel mortgage until they were removed from the premises by defendant. The theory of defendant was that when it was contemplating buying the fixtures it was agreed between the parties that the fixtures could remain in the premises without payment of any rent until defendant sold them; that it was for the best interest of the landlord in that it would be more likely to get a tenant and sell the store as a going business than it would be to have the fixtures removed and then endeavor to obtain a tenant.

The court found in favor of plaintiff, which finding defendant contends is against the manifest weight of the evidence. Upon a careful consideration of all the evidence in the record we are clearly of the opinion that the contention of defendant must be sustained.

Evidence on behalf of the plaintiff was to the effect that nothing was said about the fixtures and goods remaining in the premises without payment of rent, but that it was agreed that the fixtures might remain in the premises and that defendant was to endeavor to sell them and to secure a tenant; that after the sale under the chattel mortgage, plaintiff had a number of prospective tenants and endeavored to show them the premises but was unable to do so because there was a padlock on the front and rear doors of the store, placed there by defendant; that on a number of occasions representatives of plaintiff called up the defendant at its place of business on Lincoln avenue and demanded payment of rent; but the evidence of these witnesses is that they did not talk to anyone in authority. A witness for defendant testified that at no time did plaintiff make any demand for rent.

plaintiff's theory of the case is that it was entitled to the reasonable rental value of the premises for their use and occupation by defendant from the time defendant purchased the property at the sale under the foreclosure of the chattel mortgage until they were removed from the premises by defendant. The theory of defendant was that when it was contemplating buying the premises it was agreed between the parties that the premises would remain in the premises without payment of any rent until defendant sold them; that it was for the best interest of the plaintiff to sell the premises more likely to get a tenant and sell the store as a going business than it would be to have the premises removed and then endeavor to obtain a tenant.

The court found in favor of plaintiff, with finding defendant's contention is against the weight of the evidence. Upon a careful consideration of all the evidence in the record we are of the opinion that the contention of defendant must be rejected.

Witness on behalf of the plaintiff was to the effect that plaintiff was told about the premises and facts surrounding it was plaintiff's payment of rent, but that it was agreed that the premises might remain in the premises and that defendant was to allow to sell them and to secure a tenant; that after the sale under the chattel mortgage, plaintiff had a number of representatives and understood he was to have the premises but was unable to do so because there was a parties on the land and that about the same time, stated that by defendant; that on a number of occasions representatives of plaintiff called up the defendant at his place of business on various times and demanded payment of rent; that the evidence of these witnesses is that they did not tell to anyone in plaintiff. A witness for defendant testified that at no time did plaintiff ever pay defendant the rent.

It would serve no useful purpose, we think, to analyze the evidence given by the several witnesses, but we are clear, upon a careful consideration of it, that it was the intention of the parties that the fixtures could remain in the premises without the payment of rent and that the defendant should endeavor to sell the fixtures to any tenant that might be obtained. We think this was the understanding of both parties. It would be contrary to all experience to say that the defendant, who was engaged in the business of buying and selling fixtures, would leave fixtures of small value in the premises for a period of some months, during which period it would be required to pay a rental of more than \$200 a month.

The finding of the trial Judge is clearly against the manifest weight of the evidence, and the judgment of the Municipal court of Chicago is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Matchett, P. J., and McSurely, J., concur.

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#### FINDING OF FACT.

We find as a fact that it was the understanding of plaintiff and defendant that the fixtures were to remain in the store without payment of rent.



It would serve no useful purpose, in fact, to multiply the evidence given by the expert witnesses, but we must, when a careful consideration of it, find it was the intention of the parties that the evidence should remain in the hands of the parties at that time and that the defendant should endeavor to sell the fixtures to any tenant that might be obtained. We think this was the intention of both parties. It would be contrary to all experience to say that the defendant, who was engaged in the sale of fixtures and selling fixtures, would leave fixtures of small value in the premises for a period of some months, during which period it would be required to pay a rental of some money each month.

The finding of the jury that it is contrary to all the usual rules of the evidence, and the finding of the jury that the evidence is contrary to all the usual rules of the evidence, is contrary to all the usual rules of the evidence.

Respectfully,  
J. J. [Name]

EXHIBIT OF EVIDENCE

To find on a fact that it was the intention of the parties that the evidence should remain in the hands of the parties at that time and that the defendant should endeavor to sell the fixtures to any tenant that might be obtained. We think this was the intention of both parties. It would be contrary to all experience to say that the defendant, who was engaged in the sale of fixtures and selling fixtures, would leave fixtures of small value in the premises for a period of some months, during which period it would be required to pay a rental of some money each month.

34467

CHARLES R. VINCENT,  
Appellant,

vs.

GEORGE T. HARZ,  
Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 645<sup>5</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover \$500 claimed to be the value of a dog which plaintiff had delivered to defendant for safe-keeping, for which plaintiff was to pay \$15 a month or \$5 a week, the dog not having been returned to plaintiff upon demand. The case was tried before the court without a jury, and there was a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that plaintiff was the owner of a "Doberman Pinscher" pedigreed dog about a year old, and on December 17, 1928, delivered him to the defendant, who was a veterinary surgeon and kept dogs in his kennels at Tessville, Illinois. There was a collar and harness on the dog at the time it was delivered to the defendant. About 10:30 on the evening of December 25th, while the defendant had the dog out for an airing, he suddenly belted, the harness broke and he disappeared and has not been found.

Plaintiff's claim was that the dog was lost through the negligence of the defendant and that he was entitled to recover the reasonable value of the dog, which he testified was \$500; another witness called by plaintiff testified that the dog was worth \$750.

The defendant's position is that he was guilty of no negligence in the care of the dog but that the dog escaped on

UNITED STATES DISTRICT COURT

IN CHARGE

CHARLES E. VINCENT,  
Defendant.

ROBERT T. BARK,  
Prosecutor.

229 L. 645

MR. JUSTICE S. COHEN DELIVERED THE VERDICT IN THE CASE.

The plaintiff's evidence was entirely unimpaired by the testimony of the defendant. The value of the dog was estimated at \$200. The defendant's evidence was entirely unimpaired by the testimony of the plaintiff. The value of the dog was estimated at \$200. The defendant's evidence was entirely unimpaired by the testimony of the plaintiff. The value of the dog was estimated at \$200.

The plaintiff's evidence was entirely unimpaired by the testimony of the defendant. The value of the dog was estimated at \$200. The defendant's evidence was entirely unimpaired by the testimony of the plaintiff. The value of the dog was estimated at \$200. The defendant's evidence was entirely unimpaired by the testimony of the plaintiff. The value of the dog was estimated at \$200.

The plaintiff's evidence was entirely unimpaired by the testimony of the defendant. The value of the dog was estimated at \$200. The defendant's evidence was entirely unimpaired by the testimony of the plaintiff. The value of the dog was estimated at \$200. The defendant's evidence was entirely unimpaired by the testimony of the plaintiff. The value of the dog was estimated at \$200.

The defendant's evidence was entirely unimpaired by the testimony of the plaintiff. The value of the dog was estimated at \$200. The plaintiff's evidence was entirely unimpaired by the testimony of the defendant. The value of the dog was estimated at \$200.



account of the defect in the harness. Plaintiff, in reply to this contention, takes the position that at the time the dog was delivered the faulty condition of the harness was pointed out to the defendant and therefore the defendant was negligent in permitting the dog to escape.

When plaintiff proved the delivery of the dog to the defendant and that the latter had failed to return him, he made out a prima facie case of negligence. It was then incumbent upon the defendant to show by evidence, if he could, that he was guilty of no negligence, that he used ordinary care for the safe-keeping of the dog. This rule of law has been announced by our courts a number of times. Clemenson v. Whitney, 238 Ill. App. 308; Eysies v. Matheson, 243 Ill. App. 60; same case affirmed in 323 Ill. 269; and many other Illinois cases. But the pronouncements have not always been uniform when the defendant sought to relieve himself of liability for failure to return the bailed article, when the defense interposed was that the bailment had been lost, stolen or destroyed by fire. Nichols v. Union Stock Yards, 193 Ill. App. 14; Beard v. Maskel Park Bldg. Corp., 248 Ill. App. 467, where it was held that where the bailor had made out a prima facie case by showing delivery and failure to return the bailment, the plaintiff's case was overcome where the bailee showed that the bailment had been lost, stolen or destroyed by fire, and that plaintiff could not recover unless he went forward and showed by evidence that the bailee was negligent. We gave very careful consideration to that question in the Clemenson case, where the authorities are discussed and where we said (pp. 313-314): "We have gone into this question again, in connection with the case at bar, and have come to the conclusion that the better reasoning and the weight of authority is that where the bailor makes out a prima facie case

account of the defect in the business. Obviously, in reply to this  
question, there was no question that at the time the defect was  
discovered the timely conclusion of the business was pointed out to the  
defendant and therefore the defendant was negligent in permitting  
the defect to occur.

When plaintiff proved the defect in the delivery of the bag to the  
defendant and that the latter had failed to return him, he made  
out a prima facie case of negligence. It was then incumbent upon  
the defendant to show by evidence, if he could, that he was guilty  
of no negligence, that he used ordinary care for the safekeeping  
of the bag. This rule of law has been announced by all courts of  
competent jurisdiction. Wheeler v. United States, 221 Ill. 407, 410; Wheeler  
v. United States, 221 Ill. 407, 410; same case affirmed in 221 Ill. 407;  
and many other Illinois cases. But the government has not  
always been uniform when the defendant sought to relieve himself  
of liability for failure to return the bagged article, when the  
defect introduced was that the defendant had been lost, stolen or  
destroyed by fire. Wheeler v. United States, 221 Ill. 407, 410;  
Wheeler v. United States, 221 Ill. 407, 410; Wheeler v. United States, 221 Ill. 407, 410;  
was held that where the defect was made out a prima facie case by  
showing delivery and failure to return the bagged article, the plaintiff  
still's case was sustained where the defect shown was that the defendant  
had been lost, stolen or destroyed by fire, and that plaintiff  
could not recover unless he could further show proof by evidence  
that the defect was negligent. We gave very careful consideration  
to that question in the Wheeler case, where the defendant was  
discharged and where we said (p. 215-216): "We have been told  
this question again, in connection with the case at bar, and have  
come to the conclusion that the better reasoning and the weight  
of authority is that where the defect makes out a prima facie case



of negligence against the bailee, by showing that the goods bailed have not been returned on demand, such prima facie case is not overcome by a showing on the part of the bailee to the effect that the goods have been burned or otherwise destroyed or have been stolen; but before the bailor's prima facie case can be said to be overcome, the bailee must further produce evidence tending to prove that such burning or loss or theft was occasioned without his fault." We adhere to the rule announced in that case and in the Byales case, which ruling was approved by the Supreme court.

The evidence of both plaintiff and defendant is to the effect that the dog was gentle and affectionate and the testimony of the defendant is that he was a veterinary surgeon and had kennels where he kept dogs for the owners; that the dog in question "was a regular house dog \*\*\* just as the Colonel (plaintiff) said, an affectionate, nice dog, really an exceptional dog;" that defendant kept him in his house at Teseville and while the dog was in his possession took him out for walks; that the dog wore a harness to which was attached a leash which defendant held; that about 10:30 on the evening of December 25th he had the dog out in this manner and was walking with a gentleman, when suddenly the dog made a bolt, broke the harness and ran away; that he didn't know what caused it unless the dog saw a rabbit, cat, or some other object; that he looked for the dog, put advertisements in two Chicago newspapers but was unable to find him.

The controlling questions in the case are: Was the defect in the harness pointed out to the defendant at the time the dog was delivered to him? And if so, was defendant guilty of negligence in allowing the dog to escape? We think the defect was not specifically called to defendant's attention and that he was not negligent in the care of the dog. Edward C. Titus, called by



...negligence against the holder, by showing that the holder had  
have not been returned on demand, such prima facie case is not  
overcome by a showing on the part of the holder in the absence of  
that the holder has been warned of the consequences of non-payment  
been stated; but before the holder's prima facie case can be said  
to be overcome, the holder must further produce evidence tending  
to show that such payment or issue of stock was conditional without  
his fault. It is to be noted in this connection that in some cases and in  
the English cases, which varied and differed by the various courts,  
the evidence of such fault is not sufficient to be taken as  
the effect of the fact that the holder was not notified and the con-  
dition of the contract is that he was a voluntary assignee and  
that he was not to be liable for the contract; that the law is  
position "and a regular notice has been given to the holder (where-  
by) said, the assignee, who has, really, no contractual right;  
that the holder has not in his hands an interest in the stock  
and was in his position with him and was not; that the dog  
with a notice to which was attached a check which was not cashed;  
that about 10:30 on the evening of December 28th he was the dog  
out in this manner and was walking with a gentleman, then suddenly  
the dog made a leap, broke the harness and ran away; that in  
time's past that moment it missed the dog was a result, not, or  
some other object; that he looked for the dog, the whereabouts  
in two large newspapers but was unable to find him.  
The controlling question in the case was the fact  
before in the harness which was to be determined at the time  
the dog was delivered to him. And it was, and necessary fully at  
evidence in showing the dog to be a dog. He said the holder was  
not sufficiently careful to take notice of the dog, which he was  
not negligent in the case of the dog. Edward G. Tamm, Chief Justice.

plaintiff, testified that he worked for the plaintiff; that he got in touch with the defendant at defendant's place of business on North Clark street, Chicago, and arranged over the telephone for the delivery of the dog for keeping; that he took the dog to the defendant at the North Clark street address, and when he arrived there "I asked for Dr. Harz, and the gentleman over there wearing a white surgeon's coat said I could leave the dog there. I don't remember whether he said he was Dr. Harz or not." He further testified that he could not recognize Dr. Harz in the court room on the trial; that the gentleman to whom he turned the dog over said "that the dog would be taken out to Miles Center; that Dr. Harz had a kennel, to be kept there." Nothing was said on the direct or cross-examination by the witness as to the condition of the harness or collar on the dog. After the defendant, Harz, had testified that the harness was broken, the witness Titus was called in rebuttal and the following occurred:

"Q. At the time that you delivered this Doberman Pinscher dog to Dr. Harz did you call his attention to the condition of the harness on the dog? A. Indirectly so.\*\*\*\*\* When I brought the dog down there he had a harness and a collar and a leash went through the rings in the harness and the collar. A man in the office commented on that and asked the reason, and I pointed out that the harness was weakened by having been broken. I think it was the strap going down across the chest from the upper part of the harness down underneath which was broken, and I said by putting the leash through both the collar and harness it would hold the dog even if the harness was broken." Defendant Harz was called in surrebuttal, and in reply to a question as to the condition of the harness, said that it was "apparently strong." He was then asked whether there was any sign of the harness having been broken or mended; the witness did not answer this question but spoke

on Monday; the witness did not observe this person at any time  
said whether there was any sign of the person having been taken  
the person, said that it was "absolutely correct." He was then  
in custody, and in reply to a question as to the condition of  
for even if the person was taken. "I believe that was called  
the person and that person was taken, and I said by mistake  
was the other man who was taken. The other man was taken out of  
that the person was taken by mistake. I believe it is  
office connected with that and that the person, and I believe one  
through the ring in the person and the person. I was in the  
and then there was a person and a person and a person and  
page on the 1st. "I believe so. When I was in the  
to. But all you will find in the condition of the person  
"I. At the time that you delivered this person, that was in  
these things was called in relation to the person's condition;  
Leland, Mary, and Leland; that the person was taken, and the  
the condition of the person as called on the 1st. After the 1st  
was said on the 1st, or more-approximately by the witness as to  
Leland; that Dr. Leland had a person, to be kept there." Leland  
The day after said "that the person was taken out in the  
court room on the 1st; that the person was taken in the  
Leland; that Dr. Leland had a person, to be kept there." Leland  
I don't know that either he said or was Dr. Leland or not. He  
wearing a white uniform's coat said I don't know the person.  
the defendant as the person that was taken, and that was the  
for the delivery of the person; that he was taken out of the  
North State Street, Chicago, and returned over the telephone  
in touch with the defendant at defendant's place of business on  
originality, testified that he visited the plaintiff, and he was



about a harness being kept on dogs generally; all parties seem to have been then diverted from the important question and it was not mentioned again.

A consideration of all the evidence fails to show that the defect in the harness was pointed out to the defendant, as plaintiff contends. It is not clear that the person Mr. Titus talked to when he delivered the dog to the North Clark street address was the defendant. And again, the testimony of this witness is uncertain because he did not know what part of the harness was broken. We think the argument of counsel for plaintiff that a leash is put on a dog but for one purpose and that is to prevent the dog from running away, is unsound. It is common knowledge that a leash is put on a dog when he is out on the street so that the person in charge of the dog can hold him in check from other dogs on the street or from persons. A dog is a domestic animal, certainly the dog in question was one, and it is not to be supposed he would run away and disappear even if the leash broke. What the dog did in the instant case was not to be expected, and we think it was plaintiff's duty, this being a valuable dog as he testified, to see that the harness was not defective. Certain it is that we would not be warranted in holding that defendant was guilty of negligence in permitting the dog to escape under the circumstances. Moreover, we would not be warranted in disturbing the finding of the court in favor of the defendant unless it was against the manifest weight of the evidence; and since we are unable to say that the finding is against the manifest weight of the evidence, the judgment of the Municipal court of Chicago must be affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McGuire, J., concur.

about a business being kept on going generally; all parties were  
it have been directed from the respective positions and it  
was not without delay.

A consideration of all the evidence fails to show that  
the subject in the witness was present at the meeting, as  
stated in the evidence. It is not clear that the witness is  
satisfied to show he delivered the dog to the party named as  
the owner of the dog. And again, the testimony of this witness  
is inconsistent with the fact that the party of the witness was  
present. He claims the witness at present for himself that a dog  
is not on a dog but for some persons and that is to prevent the dog  
from coming away, is incorrect. It is common knowledge that a dog  
is not on a dog when he is not on the ground so that the party is  
charged of the dog and that he is not on the ground as the  
effect of the ground. A dog is a domestic animal, certainly not  
dog is domestic and not, and it is not to be supposed he would run  
away and disappear even in the least degree. What has he done in the  
instant case and not to be supposed, and we think it is unlikely  
that, this being a domestic dog, he is domestic, so that the  
witness was not satisfied. Therefore it is that we think not to  
warrant is called into evidence the ability of the witness in per-  
mitting the dog to escape under the circumstances. Moreover, we  
will not be warranted in identifying the finding of the court in  
favor of the defendant unless it was against the manifest weight of  
the evidence; and since we are unable to say that the finding is  
against the manifest weight of the evidence, the judgment of the  
Michigan court of appeals must be affirmed.

THE COURT AFFIRMS.

RECORDED, 7, 3, and RECORDED, 7, 3, 1907.

Filed alone November 6, 1930

34302

AGNES DE STEFANO,  
Appellee,

vs.

JOSEPH DE STEFANO,  
Appellant.

99  
APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 646<sup>1</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant, having filed a bill seeking a divorce on the grounds of cruelty of the defendant, on November 28, 1928, had a decree. There was no contest. Complainant was granted the custody of a minor child, one and a half years of age, and the defendant was ordered to pay \$7 a week for its support, the complainant waiving all rights of alimony and dower. Subsequently, January 3, 1929, defendant filed a petition asking for a modification of the amount allowed for the support of the child, based upon the representation that the child had been removed by complainant to Muskegon, Michigan. After hearing on January 6th the chancellor found that the decretal order to pay \$7 a week for the support of the minor child had been entered by agreement and that the child had been removed to Muskegon by consent of the defendant. Defendant was ordered to pay \$10 weekly for the support of the child and the child was ordered to be brought within the jurisdiction of the court and that the defendant pay complainant \$25 for railroad fare and traveling expenses for herself and the child, and also the arrearages of \$66 for its support. Defendant appealed from this order, which is the appeal now before us.

Complainant has moved that this appeal be dismissed, asserting that the defendant, for the purpose of defeating the jurisdiction of this court, has departed from this jurisdiction and has concealed himself so that he cannot be found; that he





was adjudged and still is in contempt of the trial court and that he has not purged himself of such contempt; that he was ordered to pay \$150 for attorneys' fees and the further sum of \$50 for expenses, in order that complainant might properly follow this appeal, but that defendant refused and still refuses to comply with said order. Defendant has filed counter suggestions which do not negative the assertions of complainant but is devoted mostly to questioning the propriety of the order of January 6th.

March 20, 1930, the court ordered defendant to pay to the complainant for her solicitor's fees in this appeal \$150 and the further sum of \$50 towards defraying the costs of this appeal, within ten days. Subsequently, on March 24th, defendant filed a petition, requesting that the above order be vacated and set aside. April 20th the court entered an order on this petition, setting forth the preceding matters, and that on January 6th there was in arrears on the order for the support of the child the amount of \$66; that the defendant was ruled to show cause why he had not complied with said order and a rule was issued requiring him to show cause why he should not be held in contempt for failure to comply with said order. The court further found that defendant "through his attorney had appealed from every order of court herein," and that the attorney "has ordered his client to refuse to comply with the order of the court aforesaid;" that the defendant has acquiesced in his attorney's advice and has failed to comply with the order of March 20th requiring defendant to pay \$150 for attorneys' fees to enable complainant to follow this appeal and the further sum of \$50 for the expenses of the appeal, and the court found that the "defendant has been and is now in utter defiance and scorn of each and every court order in the above entitled cause, in spite of the fact that he is able to comply with the same; and the court doth further find that the



was adjudged and still in in contempt of the trial court and that he has not purged himself of such contempt; that he was ordered to pay \$150 for attorney's fees and the further sum of \$50 for expenses, in order that complainant might properly follow this appeal, but that defendant refused and still refused to comply with said order. Defendant has filed counter suggestions which do not negative the execution of complainant but is devoted mostly to questioning the propriety of the order of January 24th. On April 25, 1914, the court ordered defendant to pay to the complainant for her solicitor's fees in this appeal \$150 and the further sum of \$50 towards defraying the costs of this appeal, within ten days. Subsequently, on March 24th, defendant filed a petition, requesting that the above order be vacated and set aside. April 20th the court entered an order on this petition, setting forth the preceding matters, and that on January 24th there was in arrears on the order for the support of the child the amount of \$50; that the defendant was ruled to show cause why he had not complied with said order and a rule was issued requiring him to show cause why he should not be held in contempt for failure to comply with said order. The court further found that defendant "through his attorney and appealed from every order of court herein," and that the attorney "has ordered his client to refuse to comply with the order of the court aforesaid;" that the defendant has resuscitated in his attorney's advice and has failed to comply with the order of March 20th regarding defendant to pay \$150 for attorney's fees to enable complainant to follow this appeal and the further sum of \$50 for the expenses of the appeal, and the court found that the "defendant has been and is now in utter defiance and scorn of every court order in the above entitled cause, in spite of the fact that he is able to comply with the same; and the court does further find that the



defendant has secreted himself and has been unable to be served with a copy of the rule to this date." It was thereupon ordered that a writ of attachment issue to seize the body of the defendant.

The record shows a case for the application of the rule stated in Lindsay v. Lindsay, 255 Ill. 442, where it was held that a party who is in contempt of the trial court cannot, until purged of such contempt, prosecute a writ of error to review the decree in such proceedings. It was said: "The weight of authority seems to be that a party in contempt is not entitled to prosecute or defend an action when the nature of his contempt is such as to hinder or embarrass the due course of procedure in the cause." Directly in point is Luskey v. Luskey, 226 Ill. App. 556, where it was held that, where a defendant by disobedience of the trial court's order that he pay complainant her solicitors' fees and the costs of printing her brief on appeal, has made it impossible for her to present her case on appeal, and where it appears that defendant has fled from jurisdiction or has concealed himself after being adjudged guilty of contempt for failure to pay such solicitors' fees and costs of brief, the appeal will be dismissed.

The facts in the instant case call for the application of this rule and the appeal is therefore dismissed.

APPEAL DISMISSED.

Hatchett, P. J., and O'Connor, J., concur.

was adjudged and still is in contempt of the trial court and that  
he has not purged himself of such contempt; that he was ordered to  
pay \$150 for attorneys' fees and the further sum of \$50 for ex-  
penses, in order that complainant might properly follow this  
appeal, but that defendant refused and still refused to comply  
with said order. Defendant has filed certain applications which  
do not negative the assertions of complainant and is devoted  
mainly to questioning the propriety of the order of January 21st.  
March 22, 1911, the court ordered defendant to pay to  
the complainant for her solicitor's fees in this cause \$150 and  
the further sum of \$50 towards defraying the costs of this appeal,  
within ten days. Subsequently, on March 22nd, defendant filed a  
petition, requesting that the above order be vacated and set  
aside. April 10th the court entered an order on this petition,  
setting forth the preceding matter, and that on January 21st  
there was an error on the order for the payment of the said  
the sum of \$150, that the defendant was asked to show cause why  
he had not complied with said order and a rule was issued requiring  
him to show cause why he failed to do so in compliance with  
said order. The court further found that  
defendant "through his attorney and counsel has every effort to  
prevent herein," and that the attorney "has ordered his client to  
refuse to comply with the order of the court aforesaid," that  
the defendant has acquiesced in his attorney's advice and was  
failed to comply with the order of March 22nd regarding defendant  
to pay \$150 for attorneys' fees to enable complainant to follow  
this appeal and the further sum of \$50 for the expenses of the  
appeal, and the court found that the "defendant has been and is  
now in utter defiance and scorn of every court order in  
the above entitled cause, in spite of the fact that he is still so  
comply with the same; and the court does further find that the

defendant has secreted himself and has been unable to be served with a copy of the rule to this date." It was thereupon ordered that a writ of attachment issue to seize the body of the defendant.

The record shows a case for the application of the rule stated in Lindsay v. Lindsay, 255 Ill. 442, where it was held that a party who is in contempt of the trial court cannot, until purged of such contempt, prosecute a writ of error to review the decree in such proceedings. It was said: "The weight of authority seems to be that a party in contempt is not entitled to prosecute or defend an action when the nature of his contempt is such as to hinder or embarrass the due course of procedure in the cause." Directly in point is Luskey v. Luskey, 226 Ill. App. 566, where it was held that, where a defendant by disobedience of the trial court's order that he pay complainant her solicitors' fees and the costs of printing her brief on appeal, has made it impossible for her to present her case on appeal, and where it appears that defendant has fled from jurisdiction or has concealed himself after being adjudged guilty of contempt for failure to pay such solicitors' fees and costs of brief, the appeal will be dismissed.

The facts in the instant case call for the application of this rule and the appeal is therefore dismissed.

APPEAL DISMISSED.

Matchett, P. J., and O'Connor, J., concur.





34178

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

CAROLINE CYRNIK,  
Plaintiff in Error.

ERROR TO CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 646<sup>2</sup>

MR. PRESIDING JUSTICE MATORETT  
DELIVERED THE OPINION OF THE COURT.

By this writ of error Caroline Cynrik seeks to reverse an order of the Circuit court of Cook county, which found that she was a delinquent child, in that she was under the age of eighteen years and "was and is" incorrigible. The order directed that she be committed to the State Training School for Girls at Geneva, Illinois.

It is first urged in her behalf that the petition is defective in that it does not describe the particular act or acts which constituted, to use the language of the brief, "said alleged offense."

The petition was filed in that division of the Circuit court of Cook county known as the Juvenile court and was verified, upon information and belief by petitioner, Nellie M. Burke. The petitioner avers that she is a resident of the county; that plaintiff in error is a girl under the age of eighteen years, now within the county and not an inmate of a state institution incorporated under the laws of the state, "and is a delinquent child in this: That the said child on the 21st day of April, 1927, in the County aforesaid was and is incorrigible."

The petition set up that the child is in the control of Harrison A. Dobbs, giving his residence; avers that the father of the child is Anthony Cynrik and the mother Mary Cynrik, and states their residence.

It further alleges that the parents consent that the

STATE OF ILLINOIS  
COUNTY OF COOK  
IN SENATE  
JANUARY 11, 1927.  
CARRIE GYRIK.  
Plaintiff in Error.

ORDER TO DISMISS COUNT  
OF COOK COUNTY.

259 I.A. 646

THE PETITIONING JUDICIAL MAGISTRATE  
DELIVERED THE WRIT OF HABEAS CORPUS.

By this writ of error Carrie Gyrick seeks to reverse an order of the circuit court of Cook county, which found that she was a delinquent child, in that she was under the age of sixteen years and "was and is" indistinguishable. The order directed that she be committed to the State Training School for Girls at Geneva, Illinois.

It is first urged in her petition that the petition is defective in that it does not describe the particular act or acts which constituted, to use the language of the writ, "said alleged offense."

The petition was filed in that division of the circuit court of Cook county known as the Juvenile Court and was verified, upon information and belief by petitioner, Nellie M. Burke. The petitioner avers that she is a resident of the county; that child left in error is a girl under the age of sixteen years, now residing in the county and not an inmate of a state institution incorporated under the laws of the state, "and is a delinquent child in that; that the said child on the first day of April, 1927, in the County of Cook was and is indistinguishable."

The petition set up that the child is in the control of Harrison A. Deppa, giving his residence; avers that the father of the child is Anthony Gyrick and the mother Mary Gyrick, and states their residence. It further alleges that the parents consent that the



child be taken away from them and placed under the guardianship of some suitable person to be appointed by the court; that the parents are unequal to the task and responsibility of controlling and correcting the child and of preventing her from repetitions of delinquency; that they and each of them are unable to care for, protect, train, educate, control and discipline the child, and that it is for the interest of the child and of the people of the state of Illinois that she be taken from the parents and placed under such guardianship.

The petition makes Harrison A. Dobbs and the parents parties defendant; prays that they may be summoned to appear and to bring the child into open court and that they show if they can why the prayer of the petition for the appointment of a suitable guardian and disposition of the custody of the child should not be made.

The record also shows that summons issued and was served on Harrison A. Dobbs and Anthony Cyrnik by reading the same to them and delivering a copy thereof to them; that summons was served on Mary Cyrnik by leaving a copy thereof at her usual place of abode with Anthony Cyrnik, a member of the family of the age of ten years and upwards.

The decree recites that the matter came on for hearing on the petition; that the child was in open court in her own proper person as well as by her counsel, the person who had theretofore been appointed to represent her; that defendants, Anthony Cyrnik, Sister Mary Angel Guardian, and Harrison A. Dobbs were also present in open court; that the court heard all the evidence adduced and the arguments of counsel and found that it had jurisdiction of all the parties and the subject matter; that petitioner was a reputable person and a resident of the County of Cook and State of Illinois; that Caroline Cyrnik was a female person under the age of eighteen years, and of the age of fourteen years on January 1, 1928, within

could be taken away from them and placed under the jurisdiction of  
some suitable person to be appointed by the court; that the persons  
are entitled to the same and responsibility of maintaining and con-  
trolling the child and are governing her from regulations of delin-  
quency; that they and each of them are liable to some law, statute,  
claim, statute, contract and discipline the child, and that it is for  
the interest of the child and of the people of the state of Illinois  
that she be taken from the persons and placed under suitable  
supervision.

The petition was signed by Harrison A. Hobbs and Anthony  
Gwynn; that they may be removed to court and to  
bring the child into open court and that they show if they can why  
the state of the petition for the appointment of a suitable per-  
son and disposition of the custody of the child should not be made.  
The record also shows that summons issued and was served  
on Harrison A. Hobbs and Anthony Gwynn by reading the same to them  
and delivering a copy thereof to them; that summons was served on  
Mary Gwynn by leaving a copy thereof at her usual place of abode  
with Anthony Gwynn, a member of the family of the age of ten  
years and upwards.

The court further finds that the matter came on for hearing  
on the petition; that the child was in open court in her own proper  
person as well as by her counsel, the person who had the custody  
been appointed to represent her; that respondents, Anthony Gwynn,  
Sister Mary Angel Guardian, and Harrison A. Hobbs were also present  
in open court; that the court heard all the evidence offered and the  
arguments of counsel and found that it had jurisdiction of all the  
matter and the subject matter; that petitioner was a reputable  
person and a resident of the county of Cook and State of Illinois;  
that Caroline Gwynn was a female person under the age of sixteen  
years, and of the age of thirteen years on January 1, 1886, within



said county and not an inmate of a state institution incorporated under the laws of the state, and that she was "a delinquent child in this, that, in the county aforesaid, on the 28th day of July, 1928, said child was and is incorrigible as alleged in the petition herein."

The decree further finds that the parents and legal guardian were unequal to the task and responsibility of controlling and correcting the child and preventing her from repetitions of delinquency; that they and each of them were unable to care for, protect, train, educate, control and discipline the child; that it was for the interest of the people of the state and of the child that she be taken away from her parents and guardian; that she be placed under the guardianship of some suitable person to be appointed by the court, and that it was for the interest of the girl and of the public that she be sent to the State Training School for Girls; that all of the allegations of the petition were true as alleged therein.

It was therefore ordered, adjudged and decreed that she be committed to the State Training School for Girls at Geneva, Illinois, an institution provided by the state of Illinois, suitable for the care of delinquent girls, subject to the rules and laws that might be enforced from time to time governing such institution; that Lucy D. Ball, superintendent of said institution, was thereupon appointed guardian of the child and was ordered and directed to place said child in said institution and to hold, care for, train and educate her until she arrived at the age of 21 years, or until sooner discharged according to law; that the court retained jurisdiction of the cause for the purpose of making such further orders for the welfare of the child as might from time to time be found to be in accordance with equity and with the statute in such case made and provided.



made not provided.

to be in accordance with equity and with the statute in such case  
for the welfare of the child as might from time to time be found

action of the cause for the purpose of making such further orders  
as the court might deem proper; that the court retained jurisdiction

and should not until the child arrived at the age of 21 years, or until  
placed with child in said institution and to hold, care for, train

appointed guardian of the child and was directed and allowed to  
Lucy D. Hall, superintendent of said institution, was thereupon

might be entered from time to time governing such institution; that  
the care of delinquent girls, subject to the rules and laws that

held, an institution provided by the state of Illinois, available for  
be committed to the State Training School for Girls at Joliet, Illi-

It was therefore ordered, adjourned and decreed that she  
alleged therein.

girls; that all of the allegations of the petition were true as  
and of the public that she be sent to the State Training School for

placed under the guardianship of some suitable person to be ap-  
that she be taken away from her parents and guardian; that she be

was for the interest of the people of the state and of the child  
protect, train, educate, control and discipline the child; that it

and correcting the child and preventing her from repetition of  
guardian were assigned to the task and responsibility of controlling

tion herein."

It is urged in the first place that the petition was insufficient in that it failed to set out and describe the act or acts constituting the alleged offense, and the brief of plaintiff in error cites a large number of cases, including the recent case of People v. Brown, 336 Ill. 257, which in substance held that where a statute has not described the acts constituting a particular offense, such acts must be specifically averred in the petition or information.

Such is the law applicable to cases in which the proceeding involves the commission of a criminal offense. This proceeding is not of that character. In proceedings under the Juvenile Court law the infant does not appear before the court in the character of an alleged violator of the law of the land. On the contrary, the child is brought within the jurisdiction of the court for the benefit of the child and of the public, in order that it may receive that care and protection which courts of chancery from ancient times have exercised. Witter v. Board of Cook County Com'rs., 256 Ill. 616. In cases such as this the state acts in its character as parens patriae for the purpose of protecting and providing for the welfare of such of its citizens as may be unable to protect and provide for themselves. The statutes governing such proceedings should be given a broad and liberal construction in order that the object for which they were enacted may be attained. Lindsay v. Lindsay, 257 Ill. 328. The finding that this child was incorrigible does not, as we construe the statute, mean that she was bad beyond correction or reformation, but rather that she was one whose reformation could not best be accomplished under the control to which she was then subjected. Hogue v. State, 220 S. W. 96.

A recital of the particular act or acts upon which the finding that she was incorrigible was based would have been very much against rather than in her interests. Indeed, we think it



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conduct, the child is present within the jurisdiction of the court  
for the benefit of the child and of the public, so that it  
may receive that care and protection which courts of equity have  
always been empowered to give. Wilder v. Board of Juvenile Judges,  
220 Ill. 616. In cases such as this the state acts in its character  
as parens patriae for the purpose of protecting and providing for  
the welfare of such of its citizens as may be unable to protect  
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the object for which they were enacted may be attained. People v. Brown,  
220 Ill. 257. The finding that this child was incorrigi-  
ble does not, as we construe the statute, mean that she was bad  
beyond correction or reformation, but rather that she was one whose  
reformation could not best be accomplished under the control of  
her own will and her own conduct. People v. Brown, 220 Ill. 257.

A recital of the particular act or acts upon which the  
finding that she was incorrigible was based would have been very  
much against rather than in her interest. Indeed, we think it



can hardly be said to be for the best interests either of the public or of the child that mistakes of youth should be perpetuated in a permanent record, which would be accessible to the public during the whole life of the child. Certainly, no good parent would ever desire any such thing for his child. As the proceeding is not in any sense criminal, the rules of criminal procedure have no application.

It is also urged "that the petition is not sufficient to deprive a person of liberty because it is sworn to on information and belief." Petition of Ferrier, 103 Ill. 367, and County of McLean v. Humphreys, 104 Ill. 378, are cited. For the reasons we have already stated, this contention cannot prevail. The child is not deprived of her personal liberty. She is not undergoing punishment in any sense of the word.

It is next urged that the decree should be reversed because it does not recite evidentiary facts in the findings of the chancellor which is said to be necessary in the absence of a certificate of evidence. That this is the general rule in chancery practice hardly requires citation of authorities. Plaintiff in error cites and discusses eleven different cases so holding. However, no one of these cases holds that the legislature may not by appropriate legislation dispense with the requirement that the evidence be thus preserved. It is contended by defendant in error that section 9 of the Juvenile act (Smith-Hurd's Ill. Rev. Stats. 1929, par. 196, p. 304) should be given the same construction in this respect that was given by the Supreme court to section 3 of the Adoption statute in Hopkins v. Gifford, 309 Ill. 363. Said section 9 in substance provides that if the court shall find any male child under the age of seventeen years or any female child under the age of eighteen years to be delinquent within the meaning of the act, the court may allow such child to remain in its own home, subject to the friendly visitation of a probation officer, or that if the

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sire such a thing for his child. As the proceeding is not in any  
case criminal, the rules of criminal procedure have no application.  
It is also urged "that the petition is not well founded  
because a person of liberty because it is sworn to on information  
and belief." Petition of Lister, 103 Ill. 387, and People v. Lister,  
104 Ill. 398, are cited. For the reasons we have  
already stated, this contention cannot prevail. The child is not  
deprived of her personal liberty. She is not undergoing punishment  
in any sense of the word.  
It is next urged that the statute should be interpreted so  
as it does not require systematic facts in the making of the  
determination which is said to be necessary in the absence of a con-  
fession of guilt. That this is the general rule is necessary  
practices hardly require citation of authorities. It is  
error after and discussion of even different cases is holding. How-  
ever, no one of these cases holds that the legislature may not by  
appropriate legislation dispense with the requirement that the evi-  
dence be then preserved. It is contended by counsel in oral argu-  
ment that of the juvenile act (Smith-Hurd's Ill. Rev. Stat. 1903,  
par. 126, p. 304) should be given the same construction as the  
present law was given by the Supreme Court in section 5 of the  
Act of 1901 in People v. Lister, 103 Ill. 387, said section  
5 in substance provides that if the court shall find any child under  
the age of seventeen years or any female child under the age  
of eighteen years to be delinquent within the meaning of the act,  
the court may allow such child to remain in its own home, subject  
to the friendly visitation of a probation officer, or that it shall



court shall further find that the parents, guardian or custodian are unfit or improper guardians or are unable or unwilling to care for, protect, train, educate or discipline such child, and that it is for the interest of such child and the people of the state that such child be taken from the custody of its parents, custodian or guardian, the court may appoint some proper person or probation officer, guardian over the person of such child and permit it to remain at its home, or order such guardian to cause such child to be placed in a suitable family home, or cause it to be boarded out in some suitable family home, or the court may commit such child to some training school for boys if a male child or to an industrial school for girls if a female child, or to any institution incorporated under the laws of the state to care for delinquent children, or to any institution that has been or may be provided by the state, county, city, town or village suitable for the care of delinquent children, including St. Charles School for Boys and State Training School for Girls; that in every case where such child is committed to an institution or association, the court shall appoint the president, secretary or superintendent of such institution or association, guardian over the person of such child and shall order the guardian to place such child in such institution or association, whereof he is such officer and to hold such child, care for, train and educate it subject to the rules and laws <sup>may</sup> that ~~be~~ in force from time to time governing such institution or association.

The subject matter of section 9 is not unlike section 3 of the Adoption statute. It will be observed that section 9, like section 3 of the Adoption act, has specifically enumerated the findings necessary to confer jurisdiction upon the court and in thus enumerating them, has precluded an interpretation which would require further findings in the decree. The act in question ex-



... shall be taken from the custody of the parent, guardian or association of children, the court may require some other person or institution or association, guardian over the person of such child and give him it to remain at his home, or other such institution to receive such child so he placed in a suitable family home, or cause it to be boarded out in some suitable family home, or the court may commit such child to some training school for boys if a male child or to an industrial school for girls if a female child, or to any institution incorporated under the laws of the state to care for delinquent children, or to any institution that has been or may be provided by the state, county, city, town or village outside for the care of delinquent children, including St. Charles School for Boys and State Training School for Girls; that in every case where such child is committed to an institution or association, the court shall appoint the president, secretary or superintendent of such institution or association, guardian over the person of such child and shall order the institution to place such child in such institution or association, wherever he is when ordered and to hold such child, care for, train and educate it subject to the rules and laws of the institution from time to time governing such institution or association.

The subject matter of section 2 is not within section 2 of the Adoption statute. It will be observed that section 2, like section 3 of the Adoption act, has specifically enumerated the findings necessary to confer jurisdiction upon the court and in thus enumerating them, has precluded an interpretation which would require further findings in the decree. The act in question ex-

pressely provides that evidence heard in these cases cannot be used against the child in any other court, thus indicating an intention that the mistakes of a child should not be perpetuated in a public record for the perusal of the present and future generations, and this fact, when considered in connection with the further fact that the precise findings necessary are expressly enumerated, leads to the conclusion that it was not the intention of the legislature that the usual chancery practice in this particular should prevail in these cases.

Plaintiff in error further contends that the court was without jurisdiction to render the decree because the record does not disclose that the mother was personally served with summons as required by the statute. People v. Lynch, 223 Ill. 346, and People v. McDonald, 225 Ill. App. 447, are cited. In People v. McDonald it appeared that no summons was either issued or served upon the mother of the alleged delinquent child, and that so far as the record showed she had no notice of the proceedings. In People v. Lynch the court was called upon to construe section 5 of the Juvenile Court act which required that the parents, legal guardian, or some near relative in case there are no parents or guardian, should have reasonable notice of the hearing upon the question of committing a child as neglected, dependent or delinquent, and as it appeared that the mother had not been served with notice, the child was discharged.

Said section 5 as amended in 1907 (see Laws of 1907, p. 70) provides in substance that all persons named in the petition shall be made defendants by name and shall be notified of the proceeding by summons if residents of the state, "in the same manner as is now or may hereafter be required in chancery proceedings by the laws of this State except only as herein otherwise



precisely provided that evidence heard in these cases cannot be used against the child in any other court, thus indicating an intention that the mistake of a child should not be regarded as a basis for his removal at the present and future generations, and this fact, when considered in connection with the latter fact that the precise findings necessary are expressly enumerated, leads to the conclusion that it was not the intention of the legislature that the usual summary practices in this particular should prevail in these cases.

Liability in these cases is not limited to the child and without jurisdiction to render the decree because the record does not disclose that the mother was personally served with summons as required by the statute. People v. Lynch, 123 Ill. 322, 2 Ill. App. 447, 200 Ill. 447, 200 Ill. 447, 200 Ill. 447. People v. McDonald, 123 Ill. 322, 2 Ill. App. 447, 200 Ill. 447, 200 Ill. 447. It appeared that no summons was either issued or served upon the mother of the alleged delinquent child, and that as far as the record shows she had no notice of the proceedings. In People v. Lynch, the court was called upon to consider section 5 of the Juvenile Court Act which provided that the juvenile, legal guardian, or some near relative in case there was no guardian or guardian, should have reasonable notice of the hearing upon the question of committing a child as delinquent, dependent or delinquent, and as it appeared that the mother had not been served with notice, the child was discharged.

This section 5 as amended in 1907 (see Laws of 1907, p. 70) provides in substance that all persons named in the petition shall be made defendants by name and shall be notified of the proceeding by summons if residence is known of the state, "in the same manner as is now or may hereafter be required in summary process cases by the laws of this state except only in certain situations



provided."

Section 11 of the Chancery act (Smith-Hurd's Ill. Rev. Stats., chap. 22, sec. 11, p. 261) provides that service of summons shall be made by delivering a copy thereof to defendant or by leaving such copy at his usual place of abode with some person of the family, of the age of ten years or upwards, and informing such person of the contents thereof. The return already recited shows service of this kind on the mother, and it was sufficient.

For the reasons indicated the decree of the Circuit court is affirmed.

AFFIRMED.

McSurely and O'Conner, JJ., concur.

provided."

Section 11 of the Library and (Smith-Barth's Ill. Rev. Stat., chap. 22, sec. 11, p. 221) provides that service of summons shall be made by delivering a copy thereof to defendant or by leaving such copy at his usual place of abode with some person of the family, of the age of ten years or upwards, and informing such person of the contents thereof. The return already received shows service of this kind on a mother, and it was sufficient for the reasons indicated in the issues of the Illinois

court is affirmed.

REVEREND

Seabury and O'Connor, Attorneys.

34214

MATHIAS HOFFMAN, Doing Business  
as M. HOFFMAN & CO.,  
Defendant in Error,

vs.

MARGARET L. OWINGS,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

2591A. 646<sup>3</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

In an action on contract and upon trial by the court  
there was a finding for plaintiff and judgment in the sum of  
\$2508.44, to reverse which defendant has sued out this writ of error.

Plaintiff's claim was based on an alleged promissory  
note which, exclusive of a clause granting power to confess judg-  
ment, is as follows:

"\$2225.00

Chicago, April 14th, 1927.

On demand after sale of 3 apt. at 8313 Throop St. or  
sale of 6 apt. at 7922-24 Rhodes Ave., after date for value  
received, I promise to pay to the order of M. Hoffman & Company  
Twenty-two Hundred Twenty-five and no/100 dollars at 7607 Cot-  
tage Grove Ave.,-- with interest at 6 per cent per annum after  
consummation of sale of either of the two above buildings  
until paid."

Defendant offered in evidence a writing signed by  
plaintiff, which is as follows:

"3/23/27

We agree to accept as commission \$4450.00 on sale of 30  
Apt. located at 7030-38 Cregier. Same to be paid from cash  
received when we sell the 3 Apt. at 8313 Throop or the 6 Apt.  
7922-24 Rhodes Ave. accepting 1/2 board rate on the 3 and 6  
Apt. when sold at prices stated in contract whichever we sell.

M. Hoffman & Co.  
By M. Hoffman."

Plaintiff objected to the introduction of this exhibit  
on the ground that it was an attempt to vary the terms of the note  
by an instrument dated prior to the execution of the note, and the  
objection was sustained.

Defendant then offered to prove that she was the owner  
of a 30 apartment building at 7030-38 Cregier avenue, Chicago; that



RECEIVED 1961, HANFORD MAINTENANCE  
 100 100 100 100 100  
 100 100 100 100 100

RECEIVED  
JAN 10 1967

THESE RESULTS WERE OBTAINED BY THE USE OF THE  
FOLLOWING DATA:

It is not possible to determine the exact date of the birth of the child.

There was a building for electricity in the town of

... ..

1. The first of these is the fact that the system is not a closed system. It is open to the outside world, and this is a major factor in its operation. The system is not a closed system, and this is a major factor in its operation.

:000107 60 01 JUNE

00.751917

[illegible]

Defendant offered in evidence a certain amount of

SECRET

9/20/88

[illegible]

Stamps sold by individual and as per the Tilted

ed on 10/10/1964. The above information was obtained from the file of the FBI, New York Office, dated 10/10/1964.

and the other side of the road, the road is very narrow and the traffic is very heavy.

...the ... ..

Notations then altered to show that the

And a copy of the same report is being furnished to the Director of the FBI.

plaintiff tried to induce her to trade such building for a 6 apartment building at 7922-24 Rhodes avenue and a 3 apartment building at 8313 Throop street; that she refused to enter into that trade, there being no cash involved with which to pay commission; that on or about March 23, 1927, plaintiff submitted to defendant a different proposition whereby her Gregier avenue property would be put in trade at the price of \$184,450, which was an increase of \$4450 over the purchase contract price representing the commission of plaintiff to be paid on the exchange of the properties; that plaintiff stated that he would sell one or the other of the smaller buildings and would not be entitled to any commission until he had sold the Throop street property for \$32,500 or the Rhodes avenue property for \$57,500; that plaintiff stated he would guarantee the sale of the Rhodes avenue property within a period of four to six months; that to evidence this understanding in part plaintiff wrote out in longhand and signed and gave to defendant the memorandum of agreement offered as defendant's exhibit 1; that the exchange of the properties was consummated on or about April 14, 1927, at which time the note sued upon was executed by defendant and represented one-half of the commission; that plaintiff made some effort to sell the properties for two or three months but thereafter ceased all efforts and never in fact sold either the Rhodes avenue or Throop street properties; that foreclosure proceedings were threatened against the Rhodes avenue property and in order to save something for herself, defendant traded the Rhodes avenue property on November 30, 1928, for bungalow property at a reduced price.

The attorney for plaintiff objected to this evidence. The court inquired whether the record was clear that this was the property mentioned in the note, whereupon the following colloquy occurred:



plaintiff failed to inform her of facts such as building lot 2 & 3, building at 1032-34 Rhodes Avenue and a 2 apartment building at 3213 Third Street; that she refused to enter into that lease, there being no cash involved with which to pay commission; that on or about March 25, 1937, plaintiff submitted to defendant a list of recent proposition whereby her Oregon Avenue property would be sold in trade at the price of \$184,400, which was an increase of \$44,000 over the purchase contract price representing the commission of plaintiff to be paid on the exchange of the properties; that plaintiff stated that she would sell one or the other of the smaller buildings and would not be entitled to any commission until she had sold the Third Street property for \$238,000 or the Rhodes Avenue property for \$257,500; that plaintiff stated she would guarantee the sale of the Rhodes Avenue property within a period of four to six months; that as evidence of this undertaking in said plaintiff's order set in longhand and signed and gave to defendant and defendant's agreement signed as defendant's exhibit I; that on or about April 14, 1937, at which time the note was executed by defendant and represented one-half of the commission; that plaintiff made some effort to sell the properties for two or three months but thereafter ceased all efforts and never in fact sold either the Rhodes Avenue or Third Street properties; that defendant proceeded to sell the properties against the Rhodes Avenue property and in order to save something for herself, defendant traded the Rhodes Avenue property on November 30, 1938, for burglar property at a reduced price.

The attorney for plaintiff objected to this evidence. The court indicated whether the record was clear that this was the property mentioned in the note, whereupon the following colloquy occurred:



"Mr. Hinckley: One of these pieces has been sold. That is agreed by the parties?  
 Mr. Moody: Yes.  
 The Court: Both of them or just one of them?  
 Mr. Moody: Just the one on Rhodes avenue.  
 The Court: The objection will be sustained to the offer of testimony."

The court then entered an order that the judgment originally confessed amounting to \$2508.44 should be confirmed and overruled a motion of defendant to vacate the judgment and for a new trial and in arrest.

The briefs discuss the question of whether the instrument here sued on is a promissory negotiable note, but that question is immaterial for the reason that the suit is between the original parties to the instrument.

The controlling question in the case is whether the court erred in excluding the evidence offered upon the theory that its introduction would tend to vary the terms of the written agreement. As the agreement of March 23, 1927, and the note (so-called) of April 14, 1927, were between the same parties and both apparently covered <sup>the</sup> subject matter only in part, the evidence was admissible. Kelsey v. Clausen, 257 Ill. 402; Mayer v. Illinois Life Ins. Co., 211 Ill. App. 285.

For the error in excluding this evidence the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and O'Connor, JJ., concur.

Mr. Minkley: One of these things has been said. That is  
 agreed by the parties?  
 Yes.  
 Both of them or just one of them?  
 Just one on a whole average.  
 The objection will be sustained for the offer of  
 testimony."

The court then entered an order that the judgment  
 originally rendered amounting to \$2500.00 should be continued  
 and overruled a motion of defendant to vacate the judgment and for  
 a new trial and in arrest.

The trial judge the possibility of whether the in-  
 strument here used as a preliminary negotiable note, but that  
 question is immaterial for the reason that the suit is between the  
 original parties to the instrument.

The controlling question in the case is whether the  
 court erred in excluding the evidence offered upon the theory that  
 the instrument would tend to vary the terms of the written agree-  
 ment. As the agreement of March 23, 1917, and the note (see exhibit)  
 of April 14, 1917, were between the same parties and both negotiable  
 if covered subject matter only in part, the evidence was admissible.  
Exhibit A. Agreement, May 1917. and: Exhibit B. Note, April 1917.  
 221 Ill. App. 228.

For the error in excluding this evidence the judgment  
 is reversed and the cause remanded.

REVEREND AND HONORABLE  
 ROBERTS and CONNOR, JJ., concur.

34251

FRANK WEGLARZ, as Administrator  
of Estate of Wanda Weglarz, Deceased,  
Appellant,

vs.

PETER BIRUTAS,  
Appellee.

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

259 I.A. 647

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff administrator from a judgment in favor of defendant in an action on the case for alleged negligence resulting in the death of plaintiff's intestate. The judgment was entered on the verdict of a jury, motions for a new trial and in arrest in behalf of plaintiff having been overruled.

The deceased died as a result of injuries sustained by her on September 26, 1926, at the intersection of West Fourteenth and Paulina streets in Chicago, where she was struck by an automobile driven by defendant.

The declaration in its several counts alleged negligence generally; failure to sound a horn, gong or signal; driving at a speed greater than fifteen miles an hour in a residential district contrary to the statute; failure to provide safe brakes on the automobile; driving at an unreasonable speed; driving on the left side of the street, and failure to give warning. In one count wanton and wilful negligence was charged.

The jury, in response to a special interrogatory submitted at the request of plaintiff, gave a negative answer to the charges contained in the wilful and wanton count.

It is urged that the court erred in the giving and refusing of instructions; that the motion for a new trial should have been granted, not only because the verdict was against the



ERANK WEDGLEY, as Administrator  
of Estate of Wanda Wedgley, Deceased,  
Appellant,

APPEAL FROM SUPERIOR

COURT OF JACK COUNTY.

PETER BIRUTAS,

Appellee.

229 I.A. 642

IN REVERSING JUSTICE MATTHEW  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff administrator from a judgment in favor of defendant in an action on the case for alleged negligence resulting in the death of plaintiff's intestate. The judgment was entered on the verdict of a jury, motions for a new trial and in arrest of judgment having been overruled.

The deceased died as a result of injuries sustained by her on September 26, 1936, at the intersection of West North tenth and Paulina streets in Chicago, where she was struck by an automobile driven by defendant.

The declaration in its several counts alleged negligence generally; failure to sound a horn, ring or signal; driving at a speed greater than fifteen miles an hour in a residential district contrary to the statute; failure to provide safe brakes on the auto while driving at an unreasonable speed; driving on the left side of the street, and failure to give warning. In one count wanton and willful negligence was charged.

The jury, in response to a special interrogatory submitted at the request of plaintiff, gave a negative answer to the charges contained in the willful and wanton count.

It is urged that the court erred in the giving and retarding of instructions; that the motion for a new trial should have been granted, not only because the verdict was against the

manifest weight of the evidence but also because of newly discovered evidence.

With reference to the instructions it is argued that the court erred in giving instructions Nos. 4 and 6 as requested by plaintiff, because in each one the jury was referred to the declaration for a determination of the issue as to the negligence charged. It is contended this was erroneous on the authority of Bernier v. Ill. Cent. R.R.Co., 296 Ill. 464.

The jury should not have been referred to the declaration for a determination of the issues. It is also true that the court should not permit the pleadings in a civil case to be taken out of the room by the jury when it retires to consider its verdict, and in the absence of an affirmative showing to the contrary we must presume that the court followed the law in this respect. Therefore, if we assume error in the giving of these instructions, it was harmless. Lerette v. Director General, 306 Ill. 348.

It is next urged that the court erred in refusing to give instruction No. 3 at the request of defendant. That instruction told the jury in substance that at the time of the injury there was a certain statute in force in the state of Illinois which divided motor vehicles into two divisions and provided that no person should drive a vehicle as described in section 2 of the act at a speed greater than was reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person, or if the speed of any motor vehicle or motor bicycle operated upon any public highway where the same passed through the residence portions of any incorporated city, town or village should exceed 15 miles an hour, such rates of speed should be prima facie evidence that the person operating the vehicle was



manifest weight of the evidence but also because of newly discovered evidence.

With reference to the instructions it is argued that the court erred in giving instructions Nos. 4 and 6 as requested by plaintiff, because in each one the jury was referred to the declaration for a determination of the issue as to the negligence charged. It is contended this was erroneous on the authority of Bergier v. Ill. Cent. R.R. Co., 208 Ill. 484.

The jury should not have been referred to the declaration for a determination of the issues. It is also true that the court should not permit the pleadings in a civil case to be taken out of the room by the jury when it retires to consider its verdict, and in the absence of an affirmative showing to the contrary we must presume that the court followed the law in this respect. Therefore, if we assume error in the giving of these instructions, it was harmless. Barrett v. Director General, 308 Ill. 348.

It is next urged that the court erred in refusing to give instruction No. 5 at the request of defendant. That instruction told the jury in substance that at the time of the injury there was a certain statute in force in the state of Illinois which divided motor vehicles into two divisions and provided that no person should drive a vehicle as described in section 2 of the act at a speed greater than was reasonable and proper, having regard to the traffic and the use of the way, or so as to endanger the life or limb or injure the property of any person, or at the speed of any motor vehicle or motor bicycle operated upon any public highway where the same passed through the residence portions of any incorporated city, town or village should exceed 15 miles an hour, such rates of speed should be prima facie evidence that the person operating the vehicle was



driving at a speed greater than was reasonable, etc.

The instruction as offered was in the language of the statute, and it is urged, citing authorities to that effect, that it was error to refuse to give it. While the general rule undoubtedly is that it is not error to give an instruction in the language of the statute, it seems that this particular statute is excepted from that general rule. Johnson v. Pondergast, 308 Ill. 255; People v. Tate, 316 Ill. 52; Gresh v. Acom, 325 Ill. 474; and Felcman, Admr. v. Branger, Gen. No. 34339, in which an opinion was filed November 3, 1930. Moreover, the substance of this instruction seems to have been covered by plaintiff's given instruction No. 2.

Complaint is also made of the refusal of the court to give defendant's requested instruction No. 4, which told the jury that while the preponderance of the evidence did not consist wholly in the greater number of witnesses testifying on one side or the other on a disputed question, yet the number of credible and disinterested witnesses so testifying was a proper element for the jury to consider in determining where was the preponderance of the evidence. It was not error to refuse this instruction for the reason that the subject matter was correctly stated in plaintiff's instruction No. 2, which was given to the jury.

While complaint is made of the refusal to give other instructions, some of which might well have been given, we think the points were substantially covered in other instructions and it was not reversible error to refuse any of them.

The controlling question in the case is whether the verdict was manifestly against the weight of the evidence and whether for that reason and because of alleged newly discovered evidence, a new trial should have been granted by the court.

The evidence shows that the accident in which deceased met her death occurred about noon, Sunday, September 26, 1926, at

driving at a speed greater than was reasonable, etc.

The instruction as offered was in the language of the statute, and it is urged, citing authorities to that effect, that it was error to refuse to give it. While the general rule undoubtedly is that it is not error to give an instruction in the language of the statute, it seems that this particular statute is excepted from that general rule. Johnson v. Ford, 308 Ill. 325; People v. Tate, 318 Ill. 52; Gresh v. Adam, 328 Ill. 474; and Belman, Adm'r, v. Bremer, Gen. No. 24329, in which an opinion was filed November 3, 1930. Moreover, the substance of this instruction seems to have been covered by plaintiff's given instruction no. 2. Complaint is also made of the refusal of the court to give defendant's requested instruction no. 4, which told the jury that while the preponderance of the evidence did not consist wholly in the greater number of witnesses testifying on one side or the other on a disputed question, yet the number of credible and disinterested witnesses so testifying was a proper element for the jury to consider in determining where was the preponderance of the evidence. It was not error to refuse this instruction for the reason that the subject matter was correctly stated in plaintiff's instruction no. 2, which was given to the jury.

While complaint is made of the refusal to give other instructions, some of which might well have been given, we think the points were substantially covered in other instructions and it was not reversible error to refuse any of them.

The controlling question in the case is whether the verdict was manifestly against the weight of the evidence and whether for that reason and because of alleged newly discovered evidence, a new trial should have been granted by the court.

The evidence shows that the accident in which deceased met her death occurred about noon, Sunday, September 26, 1926, at



the intersection of West Fourteenth and Paulina streets, Chicago. Paulina street extends north and south, West Fourteenth street east and west. There were two sets of street car tracks in West Fourteenth street. West-bound cars ran on the north tracks and east-bound cars on the south tracks. West Fourteenth street was paved with asphalt <sup>with</sup> and bricks around the car tracks. It was a residential neighborhood. At this particular time the street had no traffic except a west-bound street car.

There were two occurrence witnesses for plaintiff. William Novak, a fifteen year old boy, who lived on the south side of West Fourteenth street, testified that he was looking through a window from which he saw the accident; that defendant's automobile came east from Paulina street at about 35 or 40 miles an hour when he first saw it and when it hit deceased; that it did not slacken speed at all from the time he saw it until the time the girl was hit; that there was a west-bound street car about 40 or 50 feet west from where the girl got hit; that this street car was standing still; that he did not hear any horn or gong; that when he first saw deceased she was crossing the west-bound car track on the north; that he did not know how many feet approximately she had gone from the first time he saw her until she was hit; that the accident occurred about 110 feet east of the east line of Paulina street.

Edward Vrhel testified that he was a conductor for the Chicago Surface Lines and was standing on the rear platform of his street car at Paulina street, loading and unloading passengers; that the car had come to a stop; that the first thing he noticed about the accident was that he heard someone scream; that he looked east from the platform window and saw the rear end of the automobile going over this little girl; that the girl was hit about fifty feet east of the rear part of his street car;



the intersection of West Fourteenth and Paulina streets, Chicago. Paulina street extends north and south, West Fourteenth street east and west. There were two sets of street car tracks in West Fourteenth street. West-bound cars ran on the north tracks and east-bound cars on the south tracks. West Fourteenth street was paved with asphalt and bricks around the car tracks. It was a residential neighborhood. At this particular time the street had no traffic except a west-bound street car.

There were two occurrence witnesses for plaintiff. William Novak, a fifteen year old boy, who lived on the south side of West Fourteenth street, testified that he was looking through a window from which he saw the accident; that defendant's automobile came east from Paulina street at about 35 or 40 miles an hour when he first saw it and when it hit deceased; that it did not slacken speed at all from the time he saw it until the time the girl was hit; that there was a west-bound street car about 40 or 50 feet west from where the girl got hit; that this street car was standing still; that he did not hear any horn or going; that when he first saw deceased she was crossing the west-bound car track on the north; that he did not know how many feet approximately she had gone from the first time he saw her until she was hit; that the accident occurred about 110 feet east of the east line of Paulina street.

Edward Vrhel testified that he was a conductor for the Chicago Surface Lines and was standing on the rear platform of his street car at Paulina street, loading and unloading passengers; that the car had come to a stop; that the first thing he noticed about the accident was that he heard someone scream; that he looked east from the platform window and saw the rear end of the automobile going over this little girl; that the girl was hit about fifty feet east of the rear part of his street car;

that when he first saw her she was between the east and west-bound rails, mostly on the east-bound rails on the south track; that he did not hear any gong or horn; that the automobile was going about thirty or thirty-five miles an hour as it went past the rear of his street car, and that it went about seventy-five feet after hitting the girl before it came to a stop. He says there was no other traffic on the street at that time; that he did not see the girl at any time before the accident; that he went over and picked her up; that by that time defendant was backing up; that the street car was at a standstill; that it was about 110 or 115 feet from the east curb line of Paulina street to where the accident happened.

The girl was eight years and six months old at the time of the accident. The evidence indicates that she was in good health and a normal child. She had left her home on the day of the accident at about 11:30 a. m. Her older sister testified that she, the sister, did not know where deceased was going.

Defendant testified that at the time of the accident he was driving east on Fourteenth street from Robey; that when he came to Paulina street he was stopped by some traffic; that there was a west-bound street car in motion; that as the front end of the machine was even with the rear end of the street car he sounded his horn, and that the girl ran out and rushed in his way without warning; that after she was struck he came to a stop; that he pulled to the curb and got out and saw the conductor with the girl in his arms; that he backed up as fast as he could, put her in the machine and took her to a doctor's office and then to the County hospital. He says that he was in top speed as he came to Paulina street; that he was then going between twelve and thirteen miles an hour and was straddling the rails; that he was north of the east-bound rails; that the street car was immediately to his left and was slowly going toward the west on Fourteenth street to



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miles an hour and was straddling the rails; that he was north of  
the east-bound rails; that the street car was immediately to his  
left and was slowly going toward the west on Fourteenth street to



Paulina; that he did not see the girl at any time before the accident.

He says:

"The car was in top speed at the time I hit the girl. I never saw her. Just one leap in front of me. She hit the front left side of the bumper. The place where the girl was hit was about one hundred thirty feet from the corner."

He says that when he first saw the girl he put on the brake; that when he crossed Paulina street he was in third high speed; that during the next hundred feet until he hit the girl he was going about thirteen or fourteen miles an hour; that he sounded the horn about the center of the street and sounded it a few times; that it took him about twelve feet to come to a complete stop; that he used the emergency brake with his right hand.

Upon the motion for a new trial the attorney for plaintiff submitted his affidavit to the effect that subsequent to the trial, on or about January 13, 1930, he learned of the existence of an eye-witness to the accident, a Mrs. Mary Mitchell; that Mrs. Mitchell did not testify at the coroner's inquest in October, 1926, and that neither he nor I. F. Dankowski had any knowledge of her existence or of her testimony, "or of any facts or circumstances that would put affiant on inquiry as to her existence or testimony until subsequently to said trial and on or about January 13, 1930;" that the evidence of Mrs. Mitchell was material and could not have been produced by the use of due diligence, because she did not testify at the coroner's inquest and that he did not know of her existence or whereabouts until subsequent to the trial.

The affidavit of Mrs. Mitchell is to the effect that at the time of the accident she was sitting at an open window on the second floor at the northwest corner of Paulina and Fourteenth streets; that she looked west from this window and saw the accident; that January 13, 1930, was the first time she talked with anybody about the case; that on that day she talked with Philip A. Conley,

Pawlina; that he did not see the girl at any time before the accident.

He says:

"The car was in top speed at the time I hit the girl. I never saw her. That one was in front of me. The girl was in front left side of the bumper. The place where the girl was hit was about one hundred thirty feet from the corner."

He says that when he first saw the girl he was on the brake; that when he crossed Pawlina street he was in third high speed; that during the next hundred feet until he hit the girl he was going about thirteen or fourteen miles an hour; that he sounded the horn about the center of the street and sounded it a few times; that he took him about twelve feet to come to a complete stop; that he used the emergency brake with his right hand.

Upon the motion for a new trial the attorney for

plaintiff admitted his affidavit to the effect that subsequent

to the trial, on or about January 13, 1930, he learned of the

existence of an eye-witness to the accident, a Mrs. Mary Mitchell;

that Mrs. Mitchell did not testify at the coroner's inquest in

October, 1929, and that neither he nor I. F. Danekowski had any

knowledge of her existence or of her testimony, "or of any facts or

circumstances that would put witness on inquiry as to her existence

or testimony until subsequently to said trial and on or about Janu-

ary 13, 1930;" that the evidence of Mrs. Mitchell was material and

could not have been produced by the use of due diligence, because

she did not testify at the coroner's inquest and that he did not

know of her existence or whereabouts until subsequent to the trial.

The affidavit of Mrs. Mitchell is to the effect that

at the time of the accident she was sitting at an open window on

the second floor at the northwest corner of Pawlina and Lawrence

streets; that she looked west from this window and saw the accident;

that January 13, 1930, was the first time she talked with anybody

about the case; that on that day she talked with William A. Conley,



an assistant to Joseph F. Elward, attorney for plaintiff. Mrs. Mitchell says that she saw deceased enter a candy store at 1658 West Fourteenth street, being the northeast corner of Fourteenth and Paulina streets; that about five minutes thereafter she saw her leave this store; that at that time the passage of deceased across Fourteenth street was blocked by a west-bound Chicago Surface Line street car which was coming to a stop; that the girl looked east and west before leaving the north curbstone and starting to cross the street; that when she was in the middle of the west-bound street car tracks she looked west again; that the Birutas car had not then approached Paulina street; that the girl could not and did not see it; that the girl at the time she was hit was in the east-bound street car rails; that Birutas had a clear view of the girl for at least 35 feet before he hit her; that he could have stopped his car or avoided the accident but that he had kept on going at the same speed and did not stop his car. She says that the girl at the time she was hit was in the east-bound street car rails facing south by southeast; that the girl did not see or hear the automobile coming and that the point at which she was hit was in front of or close to 1651 West Fourteenth street. She also says that defendant's automobile did not stop or slacken its speed at Paulina street but continued east at approximately the same rate of speed on the east-bound street car track, and that its speed was approximately thirty miles an hour. She further says that another west-bound street car came along and that the girl crossed behind this second west-bound street car and was struck in the east-bound street car tracks about 100 feet east of Paulina street and about 50 feet east of the rear of this second west-bound street car; that she did not hear any automobile horn or other sound from Birutas's car; that by turning to the right or to the left defendant could have avoided the accident.



an assistant to Joseph H. Elward, attorney for plaintiff. Mrs. Mitchell says that she saw deceased enter a candy store at 1833 West Fourteenth street, being the northeast corner of Paulina street and Paulina street; that about five minutes thereafter she saw her leave this store; that at that time the passage of deceased across Fourteenth street was blocked by a west-bound Chicago bus and a line street car which was coming to a stop; that the girl looked east and west before leaving the north curbstone and starting to cross the street; that when she was in the middle of the west-bound street car tracks she looked west again; that the Elward car had not then approached Paulina street; that the girl could not and did not see it; that the girl at the time she was hit was in the east-bound street car rails; that Elward had a clear view of the girl for at least 35 feet before he hit her; that he could have stopped his car or avoided the accident but that he had kept on going at the same speed and did not stop his car. She says that the girl at the time she was hit was in the east-bound street car rails facing south by southeast; that the girl did not see or hear the automobile coming and that the point at which she was hit was in front of or close to 1833 West Fourteenth street. She also says that defendant's automobile did not stop or slacken its speed at Paulina street but continued east at approximately the same rate of speed on the east-bound street car track, and that it speeded was approximately thirty miles an hour. She further says that another west-bound street car came a way and that the girl crossed behind this second west-bound street car and was struck in the east-bound street car tracks about 100 feet east of Paulina street and about 30 feet east of the rear of this second west-bound street car; that she did not hear any automobile horn or other sound from Elward's car; that by turning to the right or to the left defendant could have avoided the accident.

In People v. Pennell, 315 Ill. 124, an opinion of the Supreme court has summarized the requirements necessary in order that newly discovered evidence may require the allowance of a new trial. It is there said:

"(1) The evidence must appear to be of such conclusive character as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; and (5) it must not be merely cumulative to the evidence offered on the trial."

This evidence does not meet the requirements in that it is not of a conclusive character and in that it does not appear that it could not have been discovered before the trial by the exercise of due diligence. It is also, in our opinion, merely cumulative to the evidence which was offered. Indeed, the affidavit in some respects corroborates the evidence offered upon the trial, all of which in our opinion tends to show (as the verdict indicates the jurors must have believed) that this unfortunate accident came about through the fact that the little girl suddenly and unexpectedly stepped in front of the automobile, the street car having made it impossible for her to see the automobile or the driver of the automobile to see her. The verdict of the jury can be explained only on this theory, and a consideration of the whole evidence compels the conclusion that the accident happened in this manner. At any rate, the question of fact was for the jury.

The judgment of the trial court is therefore affirmed.

**AFFIRMED.**

McSurely and O'Connor, JJ., concur.



In People v. Fennell, 315 Ill. 124, an opinion of the

Supreme Court has summarized the requirements necessary in order that newly discovered evidence may require the allowance of a new trial. It is there said:

"(1) The evidence must appear to be of such conclusive character as will probably change the result of a new trial; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; and (5) it must not be merely cumulative to the evidence offered on the trial."

This evidence does not meet the requirements in that

it is not of a conclusive character and in that it does not appear that it could not have been discovered before the trial by the exercise of due diligence. It is also, in our opinion, merely cumulative to the evidence which was offered. Indeed, the affidavits in some respects corroborates the evidence offered upon the trial, all of which in our opinion tends to show (as the verdict indicates the jurors must have believed) that said automobile accident came about through the fact that the little girl suddenly and unexpectedly stepped in front of the automobile, the driver of the automobile having made it impossible for her to see the automobile or the driver of the automobile to see her. The verdict of the jury can be explained only on this theory, and a consideration of the whole evidence compels the conclusion that the accident happened in this manner. At any rate, the question of fact was for the jury. The judgment of the trial court is therefore affirmed.

AFFIRMED.

McCarthy and O'Connor, JJ., concur.



34290

LEO KOSITCHER,  
Appellee,

vs.

THE NEW JERSEY FIDELITY AND  
PLATE GLASS INSURANCE CO. OF  
NEWARK, N. J., a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO

259 I.A. 647<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it entered by default on December 31, 1929. Defendant, as its name indicates, is an insurance company, and the suit of plaintiff was based on a policy issued by defendant to plaintiff purporting to insure against burglary, theft and larceny.

The statement of claim alleged that the policy covered the premises occupied by the assured and known as the third apartment in the building located at 5129 Greenwood avenue, Chicago; that the policy provided that the insurance should apply to property owned by the assured or by any permanent member of the household of the assured who did not pay board or rent or by a relative of the assured permanently residing with him; that on January 16, 1929, a diamond ring belonging to plaintiff's mother, who permanently resided with him, was feloniously taken and stolen from assured's apartment by some person or persons unknown; that immediate notice of loss was given and proof of loss furnished to defendant within sixty days as provided in the policy; that the ring was of the value of \$700; that the policy provided the liability of defendant on jewelry should not exceed fifty per cent, and that the amount of the insurance was \$1,000. The statement further alleged that plaintiff kept and performed all things required of him by the policy but that defendant refused to pay.

THE NEW YORK CITY  
PLATE CLASS LICENSE CO.,  
INC., a corporation,  
New York, N. Y.

THE NEW YORK CITY  
PLATE CLASS LICENSE CO.,  
INC., a corporation,  
New York, N. Y.

This is an account by reference to a certain account  
it entered by date of December 12, 1911. The account, as the  
same indicated, is an insurance company, and was not of liability  
was based on a policy issued by reference to liability insurance  
to insure against liability, loss and interest.  
The statement of claim alleged that the policy covered  
the premises occupied by the insured and known as the claimant's  
rent in the building located at 2110 Greenwood Avenue, Chicago,  
Illinois.  
That the policy provided that the insurance should apply to property  
owned by the insured or by any person or person of the household of  
the insured who did not pay board or rent or by a relative of the  
insured personally residing with him; that on January 16, 1912, a  
claimant was residing in claimant's apartment, was personally re-  
sided with him, was temporarily absent and claimant's apartment  
apartment by some person on certain matters; that claimant's notice  
of loss was given and proof of loss furnished to defendant within  
sixty days as provided in the policy; that the time was of the  
value of \$700; that the policy provided the liability of defendant  
on jewelry should not exceed fifty per cent, and that the amount  
of the insurance was \$1,000. The statement further alleged that  
claimant kept and performed all things required of him by the  
policy but that defendant refused to pay.



Two prior motions having been withdrawn, defendant on January 13, 1930, moved the court to vacate the judgment and in support of said motion presented the affidavit of Charles F. Martin.

The affidavit states that the suit was begun on December 24, 1929; that service was made on W. W. Gaughn, an employee of defendant, on December 26, 1929, and judgment entered on December 31, 1929; that by reason of the absence of several of the employees of defendant the summons in the cause was delayed in being referred to the proper officers of defendant for forwarding to its attorney; that the manager of the Chicago office of defendant was absent from Chicago by reason of injuries sustained in an automobile accident; that for that reason the Chicago office was under the control and management of P. J. Page, who took charge of said office about December 21, 1929; that Page was unfamiliar with the management and operation of the office, and that by reason of his unfamiliarity with such management, the forwarding of the summons to the attorney for defendant was delayed; that the affiant, Charles F. Martin, at the time of the service of the summons was in Columbus, Ohio, upon business and immediately upon his return delivered the summons to the attorney for defendant.

The affiant says that he is acquainted with the facts and that defendant has a good and valid defense to the whole of plaintiff's claim; that defendant is not indebted to plaintiff by reason of the policy; that defendant denies that a diamond ring belonging to plaintiff was feloniously taken and stolen as alleged; denies that plaintiff sustained any direct loss by burglary, theft or larceny in the sum of \$500 or any other sum; denies that an affirmative proof of loss was furnished defendant as alleged or as provided by the terms and agreements of the policy of insurance;



Two prior motions having been withdrawn, defendant on January 13, 1930, moved the court to vacate the judgment and to set aside the verdict rendered on January 7, 1930.

The affidavit stated that the suit was begun on December 24, 1929; that service was made on W. W. Duggan, an employee of defendant, on December 25, 1929, and defendant retained on December 26, 1929; that by reason of the absence of several of the employees of defendant the summons in the cause was delayed in being returned to the proper officers of defendant for forwarding to the attorney; that the manager of the Chicago office of defendant was absent; that Chicago by reason of illness sustained in an automobile accident; that for that reason the Chicago office was under the control and management of P. J. Page, who took charge of said office about December 21, 1929; that Page was unfamiliar with the management and operation of the office, and that by reason of his unfamiliarity with such management, the forwarding of the summons to the attorney for defendant was delayed; that the attorney, Charles J. ... at the time of the service of the summons was in California, Ohio, upon business and immediately upon his return delivered the summons to the attorney for defendant.

The affidavit says that he is acquainted with the facts and that defendant has a good and valid defense to the whole of plaintiff's claim; that defendant is not indebted to plaintiff by reason of the policy; that defendant denies that a ... belonging to plaintiff was feloniously taken and stolen as alleged; denies that plaintiff sustained any direct loss by burglary, theft or larceny in the sum of \$200 or any other sum; denies that an affirmative proof of loss was furnished defendant as alleged or as provided by the terms and agreements of the policy of insurance;

denies that plaintiff has kept and performed the things in said policy mentioned on his part to be kept and performed; denies that plaintiff gave an immediate notice to the police authorities as provided under the terms and agreements in the policy of insurance; denies that the value of the ring at the time of the alleged loss was \$700 as set forth in plaintiff's statement of claim; denies that plaintiff used reasonable care to protect the premises as provided by the terms and agreements in the policy of insurance; denies that any loss was such as was contemplated by the terms and conditions of the policy sued on, and denies that defendant waived notice or proof of loss; affirmatively alleges that plaintiff did not sustain any loss or damage whatsoever by direct loss by burglary, theft or larceny of any of the property of the insured; and further alleges that since the filing of the suit by plaintiff, one M. Kositchek, mother of plaintiff, has filed her suit in this court against defendant for recovery on the loss of a diamond ring alleged to have been feloniously taken and stolen from the third apartment occupied by her of the building at 5131 Greenwood avenue, Chicago, under insurance policy No. B-411211 and renewal thereof issued by defendant, and that the diamond ring in this cause alleged to have been taken and stolen is the same ring for which recovery is sought against this defendant by the mother of plaintiff.

The affidavit further alleges that if said ring was taken from plaintiff on or about January 16, 1929, it was taken by and through the connivance and with the consent of plaintiff; that if plaintiff does not now have possession or control of the ring, his lack of possession or control is due to his having voluntarily parted with it.

As the motion to set aside the judgment of the Municipal court was made in less than thirty days after it was entered, the court had jurisdiction to set the judgment aside for any reason



denies that plaintiff has kept and performed the things in said policy mentioned on his part to be kept and performed; denies that plaintiff gave an immediate notice to the police authorities as provided under the terms and agreements in the policy of insurance; denies that the value of the ring at the time of the alleged loss was \$700 as set forth in plaintiff's statement of claim; denies that plaintiff used reasonable care to protect the premises as provided by the terms and agreements in the policy of insurance; denies that any loss was such as was contemplated by the terms and conditions of the policy used on, and denies that defendant waived notice or proof of loss; affirmatively alleges that plaintiff did not sustain any loss or damage whatsoever by direct loss by burglary, theft or injury of any of the property of the insured; and further alleges that since the filing of the suit by plaintiff, one M. Hamilton, mother of plaintiff, has filed her suit in this court against defendant for recovery on the loss of a diamond ring alleged to have been feloniously taken and stolen from the third apartment occupied by her at the building at 818 Greenwood Avenue, Chicago, under insurance policy No. H-41131 and renewal thereof issued by defendant, and that the diamond ring in this case alleged to have been taken and stolen is the same ring for which recovery is sought against this defendant by the mother of plaintiff.

The plaintiff further alleges that it said ring was taken from plaintiff on or about January 16, 1930, it was taken by and through the connivance and with the consent of plaintiff; that it plaintiff does not now have possession or control of the ring, his lack of possession or control is due to his having voluntarily parted with it.

As the motion to set aside the judgment of the court was made in less than thirty days after it was entered, the court had jurisdiction to set the judgment aside for any reason



which might appeal to its judicial discretion, and an order of this kind denying a motion to set aside such judgment will be reviewed and reversed by this court only for an abuse of that discretion. The cases so holding are numerous, and many of these are cited in the briefs; but a review thereof is unnecessary.

It is, we think, the well settled and long established practice in this State that upon the showing of a reasonable excuse for failure to appear, a judgment will be set aside, provided the affidavit in support of the motion discloses a meritorious defense and is made in apt time. We think the absence of defendant's manager by reason of his injuries is a sufficient excuse for the failure of defendant to forward its summons to its attorney. In Tomy v. Union of Roumanian Beneficial & Cultural Societies, 256 Ill. App. 602, this court stated that it was the practice in our courts to be liberal in setting aside defaults and judgments when the motion to do so was made at the term in which the judgment was entered and when it appeared that to do so would promote justice.

The controlling question in the case here therefore is whether defendant has set up a meritorious defense. We think the affidavit does set up facts which, if true, show that plaintiff had no right to recover the judgment. The objections of plaintiff to various paragraphs of the affidavit may be summarized by the statement that the allegations of fact set forth in the statement of claim are only the conclusions of the person making the affidavit. However, every statement of fact is in one sense only a conclusion of the party asserting it, and the nature of this action and the circumstances were such that defendant would not have particular knowledge with reference to the exact facts. If the statements made in the affidavit are true, plaintiff has no right to recover. Courts exist for the purpose of determining

which might amount to its judicial discretion, and in order of this kind having a motion to set aside such judgment will be reviewed and reversed by this court only for an abuse of that discretion. The cases so holding are numerous, and many of these are cited in the briefs; but a review thereof is unnecessary. It is, we think, well settled and long established practice in this State that upon the showing of a reasonable excuse for failure to appear, a judgment will be set aside, provided the affidavit in support of the motion discloses a serious illness and in such an event. We think the absence of defendant's manager by reason of his injury is a sufficient excuse for the failure of defendant to forward the summons to the attorney. In Long v. State of Tennessee, 101 Tenn. 111, 12 S.W. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

what the substantial rights of litigants are rather than for the purpose of settling disputes on technical points of practice.

The trial court erred in denying the motion of defendant to set aside the judgment and award a trial upon the merits, and for that reason the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and O'Connor, JJ., concur.



what the substantial rights of living are known from the law  
 of nature to be, and the law of nature is the law of God.  
 The trial court tried to decide the matter of the

plaintiff to get rid of the judgment and award a trial upon the  
 merits, and for that reason the judgment is reversed and the

case remanded.

REVEREND AND HONORABLE

Respectfully and Obediently, J. J. Conner.

34311

EDITH F. TOLEBERT,  
Appellee.

vs.

MRS. CHARLES BOHMAN,  
Appellant.

1057  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 647<sup>3</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This appeal is by defendant from a judgment in the sum of \$153 entered upon the verdict of a jury as directed by the court. The action was upon a written lease for rent, and it was stipulated in open court that if defendant was liable at all, the sum of \$153 was due.

In her affidavit of merits defendant sets up <sup>as</sup> an affirmative defense that she had been evicted by plaintiff from the demised premises, which was an apartment on the first floor of the building at 5521 Everett avenue in Chicago. The lease demised the premises for a term commencing April 1, 1928, and expiring September 30, 1928. The evidence shows that defendant went into possession of the premises; that on June 1, 1928, she left the premises and went to her home in Winnetka, Illinois; that she paid her rent up to July, 1928.

Defendant's testimony as to the alleged eviction is uncontradicted. She says that when she moved to Winnetka she arranged with the agent for the apartment to be sublet if a subtenant could be secured; that for the purpose of permitting the flat to be shown she left the key to the front door of the apartment with the wife of the janitor, who had a flat in the basement of the building, and that she expressly told the wife of the janitor that she should not permit anyone else to occupy the apartment during her absence; that defendant took all of her belongings, including bedding, except the carpeting which was

WITH P. JOHNSON,  
 Attorney,  
 25,  
 1001 N. W. 10th St.,  
 Miami, Fla.

STATE OF FLORIDA  
 IN SENATE  
 JANUARY 1, 1935

IN SENATE  
 JANUARY 1, 1935

This appeal is by defendant from a judgment in the sum of \$125 entered upon the verdict of a jury as directed by the court. The motion was upon a written issue for trial, and it was stipulated in open court that if defendant was liable at all, the sum of \$125 was due.

In her affidavit of motion defendant sets up as follows: In her defense that she had been evicted by plaintiff from the premises, which was an apartment on the first floor of the building at 8281 Everett avenue in Chicago. The lease between the parties for a term commencing April 1, 1932, and expiring September 30, 1932. The evidence shows that defendant went into possession of the premises; that on June 1, 1932, she left the premises and went to her home in Winnetka, Illinois; that she paid her rent up to July, 1932.

Defendant's testimony as to the alleged eviction is as uncontradicted. She says that when she moved to Winnetka she arranged with the agent for the apartment to be evicted if a tenant could be secured; that for the purpose of permitting the flat to be shown she left the key to the front door of the apartment with the wife of the janitor, who had a flat in the basement of the building, and that she expressly told the wife of the janitor that she should not permit anyone else to occupy the apartment during her absence; that defendant took all of her belongings, including bedding, except the carpeting which was



tacked to the floor.

Defendant says that when she returned to the apartment during the week of July 4th, she discovered that it had been occupied for sleeping purposes by some person or persons; that the in-a-door bed was lowered down into a position for sleep in the living room and was made up with bedding on it; that she complained to the janitor of the building, who told her that he had opened the door with the key which she had left with his wife and had permitted a party to occupy it for sleeping purposes until an in-a-door bed could be installed in this party's apartment across the hall; that thereupon she wrote a letter to William Hughes & Company, the agents of plaintiff, enclosing a check for \$65 to cover the rent for June.

The letter, dated July 12, 1928, is in evidence, and in it defendant stated in substance that other persons had been permitted access to her apartment and had been using it for sleeping quarters, and that she had been informed that this had been going on for some time; that upon being so informed she immediately had the carpeting removed; that the apartment was then available to rent or otherwise, as plaintiff might wish. She further said:

"Since the apartment has been occupied by others during the month of July, I am enclosing my check in the amount of \$65 to cover rent to and including the thirtieth day of June, on which date my lease expired by reason of your placing others in possession thereof."

The rent for July was paid by check by defendant as the result of a judgment by confession obtained against her in a suit brought by plaintiff. Defendant admits that inasmuch as she did not avail herself of the alleged breach of the lease until July 12th and the rent under the lease was due July 1st, she was liable for the July rent. The check was to the order of William Hughes & Company and was paid through the Clearing House.

At the close of the evidence defendant made a motion for an instruction in her favor, which was denied, but a similar

placed in the floor.

Defendant says that when she returned to the apartment during the week of July 1st, she discovered that it had been occupied for sleeping purposes by some person or persons; that the in-a-door bed was lowered down into a position for sleep in the living room and was made up with bedding on it; that she communicated to the janitor of the building, who said that he had opened the door with the key which she had left with his wife and had permitted a party to occupy it for sleeping purposes until an in-a-door bed could be fastened in this party's apartment across the hall; that thereupon she wrote a letter to William B. C. Co., Inc., and signed it "Johnnie", enclosing a check for \$50 to cover the rent for July. The letter, dated July 1st, 1935, is in evidence, and

in it defendant stated in substance that after returning and seeing defendant's name in her apartment and not being in the apartment the next day, and that she had been informed that said name had been going on for some time; that upon being so informed she immediately had the carpeting removed; that the apartment was then available to rent or otherwise, as plaintiff alleged when. The further said:

"Since the apartment has been vacated by a party during the month of July, I am endeavoring to check in the amount of \$50 to cover rent to and including the calendar day of June, on which date my lease expired by reason of your placing others in possession thereof."

The rent for July was paid by check by defendant on the receipt of a judgment by confession obtained against her in a suit brought by plaintiff. Defendant admits that inasmuch as she did not avow herself of the alleged breach of the lease until July 1935 and the rent under the lease was due July 1st, she was liable for the July rent. The check was to the order of William B. C. Co., Inc. and was paid through the Clearing House. At the close of the evidence defendant made a motion for an instruction in her favor, which was denied, but a similar



motion by plaintiff to find in her favor was granted.

The question to be determined upon the record is whether from the uncontradicted evidence a jury could have reasonably found that defendant had been evicted from the apartment by plaintiff. It is not, of course, contended that there was an actual physical eviction by expulsion, but it is contended upon the authority of Keating v. Springer, 146 Ill. 481; Gibbons v. Hoefeld, 299 Ill. 455; Giddings v. Williams, 336 Ill. 482; Lawler v. McNamara, 203 Ill. App. 285; Hartenbauer v. Brumbaugh, 220 Ill. App. 326, and Kesner v. Consumers Co., 239 Ill. App. 92, that the evidence would warrant a verdict of constructive eviction. In Keating v. Springer, *supra*, the Supreme court said:

"Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises, will constitute an eviction."

This statement is quoted with approval in Gibbons v. Hoefeld, *supra*, also cited and relied on by defendant.

The evidence offered in defendant's behalf could not reasonably be found to prove anything more than that a co-tenant had on occasion slept in the in-a-door bed which was located in defendant's apartment while she was absent therefrom. This trespass comes short of being an act "of<sup>a</sup> grave and permanent character," and since there is no proof in the record that plaintiff knew of it, we think it could not reasonably be regarded as "a clear indication of intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises." On the contrary, we think the inference from all the testimony is that defendant desires to escape her liability for rent by interposing a technical objection.

Although plaintiff has not appeared in this court to support the judgment it will be affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.



section by ability to find in the facts and evidence.

The question is to be determined from the facts as

whether from the undisputed evidence a jury could have reasonably

found that defendant had been evaded from the agreement by

plaintiff. It is not, of course, contended that there was an

actual physical evasion by defendant, but it is contended upon

the authority of Restatement (Second) of Torts, § 336, that

plaintiff, who had a right to the use of the land, was

entitled to the use of the land, and that defendant's

use of the land was a violation of the plaintiff's right.

Evidence would warrant a finding of constructive evasion.

Restatement (Second) of Torts, § 336, and the court said:

"Adequacy of a grave and permanent character, which amounts to a clear violation of the plaintiff's right to the use of the land, will give the plaintiff the right to recover damages, which constitute an invasion."

This statement is quoted with approval in Restatement (Second) of Torts, § 336.

Plaintiff, who also filed and relied on by defendant.

The evidence offered in defendant's behalf could not

reasonably be found to prove anything more than that a defendant

had an occasion slight in the 12-2-24 and when was located in

defendant's apartment while who was absent therefrom. This fact

does not amount to being an act of "grave and permanent character."

and since there is no proof in the record that plaintiff knew of

it, we think it would not reasonably be regarded as "a clear

violation of the plaintiff's right to the use of the land."

the enjoyment of the land is "grave and permanent." In the contrary, we think

the inference from all the evidence is that defendant's failure to

enough not likely for him to have intended a permanent violation.

Although plaintiff has not succeeded in this case, it

suggests the judgment is will be affirmed.

REVEREND

Respectfully and sincerely, J. J. [unclear]

34319

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

E. H. BLUME, GEORGE P. LEE, W. Z.  
MAGID and LACI STEIN,  
Plaintiffs in Error.

ERROR TO CRIMINAL COURT  
OF COOK COUNTY.

259 I.A. 647<sup>4</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

Defendants were tried by a jury on a plea of not guilty under an indictment of two counts, one of which charged that they conspired together to obtain certain property of Shekleton Brothers, Inc., a corporation, by means of false pretenses, while the other count alleged a conspiracy to obtain the same property from Shekleton Brothers by means of the confidence game. The jury returned a verdict of guilty and fixed the punishment of each of the defendants at a fine without imprisonment. Motions of defendants for a new trial and in arrest were overruled and judgment was entered on the verdict.

The indictment in particular charged that about September 1, 1927, defendants obtained checks and money or property to the value of \$5,600. The evidence shows that this property was obtained from Shekleton Brothers in the course of a real estate transaction, in which defendant Magid was supposed to represent defendant Stein. The material facts which the jury would have been justified in regarding as established beyond a reasonable doubt may be summarized as follows:

Shekleton Brothers, a corporation, was engaged in the real estate business. The office of the corporation was at 160 North LaSalle street, Chicago. Defendant Magid was a licensed real estate broker and had been in the real estate business about 11 years. He had worked for various operators, including Shekleton Brothers. He was born in Russia, came to Chicago when 15 years



1000

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Mr. President, I am pleased to have the opportunity to discuss the work of the FBI and the Department of Justice in the area of law enforcement and public safety. I am also pleased to have the opportunity to discuss the work of the FBI and the Department of Justice in the area of law enforcement and public safety.

and judgment was entered on the verdict.

Actions of defendants for a new trial and in arrest were overruled.

ment of each of the defendants at a time almost instantaneous.

name. The jury returned a verdict of guilty and fixed the punishment.

same property from Blackston Brothers by means of the confessions.

license, while the other count alleged a conspiracy to obtain the

Blackston Brothers, Inc., a corporation, by means of false and

that they conspired together to obtain certain property of

guilty under an indictment of two counts, one of which charged

defendants were tried by a jury on a plea of not

may be summarized as follows:

Twisted in regarding an estimated beyond a reasonable doubt  
detached state. The material took which the jury would have been  
frustrated, in which statement said was exposed in material  
was obtained from Whelan's property in the course of a real estate  
so the value of \$8,000. The value was that this property  
former I, 1937, defendant's estate and money of property  
The indictment in relation to the above is as follows:

He was born in Berlin, Germany, in 1892. He was educated in Berlin and in the United States. He was a member of the German Communist Party and was active in the German resistance movement. He was arrested in 1941 and was held in the Berlin Gestapo prison. He was released in 1945 and came to the United States in 1946. He was a member of the Communist Party, U.S.A. and was active in the Communist movement in the United States. He was arrested in 1950 and was held in the New York City House of Detention. He was released in 1951 and was deported to Germany. He was a member of the German Communist Party and was active in the German resistance movement. He was arrested in 1941 and was held in the Berlin Gestapo prison. He was released in 1945 and came to the United States in 1946. He was a member of the Communist Party, U.S.A. and was active in the Communist movement in the United States. He was arrested in 1950 and was held in the New York City House of Detention. He was released in 1951 and was deported to Germany.



of age, and, according to the testimony of defendant Stein, he became acquainted with Stein when working "as a kid in Hanna and Hogg's." As a matter of fact, Stein was financially irresponsible and was without any business, profession or employment of any kind.

Defendant Lee was in the real estate business with an office at 7 South Dearborn street, Chicago. He was in business for himself and states, "I handle the sale of real estate, the management of properties, and the financing of properties." He did business under the name of George P. Lee & Company. Prior to February 1, 1927, Lee for six months held the title to the property known as 6511 to 6525 Ellis avenue. This land was improved by an apartment building. The property was conveyed by Lee to Louis Golden and about February, 1927, Lee became the manager of this property in Golden's behalf. It was encumbered by two mortgages, the first mortgage securing an indebtedness of \$52,000 and the second an indebtedness of \$55,000. Lee testified that it was desired that the property be refinanced, and for this purpose the property on February 1, 1927, was conveyed in trust to the Chicago Title & Trust company as trustee, to secure an issue of \$110,000 in bonds. Lee issued a circular which is in evidence and which describes these bonds as "6½% first mortgage real estate gold bonds secured by first mortgage on land and building, 6511-6525 Ellis avenue." The circular also states that interest is payable August 1st and February 1st at the Standard Trust & Savings Bank, Chicago; that the bonds are the direct obligation of Louis Golden, "who has a good financial standing;" that the building is insured to cover the loan; that the Chicago Title & Trust Company guarantees the title, and:

"In addition to very substantial security during the life of the bonds, the owner of the property is required to deposit with us sufficient funds to take care of the taxes, interest and principal.

of age, and, according to the testimony of defendant Stein, no one

came acquainted with Stein when visiting "as a kid in Kansas and

home." As a matter of fact, Stein was financially irresponsible

and was without any business, professional or religious of any kind.

Defendant Lee was in the real estate business with an

office at 7 South Dearborn street, Chicago. He was in business

for himself and stated, "I handle the sale of real estate, the

management of properties, and the financing of properties." He did

business under the name of George E. Lee & Company, which is a firm

and Lee for six months prior to the date of the property known

as 6211 to 6225 Ellis street. This land was conveyed by an agent

named William. The property was conveyed by Lee to Louis Golden

and about February, 1937, Lee became the owner of this property

in Golden's name. It was conveyed by two mortgages, the

first mortgage amounting to \$25,000 and the second

an indebtedness of \$25,000. Lee testified that in his opinion

that the property he refinanced, and the same property the property

on February 1, 1937, was conveyed in trust to the Chicago Title &

Trust company as trustee, he created an issue of \$10,000 in bonds.

Lee issued a check which is in evidence and which described

these bonds as "Specified mortgage bond sales with bonds secured

by first mortgage on land and building, 6211-6225 Ellis street."

The check also stated that interest is payable August 1st and

February 1st at the National Trust & Savings Bank, Chicago; that

the bonds are the direct obligation of Louis Golden, "who has a

good financial standing;" that the interest is payable in cash

the bank; and the Chicago Title & Trust company guaranteed the

title, and:

"In addition to very substantial security during the life of the bonds, the issue of the property is insured as to title and building against fire and loss, interest and principal."



We recommend these bonds for safe investment.

G. P. Lee & Co.,

Safeguarded Real Estate Loans  
and Investments, Union Trust  
Building, Chicago.

We redeem our bonds."

Defendant Blume was a sales manager of the Chicago Towel Company and had previously served as manager for different concerns, including Armour & Company. At the time of the transaction here in question he was connected with the Hotel Sherman. He says he became interested in this bond issue through a man known as F. H. Brown, whom he met on a Twentieth Century train traveling from New York to Chicago in April, 1927, and who represented himself to be a man handling real estate matters, bonds, finances, etc.; that he afterwards asked Brown if he could get him, Blume, a mortgage on a house owned by him in Florida; that Brown replied that he did not go into that sort of business but that he could get a man who would handle the matter for Blume; that Brown then went to a telephone and returned, saying that he could not get the man then but that he would take Blume to this man's office on the following morning; that the following day he met Brown, who took him to the office of Lee, and that, according to Blume, was the first time he met Lee.

Blume further says that some five or six weeks later, Brown visited him and stated that he had a refinancing proposition with Lee whom Blume had previously met and that he, Brown, was going to sell a first mortgage bond issue; that Blume told Brown he was not interested; that Brown had the printed circular describing the bonds and had one of the bonds with him, and that Brown suggested that if he were not interested he might have some friends who would be and promised Blume a commission if he would put him in touch with such friends; that Brown gave him three or four circulars which he put in his pocket; that a day or two later he met Magid, from whom he had purchased the Florida



We recommend these bonds for sale investment.

J. W. Lee & Co.,  
 100 North La Salle Street  
 Chicago, Illinois

We return our bonds."

Defendant Brown was a sales manager of the Chicago

Towel Company and had previously served as manager for different

concerns, including Standard Oil Company. At the time of the trans-

action here in question he was associated with the Hotel Sherman.

He says he became interested in this bond issue through a man known

as E. L. Brown, whom he met on a twentieth century train traveling

from New York to Chicago in April, 1917, and who represented him-

self to be a man handling real estate matters, bonds, insurance,

etc.; that he afterwards asked Brown if he would not sell him bonds,

mortgage on a house owned by him in Chicago; that Brown replied that

he did not go into that sort of business but that he could get a

man who would handle the matter for him; that Brown then went to a

telephone and returned, saying that he could not get the man then

but that he would take him to this man's office on the following

morning; that the following day he met Brown, who took him to the

office of Lee, and that, according to him, was the first time he

met Lee.

Brown further says that some five or six weeks later,

Brown visited him and stated that he had a recommended proposition

with Lee whom Brown had previously met and that he, Brown, was

going to sell a first mortgage bond issue; that Brown told Brown

he was not interested; that Brown had the printed circular des-

cribing the bonds and had one of the bonds with him, and that

Brown suggested that if he were not interested he might have some

friends who would be and promised Brown a commission if he would

put him in touch with such friends; that Brown gave him three or

four addresses which he put in his pocket; that a day or two

later he met Nagle, from whom he had purchased the Florida

property; that he then took the matter up with Magid, gave him a circular and told him that if he was able to put the deal over he, Blume, should be taken care of. Magid suggested, so Blume says, that he had a number of friends who had parcels of real estate for sale and that he thought the bonds might be put up in transactions for the purchase of real estate instead of cash. He says that Brown gave him a \$500 bond which he passed on to Magid; that Magid thereafter found several real estate deals which it was possible to put through by the use of these bonds, which were obtained by Magid from Blume, who got them from Brown.

Brown was not produced upon the trial, although both Lee and Blume testified to transactions with him. Blume says he never visited Brown's office but understood that it was in the American Bond & Mortgage building. He says Brown had a telephone number - "an Oak Park exchange, Euclid something."

The whole transaction, insofar as Brown is concerned, has an atmosphere of unreality which we think would have justified a finding by the jury that he is a mythical person and that the story of his relations with these defendants is a pure fabrication. These bonds were worthless, and there is evidence from which the jury would have been justified in finding that defendants knew they were worthless. Under these circumstances, Magid went to his old employer, Shekleton Brothers, and told them that he had a wealthy client who was interested in purchasing certain real estate situated on 157th and Halsted streets, which Shekleton Brothers desired to sell. He said that this client was a wealthy, retired wine dealer, and on the following day he produced Stein as this wealthy client. Stein appeared with \$7500 worth of these bonds and Magid told Mr. Clemens of Shekleton Brothers, with whom he dealt, that Stein did not want to pay the bonds down on the purchase price; that the bonds were a good investment which he



property; that he then took the matter up with Magid, gave him a  
check and told him that if he was able to get the bond over  
he, Magid, should be taken care of. Magid suggested, as Brown  
says, that he had a number of friends who had parcels of real  
estate for sale and that he thought the bonds might be put up in  
transactions for the purchase of real estate instead of cash.  
He says that Brown gave him a \$100 bond which he passed on to  
Magid; that Magid thereupon found several real estate deals which  
it was possible to get through by the use of these bonds, which  
were obtained by Magid from Brown, who got them from Brown.  
Brown was not pleased with the deal, although it  
was and Brown testified to transactions with him. Brown says he  
never visited Brown's office but understood that it was in the  
American Bond & Mortgage Building. He says Brown had a telephone  
number - "an Oak Park exchange, English country."  
The whole transaction, however, as Brown is concerned,  
has an atmosphere of mystery which we think would have justified  
a finding by the jury that he is a mythical person and that the  
story of his relations with these defendants is a pure invention.  
These bonds were worthless, and there is evidence from which  
the jury would have been justified in finding that defendants knew  
they were worthless. Under these circumstances, Magid went to his  
old employer, Whistler Brothers, and told them that he had a  
wealthy client who was interested in purchasing certain real es-  
tate situated on 187th and Belmont streets, which Whistler  
Brothers desired to sell. He said that this client was a wealthy,  
retired wine dealer, and on the following day he produced Stein as  
this wealthy client. Stein appeared with \$7500 worth of these  
bonds and Magid told Mr. Clement of Whistler Brothers, with whom  
he dealt, that Stein did not want to pay the bonds down on the  
purchase price; that the bonds were a good investment which he



desired to hold but that Stein would be willing to give his note for \$5,000 with \$7,500 worth of the bonds as security; that Stein had money coming in right along from other sources with which he would pay the note. Thereupon Clemens said that he would accept the bonds as collateral for the note. The contract and the note were signed by Stein, and the question then came up in regard to commissions. Clemens objected to paying commissions until he received some money. Magid said that if he had known that the check would not be ready immediately after the deal was made, he would not have brought the deal into the office, and he demanded his money right away. The matter was taken up with A. R. Shekleton, who told Magid that the Shekleton Brothers themselves would not pay the commissions, but that he knew where the money could be borrowed on the note and collateral. Magid said that he would discount the commission \$500, and this Shekleton Brothers agreed to do. About the time the deal was closed Magid said that he had some partners in the deal and wanted checks made out to different people. A check for \$2,000 was given to him, payable to the order of Blume and one for \$1,400 payable to the order of Magid. These checks were cashed but were lost prior to the trial, and Blume testifies that he passed his check on to Brown. In closing this transaction the Lee circular was used and relied upon by the representatives of Shekleton Brothers. As a matter of fact, it is conceded that Stein was financially irresponsible and he was paid \$50 by Magid for the part he played in the transaction as the "wealthy retired wine dealer." The worthlessness of the bonds, of course, appeared when the interest coupons were presented for payment, although some of these coupons seem to have been taken care of by defendant Lee.

The court, over the objection of defendants, admitted evidence tending to show other transactions concerning these

desired to hold but that Stein would be willing to give his note for \$5,000 with \$7,500 worth of the bonds as security; and Stein had money coming in right along from other sources with which he would pay the note. Thereupon Stein said that he would accept the bonds as collateral for the note. The contract and the note were signed by Stein, and the question then came up in regard to commissions. Stein objected to paying commissions until he received some money. Hagitt said that if he had known that the check would not be ready immediately after the deal was made, he would not have brought the deal into the office, and he demanded his money right away. The matter was taken up with A. W. Whipple, who told him that the Whipple Brothers' lawyers would not pay the commissions, but that he knew where the money could be borrowed on the note and collateral. Hagitt said that he would discount the commission \$500, and the Whipple Brothers agreed to do so. About the time the deal was closed Hagitt said that he had some partners in the deal and wanted someone made out to deliver a check for \$2,000 was given to him, payable to the order of him and one for \$1,400 payable to the order of him. These checks were cashed but were lost prior to the trial, and Whipple testified that he passed his check on to Stein. In closing this transaction the law officer was used and called upon by the representatives of Whipple Brothers. As a matter of fact, it is concluded that Stein was financially irresponsible and he was paid \$50 by Hagitt for the part he played in the transaction as the "wealthy retired wine dealer." The verities of the bonds, of course, appeared when the instant company was presented for payment, although some of these contracts seem to have been taken care of by defendant Lee.

The court, over the objection of defendant, admitted evidence tending to show other transactions concerning these



worthless bonds at about the same time by defendants, Magid and Stein, in which they attempted to dispose of these worthless bonds by the same sort of representations. One of these transactions was with Arthur Michel & Company and another with the Northside Realty Company.

It would extend this opinion unduly to fully discuss all the evidence, to which we have given careful consideration. It is sufficient to say that it leaves no doubt in our minds, as it must have convinced the jury, that these defendants were working together in a joint undertaking whereby they designed to defraud any whom they might be able to defraud and to divide the proceeds among themselves. Indeed, we think the evidence would justify a much more severe penalty than that which was inflicted by the jury. Defendants rely upon technical considerations, rather than upon the merits of the case as disclosed by the evidence, in their arguments for reversal.

It is argued in the first place that if the evidence for the State proves a conspiracy at all, it at most tends to prove a conspiracy to defraud the public generally, and that this will not sustain the allegation of the indictment which charges a specific intention to defraud Shekleton Brothers, Inc., a corporation. To this contention defendants cite Lowell v. People, 229 Ill. 227; People v. Walsh, 322 Ill. 195, and similar cases. However, this court is not limited only to the evidence offered by the State in deciding that question. We may, and it is our duty also <sup>to</sup> consider the evidence offered in behalf of defendants. Porter v. People, 158 Ill. 370. As we have already indicated, the evidence offered by defendants themselves seems to supply the missing links, if there are any such, and makes it impossible for any reasonable person considering the evidence to come to any other conclusion than that defendants are all guilty.



were made known at about the same time by defendant, and that, in fact, they attempted to dispose of these articles by the same sort of representation. One of these transactions was with Arthur Michael & Company and another with the defendant, Realty Company.

It would extend this opinion merely to tell of the all the evidence, to which we have given careful consideration. It is sufficient to say that it leaves no doubt in our minds, as it must have occurred to the jury, that these defendants were working together in a joint enterprise whereby they designed to defraud any whom they might be able to defraud and to divide the proceeds among themselves. Indeed, we think the evidence would justify a much more severe penalty than that which was inflicted by the jury. Defendants rely upon technical considerations known upon the merits of the case as disclosed by the evidence, in their argument for reversal.

It is argued in one brief given out by the evidence for the State proves a conspiracy at all, it is not bound to prove a conspiracy to defraud the public generally, and that this will not sustain the allegation of the indictment which charges a specific intention to defraud American Express, Inc., a corporation. To this contention defendants cite People v. Frazar, 200 Ill. 287; People v. Wagon, 202 Ill. 175, and similar cases. However, this court is not limited only to the evidence offered by the State in deciding these questions. We say, and it is our duty <sup>to</sup> consider the evidence offered in behalf of defendants. People v. Frazar, 200 Ill. 287. As we have already indicated, the evidence offered by defendants themselves seems to supply the missing links, it there are any such, and makes it impossible for any reasonable person considering the evidence to come to any other conclusion than that defendants are all guilty.

It is true that there is no evidence that these four defendants all met together at a particular time and stated in detail the means whereby they were to defraud Shekleton Brothers, but such an understanding must be inferred from their acts. There was a common design and purpose in which Stein, Madig, Lee and Blume each performed their several parts. They were willing to defraud anybody, and under the leadership of Magid they were brought in contact with Shekleton Brothers and succeeded in defrauding them. This is sufficient evidence upon which to base a verdict in a conspiracy case. People v. Strauch, 240 Ill. 60; People v. Peindexter, 243 Ill. 68; People v. Walinsky, 300 Ill. 92.

It is urged that assuming a conspiracy, the evidence is not sufficient to show that the object of the conspiracy, if consummated, would amount to either false pretenses or the confidence game. The verdict is a general one, and if the proof sustains a conviction under either count it is sufficient. People v. Smith, 239 Ill. 91. It is urged that considered from a standpoint of obtaining money under false pretenses, the proof is insufficient because it does not show that the party defrauded here relied upon statements made by defendants, to which point People v. Gallowich, 283 Ill. 360, is cited. There is abundant evidence here to indicate such reliance. The defrauded party would not have given the checks, entered into a contract for the sale of the real estate or borrowed the funds with which to pay these commissions, had it not been for the representations of Lee, Magid and Stein to the effect that the bonds were first mortgage bonds and that Stein was a man of wealth and reputation. It may be true that if before completing this deal, Shekleton Brothers had required an abstract of title to the property and examined the same, the worthlessness of this third mortgage would have been apparent, but their negligence, if any, in this respect does not lessen the moral culpability of those who



It is true that there is no evidence that these four defendants all met together at a particular time and place in detail the means whereby they were to defraud American Express, but such an understanding must be inferred from their acts. There was a common design and purpose in which Stein, Magid, Lee and Alvin each performed their several parts. They were willing to defraud anybody, and under the leadership of Magid they were brought in contact with American Express and succeeded in defrauding them. This is sufficient evidence upon which to base a verdict in a conspiracy case. People v. Schwartz, 24 Ill. 2d; People v. Schwartz, 24 Ill. 2d; People v. Schwartz, 24 Ill. 2d. It is urged that assuming a conspiracy, the evidence is not sufficient to show that the object of the conspiracy, if consummated, would amount to either false pretenses or larceny. Hence error. The verdict is a general one, and it was proper to take a conviction under either count if it is sufficient. People v. Smith, 239 Ill. 51. It is urged that conspiracy is a technical offense requiring money under false pretenses, the proof is insufficient because it does not show that the party defendant here relied upon statements made by defendants, to which relied People v. Schwartz, 24 Ill. 2d. There is abundant evidence here to infer such reliance. The defendant party would not have given the checks, entered into a contract for the sale of the real estate or borrowed the funds with which to pay these commissions, had it not been for the representations of Lee, Magid and Stein to the effect that the bonds were first mortgage bonds and that Stein was a man of wealth and reputation. It may be true that if before consummating this deal, American Express had required an abstract of title to the property and examined the same, the worthlessness of the said first mortgage would have been apparent, but their negligence, if any, in this respect does not lessen the moral culpability of those who



deceived them by false representations. Whether the evidence is sufficient to show the obtaining of money by the confidence game or not, we think it is sufficient to establish the crime of false pretenses, and this is sufficient to sustain the conviction.

People v. Peers, 307 Ill. 539.

It is urged that the court erred in permitting defendant Lee to be recalled by the State's attorney to the witness stand for further examination, after all defendants had rested their case and the State had put two witnesses on the stand in rebuttal, and Edwards v. State, 71 Tex. Criminal, 417; 160 S.W. 709 is cited to this point. This authority from another jurisdiction does not sustain the contention. Under the practice in this State we do not doubt the matter was clearly within the discretion of the trial judge. North v. People, 139 Ill. 81; Crowell v. People, 190 Ill. 508; People v. Hall, 242 Ill. 284. While these cases are not directly in point, they do indicate that all matters of this kind rest in his discretion.

It is next contended that the court erred in permitting the State's attorney to make an inflammatory argument which was not supported by the evidence. It is objected that in the course of his argument the State's attorney said defendants were more contemptible and reprehensible than <sup>a</sup>man who held up others with guns and took their money; that it was worse to make misrepresentations to business men and take their money by showing third mortgage gold bonds and representing them as first mortgage gold bonds, than to be a thief who would go out and steal with a gun. It is also objected that the State's attorney stated that in his opinion Blume was the mysterious Brown. To this last statement, however, an objection was sustained by the court, although a careful consideration of the testimony we think compels that conclusion. We do not consider either of these statements by the State's

deceived them by false representations. Whether the witness is  
 sufficient to show the obtaining of money by the confidence game  
 or not, we think it is sufficient to establish the crime of false  
 pretenses, and this is sufficient to sustain the conviction.

People v. Young, 207 Ill. 250.

It is urged that the court erred in permitting the  
 defendant to be recalled by the State's attorney on the witness  
 stand for further examination, after all testimony had rested.  
 Their case and the State had put two witnesses on the stand in  
 rebuttal, and People v. State, 77 Ill. 401, 100 Ill. 217, 100 Ill. 217.  
 709 is cited to this point. This authority from another jurisdiction  
 does not sustain the conviction. Under the provision in this  
 State we are not bound by the matter was already within the jurisdiction  
 of the trial judge. People v. Young, 207 Ill. 250, 207 Ill. 250.  
People v. State, 77 Ill. 401, 100 Ill. 217, 100 Ill. 217. This case  
 cannot be so directly in point, for the defendant had all evidence  
 of this kind used in his defense.

It is now contended that the court erred in permit-  
 ting the State's attorney to make an inflammatory argument which  
 was not supported by the evidence. It is objected that in the  
 course of his argument the State's attorney said that the witness  
 were sympathetic and reprehensible <sup>in</sup> that they had no other  
 life and lost their money; that is no more than a mere state-  
 ment to business men and take their money by showing their  
 mortgage and bonds and representing them as first mortgage bonds.  
 bonds, then to be a thief who would go out and steal with a gun.  
 It is also objected that the State's attorney stated that in his  
 opinion there was the notorious Brown. To this last statement,  
 however, an objection was sustained by the court, although a general  
 objection of the testimony we think compels that conclusion.  
 We do not consider either of these statements by the State's



attorney as justly subject to criticism. The reversal of a conviction in a case like this should require something more than a nice distinction between those who separate citizens from their property at the point of a gun and those who separate them from their property by mere false representations. In either case the victim is separated from his money. It would not seem to make much difference as to which method is employed.

It is urged that the court erred in a remark made to one of the witnesses, Derwin, at the conclusion of his testimony to the effect that he "had better go while the going is good." It was probably a mere pleasantry, but at any rate as the record shows no objection or exception on the part of <sup>any</sup> defendant, it cannot be urged as error here.

It is also urged that the court erred in admitting evidence of other crimes than those for which defendants were being tried under the indictment. These transactions were under well established rules, however, admissible in this kind of case for the purpose of showing the criminal intent. Williams v. People, 166 Ill. 132; People v. Weil, 244 Ill. 176; People v. Mandrell, 306 Ill. 413. Moreover, this testimony was admissible on other grounds. As was said in People v. Cione, 293 Ill. 321, a defendant cannot by multiplying his crimes diminish the amount of competent testimony against him.

It is also urged that there is a variance between the indictment and the evidence as to the amount of checks which defendants obtained. This point, however, was not raised in the trial court and it cannot be raised here for the first time. People v. Melnick, 274 Ill. 616; People v. Weisman, 296 Ill. 156.

It is also urged that the court erred in overruling defendants' motion for a new trial, particularly, upon the ground of newly discovered evidence; but the affidavit of defendants did



attorney as justly entitled to criticism. The reversal of a non-  
violation in a case like this should require something more than a  
nice distinction between those who separate themselves from their  
property at the point of a gun and those who separate them from  
their property by mere false representations. In either case the  
violation is suggested from the money. It would not seem to make  
much difference as to which method is employed.

It is urged that the court erred in a technical matter  
as one of the witnesses, Berwin, at the conclusion of his testimony  
to the effect that he "had better be going to bed." It  
was probably a mere pleasantness, but at any rate in the record shows  
no objection or exception on the part of <sup>any</sup> defendant, it cannot be  
urged as error here.

It is also urged that the court erred in admitting  
evidence of other crimes than those for which defendants were  
being tried under the indictment. These representations were made  
well established facts, however, admissible in this kind of case  
for the purpose of showing the criminal intent. Williams v. State,  
1904, 100 Ill. 412; Knox v. State, 1901, 100 Ill. 412; State v. Williams,  
1901, 100 Ill. 412. However, this testimony was admissible  
on other grounds. As was said in Williams v. State, 1901, 100 Ill. 412,  
a defendant cannot by multiplying his crimes lessen the amount  
of competent testimony against him.

It is also urged that there is a variance between  
the indictment and the evidence as to the amount of checks which  
defendants obtained. This claim, however, was not raised in the  
trial court and it cannot be raised here for the first time.  
People v. Williams, 1901, 100 Ill. 412; People v. Williams, 1901, 100 Ill. 412.  
It is also urged that the court erred in excluding  
defendants' motion for a new trial, particularly upon the ground  
of newly discovered evidence; but the admissibility of defendants' dis-

not comply with the rule set forth in People v. Pennell, 315 Ill. 124. It was therefore properly denied.

It is finally urged that the evidence does not show defendants to be guilty of a conspiracy. We have already considered this contention. An examination of this whole record leaves us without a reasonable doubt of the guilt of each of the defendants. We will not reverse the judgment simply that a better record may be made. People v. Stokes, 334 Ill. 200.

For the reasons set forth, the judgment of the trial court is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

not comply with the rule set forth in Franklin v. Franklin, 218 Ill.

124. It was therefore properly denied.

It is finally urged that the evidence does not show

defendants to be guilty of a conspiracy. We have already consid-

ered this contention. An examination of this whole record leaves

us without a reasonable doubt of the guilt of each of the defend-

ants. We will not reverse the judgment simply upon a technical

record may be made. Franklin v. Franklin, 218 Ill. 124.

For the reasons set forth, the judgment of the trial

court is affirmed.

APPEAL.

McGregory and McGowan, JJ., concur.



34417

1077  
GEORGE P. HUFFMAN, J. M.  
HUFFMAN and H. M. HUFFMAN,  
Appellants,

vs.

H. W. DUBISKE & COMPANY,  
a Corporation,  
Appellee.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 647<sup>5</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

I. Plaintiffs sued upon a writing executed by C.A. Hawkins and the Dayton Savings & Trust Company, for the benefit of plaintiffs as alleged in their declaration. Common counts and additional counts were filed, and some of these were withdrawn. Defendant demurred generally and specially to the remaining counts except the common counts, and the demurrers having been sustained plaintiffs elected to stand by these counts. To the common counts defendant filed a plea of the general issue, and the cause coming on for hearing, plaintiffs stated to the court that they could not proceed under the common counts for the reason that they had no evidence that was admissible thereunder. The court then directed a verdict for defendant under these counts, upon which judgment was entered.

The proper practice under the circumstances would have been to withdraw the common counts, but as the parties have argued the questions at issue as if the same had been withdrawn and judgment entered against plaintiffs upon overruling the demurrers to their declaration, we shall consider the case upon that theory.

II. The controlling question is whether the demurrers of defendant to the second, third, fourth and fifth additional counts were properly sustained; in other words, whether these additional counts or any one of them state a cause of action.

GRANT R. KENNEDY, J. R.  
MONTANA and W. L. KENNEDY  
Associates

vs.

M. W. WILKINS & COMPANY,  
a Corporation,  
Appellee.

APPEAL FROM DISTRICT COURT  
OF THE STATE OF MONTANA

2501 A. 647

W. L. KENNEDY, J. R.  
MONTANA and W. L. KENNEDY  
Associates

I. Plaintiff filed upon a petition verified by J. R. Kennedy and the Hayden Building & Trust Company, for the benefit of plaintiff as alleged in their declaration. Common counts and additional counts were filed, and some of these were withdrawn. Defendant demurred generally and specially to the remaining counts except the common counts, and the demurrers having been sustained plaintiff's elected to stand by those counts. To the common counts defendant filed a plea of the General Issue, and the court on for hearing, plaintiff's stated to the court that they could not proceed under the common counts for the reason that they had no evidence that was admissible thereunder. The court then directed a verdict for defendant under those counts, upon which judgment was entered.

The proper practice under the circumstances would have been to withdraw the common counts, but as the parties have argued the questions at issue as if the same had been withdrawn and judgment entered against plaintiff's upon overruling the demurrers to their declaration, we shall consider the case upon that theory.

II. The controlling question is whether the demurrers of defendant to the second, third, fourth and fifth additional counts were properly sustained; in other words, whether those additional counts or any one of them state a cause of action.



The writing in question was entered into October 18, 1921, and it forms the basis of each count. A construction of this contract is therefore necessary to a decision of the ultimate question here involved. We set up the writing verbatim. It is in the form of a preliminary statement followed by eight paragraphs numbered 1 to 8 inclusive and is in the words following:

"To the Dayton Savings and Trust Company,  
Dayton, Ohio.

Gentlemen:

For certain valuable considerations this day paid the undersigned by C. A. Hawkins, receipt of which is hereby acknowledged, the undersigned does hereby agree to sell for your account as Trustee, Nine Hundred Seventy-five (975) shares of the Preferred Capital Stock of the Davis Sewing Machine Company, a Delaware Corporation, upon the terms and conditions hereinafter set forth, to-wit:

1. A commission of fifteen (15%) per cent of the sales price for all such stock sold by the undersigned shall be retained out of the moneys collected, as hereinafter provided. All of said stock shall be sold at its par value of One Hundred (\$100.00) Dollars per share, provided, however, that should any sales be made at less than One Hundred (\$100.00) Dollars per share, the undersigned shall, nevertheless, pay to you the sum of Eighty-five (\$85.00) net per share. Any difference between the par value of such stock and any sales price less than par, shall, in each instance, be taken from the agreed commission.

2. The undersigned, may at its option, sell such stock either for all cash or on terms of part cash and the balance of the purchase price in deferred payments, provided, however, that where such stock shall be sold on the deferred payment plan, not less than twenty-five (25%) per cent of the sales price shall be collected from the purchaser at the time of making the sale, and that the balance of such purchase price shall be divided into ten equal monthly installments, all of which shall become due and payable within eleven (11) months from date of sale.

3. All sales so made by the undersigned shall be evidenced by contracts to be entered into between the undersigned and the purchasers thereof. Each such contract shall contain a clause by the terms of which it shall be provided that no purchaser shall be entitled to receive dividends thereon until after such stock shall have been paid for in full, and a further clause providing that no certificate or certificates evidencing the ownership of such stock shall be delivered to the purchaser thereof until after he shall have made payment therefor in full.

4. Sale of such stock shall be made in units of not more than one share of common stock of said corporation with each share of preferred stock; and sale of stock hereunder concluded by September 1, 1922.

5. In each instance where such stock shall have been sold for all cash, the undersigned will collect from the purchaser thereof the agreed purchase price, and will remit to you the sum of Eighty-five (\$85.00) Dollars per share for each share of stock so sold for cash within ten days after the receipt thereof by the undersigned. On all stock sold on the deferred payment plan, the



27 The witness is confident and certain that the following is correct:

1987, and it takes the sale of each copy. A consultation of this contract is therefore necessary to a decision of the National Commission on the subject. We are not the writer. It is in

"To the Eastern Savings and Loan Company,  
Chicago, Illinois."

1933-1934

[illegible]

1992

1. A commission of fifteen (15) members shall be appointed by the Board of Directors for the purpose of investigating the affairs of the company and of making a report to the Board of Directors. The commission shall have the right to call upon any officer or employee of the company for information and to examine any books, papers, or documents of the company. The commission shall also have the right to employ such other persons as it may deem necessary for the purpose of its investigation. The commission shall report its findings to the Board of Directors within thirty (30) days of its appointment. The Board of Directors shall then take such action as it may deem proper in the light of the commission's report.

2. The undersigned, may at its option, will deem it proper to pay or to cause to be paid the balance of the purchase price in deferred payments, provided, however, that where such shall be held on the deferred payment plan, the loan term twenty-five (25) per cent of the sales price shall be collected from the purchaser at the time of making the sale, and that the balance of such purchase price shall be divided into equal monthly installments, all of which shall be paid and payable within eleven (11) months from date of sale.

7. All sales or leases made by the undersigned shall be valid and binding upon the undersigned and his heirs, assigns and assigns forever, and no court of law or equity shall have jurisdiction to set aside or annul the same.

4. Sale of stock shall be made in units of not more than one share of common stock of said corporation at the sale of preferred stock; and sale of stock hereunder concluded by

4. In cases where the undersigned will collect from the person or persons named in the order, the undersigned will collect from the person or persons named in the order, and will remit to you the sum of \$100.00 (one hundred dollars) for each share of stock so sold for cash within ten days after the receipt thereof by the undersigned. In all cases sold on the deferred payment plan, the undersigned will collect from the person or persons named in the order, and will remit to you the sum of \$100.00 (one hundred dollars) for each share of stock so sold for cash within ten days after the receipt thereof by the undersigned. In cases where the undersigned will collect from the person or persons named in the order, the undersigned will collect from the person or persons named in the order, and will remit to you the sum of \$100.00 (one hundred dollars) for each share of stock so sold for cash within ten days after the receipt thereof by the undersigned.

undersigned will collect from the purchaser the initial payment and, within ten days after receipt of such initial payment, will remit to you the sum of, at least Ten (\$10.00) Dollars per share. Thereafter the undersigned will collect from each purchaser the several successive installments and remit to you in each instance within ten (10) days after receipt thereof the amount due to you until you shall have received the full amount of Eighty-five (\$85.00) Dollars per share. As and when payments therefor shall be made to you, you shall deliver the Certificate to the undersigned, and at the same time, make delivery to the Industrial Credits Corporation of an equal number of shares of the non par common capital stock of said The Davis Sewing Machine Company, a Delaware corporation.

6. The undersigned will assume responsibility and expense of making any adjustments or settlements with any purchaser or purchasers who may default in making any of the deferred payments, and in the event that any such purchaser shall fail to make payment in full within a period of two years from date of sale, the undersigned will either pay the full amount of all unpaid installments and accept certificates in each instance for the amount of stock specified in such defaulted contract, or agree that all moneys that may have been paid to you shall be held by you in each instance as liquidated damages.

7. The undersigned is under contract to sell for the Davis Sewing Machine Company, a Delaware Corporation, Thirty-two Thousand Seven Hundred Eighty (32,780) shares of said preferred stock. The sale of the Nine Hundred and Seventy-five (975) shares of said preferred stock, provided for herein, shall begin at the time when there shall have been sold for said The Davis Sewing Machine Company, a Delaware corporation, twenty thousand (20,000) of said shares. Thereafter the sale of all such stock as made by the undersigned shall be deemed to be made contemporaneously for the said Delaware corporation, for other parties of whom there may be as much as 20,000, and for the account of this contract. It is agreed, however, that one-tenth of all sales of Davis stock made by the undersigned after twenty thousand (20,000) shares shall have been sold for the Delaware corporation, shall be applied to the sale of stock under this contract until the entire amount of nine hundred and seventy-five (975) shares of Preferred stock shall have been sold. All cash and time sales shall be divided in said proportions.

8. The undersigned for considerations received from C. A. Hawkins, receipt of which is hereby acknowledged, will also agree to sell at the same time, subject to the same conditions, and upon the same terms, such amount of said preferred stock at Eighty-five (\$85.00) Dollars per share, as will produce sufficient money, when sold, to pay to Frank T. Huffman the sum of money provided to be paid to him in the contract between Charles A. Hawkins, first party, and George P. Huffman, John M. Huffman and H. M. Huffman, second parties. Sales of said stock shall begin at the same time as provided for the 975 shares, and when so begun one-tenth of the total sales of Davis Company stock made by us shall be deemed to be for this account. This account shall be first liquidated by you, and thereafter its proportion of sales shall be applied to the account of 975 shares until the same shall have been paid.

In Witness Whereof, H.W. Dubiske & Company, by its duly authorized officers, has caused its name to be hereupon subscribed this day of October, A.D. 1921.

H.W. Dubiske & Company  
By H.W. Dubiske, President.  
By M.F. Corson,  
Asst. Secretary."







III. The second additional count avers that defendant from time to time up to November, 1922, requested further time from plaintiffs within which to sell the stock and promised to sell and pay for it if the request was granted. It avers that defendant thereby waived any provision as to the prior sale of other stock and thereby became bound to sell these 975 shares, which it had refused to do.

The fourth additional count also avers a request by defendant for an extension of time and states that plaintiffs "impliedly agreed to such extension of time," but that defendant did not sell the stock within a reasonable time; that thereafter plaintiffs offered the stock but were unable to sell it; that the reasonable cash market value of the stock "just prior and at the time said plaintiffs endeavored to sell it was, to-wit, nothing."

The fifth additional count avers a like request for an extension of time by defendant and that the extension was valuable in that defendant was enabled thereby to maintain the market for the sale of said shares of capital stock and certain other shares of the stock which it had then and there undertaken to sell; that plaintiffs, although ready, willing and able to have sold the stock during this requested period of time and thus minimize their loss, impliedly agreed to such extension of time as requested, but that defendant did not sell; that plaintiffs thereafter offered the stock but were unable to sell it; that the value of the stock just prior to and at the time plaintiffs endeavored to sell it was nothing.

IV. The parties to this suit differ decisively as to the nature of the obligation imposed upon defendant under this agreement. Plaintiffs say that defendant assumed an unqualified obligation to sell these 975 shares on the terms named in the writing and an obligation to conclude the sale on or before September 1, 1922. In the alternative, they insist that if this construction

III. The second additional ground upon which defendant from time to time up to November, 1932, requested Plaintiff to sell the stock which he owned and was bound to sell and pay for it at the purchase was stated. It was that defendant Plaintiff asked any provision as to the time and at what price and thereby became bound to sell those 275 shares, which is now retained as is.

The fourth additional ground upon which a request by defendant for an extension of time and stated that Plaintiff's Plaintiff agreed to such extension of time, but that defendant did not sell the stock within a reasonable time; that defendant Plaintiff offered the stock but were unable to sell it; that the Plaintiff could not sell the stock "just prior" and at the time said Plaintiff withdrew to sell it was, so-called, pending.

The fifth additional ground upon which a like request for an extension of time by Plaintiff and that the extension was refused in that defendant was unable to sell the stock within the time the sale of said shares of United Stock and certain other shares of the stock which is now owned and were understood to sell; that Plaintiff, although ready, willing and able to sell the stock during this requested period of time and then Plaintiff still later Plaintiff agreed to such extension of time on request, but that defendant did not sell; that Plaintiff Plaintiff offered the stock but were unable to sell it; that the stock at the time Plaintiff to and at the time Plaintiff withdrew to sell it was pending.

IV. The parties to this suit differ materially as to the nature of the obligation imposed upon defendant under the agreement. Plaintiff says that defendant assumed an unqualified obligation to sell those 275 shares on the terms stated in the writing and on obligation to conclude the sale on or before September 1, 1932. In the alternative, they insist that if this obligation



of the writing is rejected, then at the least defendant assumed the duty of a broker to sell the stock upon the then existing market, namely, the market which existed from the time of the execution of the writing up to September 1, 1922.

On the other hand, defendant contends that neither of these constructions is possible or reasonable; that the agreement discloses a simple employment of defendant as a broker to undertake the sale of this stock, and that the only obligation was to use reasonable diligence to sell the stock at the price named and to carry out the positive instructions set forth by the terms of the writing.

V. Plaintiffs have cited a large number of cases, such as Cathran v. Ellis, 107 Ill. 413; Heinemann v. Heard, 50 N. Y. 27, to the point that a broker is liable to his principal in damages either for negligence or for the violation of positive instructions. The law announced in these cases is well settled. Whether it is applicable here must depend obviously upon the construction which is to be given to this writing. The controlling purpose in construing a contract is to ascertain the intention of the parties thereto as the same is expressed in the words of the contract. Did defendant assume the obligation to sell absolutely and in all events these 975 shares of stock and to pay for the same? Plaintiffs assert the affirmative and rely upon the express language of the preliminary paragraph of the writing, which says, "The undersigned does hereby agree to sell for your account as Trustee," etc. Plaintiffs say that these words convey the idea of an absolute obligation, and they cite the dictionaries to that point. The word "agree" does not at all times necessarily convey the idea of an unconditional and binding obligation. The word "sell" in its primary significance does not necessarily convey the idea of a sale in the strict legal sense that is a valid contract for the



of the writing is rejected, then at the latest defendant assumes the duty of a broker to sell the stock upon the then existing market, namely, the market which existed from the time of the execution of the writing as to September 1, 1917.

On the other hand, defendant contends that neither of these constructions is possible or reasonable; that the agreement discloses a simple employment of defendant as a broker to undertake the sale of this stock, and that the only obligation was to use reasonable diligence to sell the stock at the price named and to carry out the positive instructions set forth by the terms of the writing.

V. Defendant has cited a large number of cases, such as Winters v. Miller, 107 Ill. 411; Winters v. Miller, 107 Ill. 411, to the point that a broker is liable to his principal in damages either for negligence or for the violation of positive instructions. The law announced in these cases is well settled. Whether it is applicable here must depend absolutely upon the construction which is to be given to this writing. The controlling purpose in construing a contract is to ascertain the intention of the parties thereto as the same is expressed in the words of the contract. This defendant assumes the obligation to sell absolutely and in all events before 9 PM shares of stock and so pay for the same. Plaintiff asserts the affirmative and rely upon the express language of the preliminary paragraph of the writing, which says, "The undersigned does hereby agree to sell for your account as trustee," etc. Plaintiff says that these words convey the idea of an absolute obligation, and that also the intention of the parties. The word "agree" does not at all times necessarily convey the idea of an unconditional and binding obligation. The word "sell" in its ordinary significance does not necessarily convey the idea of a sale in the strict legal sense that is a valid contract for the

conveyance of the title and delivery and possession of goods and chattels. It may or may not convey that idea. Whether it does or not must usually be determined by the circumstances which appear and by the context of the writing in which the words are used. Here, the verb "to sell" is modified by the phrase "for your account as trustee." It is further modified by the phrase, "upon the terms and conditions hereinafter set forth." In other words, the agreement to sell is not unqualified. It is limited expressly by the phrase which follows it to the conditions "hereinafter set forth," which evidently refers to the eight paragraphs thereafter enumerated.

Further, in construing the intention of the parties to this writing, it appears from the writing and by the averments of the declaration that defendant was acting in the capacity of a broker. That is the relationship established between the parties to this agreement. It also appears that that relationship existed between defendant and the Davis Sewing Machine Company, for which defendant had undertaken to sell 32,790 other shares of this preferred stock. Just what were the precise terms of this agreement with the Davis Sewing Machine Company are not stated, but it will be noted that the parties seem to have thought it necessary to secure the consent of the Davis Sewing Machine Company to their transaction, which consent appears upon the writing in this language: "The undersigned consents to the above contract."

It must be conceded, we think, that the obligation to sell absolutely and in all events or to guarantee its sales is not a usual obligation assumed by a broker. If such obligation had been intended, it would seem reasonable to suppose unequivocal words would have been used leaving no doubt as to the intention. Such words were not used.

Plaintiffs cite Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64, and argue that the court there construed language similar to that



conveyance of the title and delivery and possession of goods and  
 chattels. It may or may not depend upon these. Whether it does or  
 not must usually be determined by the circumstances which appear  
 and by the content of the writing in which the words are used. Here,  
 the verb "to sell" is modified by the phrase "for your account as  
 trustee." It is further modified by the phrase, "upon the same  
 and conditions hereinafter set forth." In other words, the phrase  
 "to sell" is not unmodified. It is limited and qualified by the  
 phrase which follows it to the conditions "hereinafter set forth,"  
 which evidently refers to the sixth paragraph hereinafter enumerated.  
 Further, in construing the intention of the parties to  
 this writing, it appears from the writing and by the evidence of  
 the negotiation that defendant was acting in the capacity of a  
 trustee. That is the relationship established between the parties  
 to this agreement. It also appears that this relationship existed  
 between defendant and the Davis Sewing Machine Company, for which  
 defendant had undertaken to sell \$2,700 other goods of this pro-  
 ported stock. Just what were the precise terms of this agreement  
 with the Davis Sewing Machine Company are not stated, but it will  
 be noted that the parties seem to have looked at defendant as re-  
 ceiving the consent of the Davis Sewing Machine Company to their trans-  
 action, which consent appears upon the writing in this language:  
 "The undersigned consents to the above contract."  
 It must be concluded, we think, that the obligation to  
 sell absolutely and in all events or to manufacture the sales is not  
 a moral obligation assumed by a trustee. It was obligated had been  
 intended, it would seem reasonable to suppose unqualified words  
 would have been used leaving no doubt as to the intention. Such  
 words were not used.  
 Therefore also WILLIAMS v. WILSON, 10 Cal. 191, 22 Cal. 2d.  
 and argue that the court in the construed language similar to that



which appears here as imposing an absolute obligation on the broker to sell. That was an agreement for the sale of certain real estate. The language of the contract was:

"The said first party agrees and binds himself to sell said lots for said second party within twelve months from the date hereof, and to guarantee, account for and pay over to said second party at least \$12,500 net therefor, except interest paid by said second party on the deferred payment for said lots."

The court there held that the broker had assumed an absolute obligation to sell and to pay. There is, however, a wide difference between the unmodified language there used and the language used in this writing, in which words that might possibly be regarded as unconditional are expressly made conditional. The preliminary paragraph therefore cannot be construed as imposing an absolute and unqualified obligation upon defendant.

The construction for which plaintiffs contend is further negatived by the language used in the paragraphs which follow. The first of these states that a commission of 15 per cent of the sales price of "all such stock sold by the undersigned shall be retained" by defendant out of moneys collected; that defendant shall sell its stock at its par value of \$100 per share, provided that if any sales be made at a less sum, defendant shall nevertheless pay the sum of \$85 net per share. It further provides that any difference between the par value of the stock and the sales price less than par shall be in each instance taken from the agreed commission. If it was the intention of the parties that defendant should pay \$85 net per share for 975 shares of this preferred stock, why did not this writing (which, as plaintiffs say, was apparently prepared by lawyers) so provide? In such case, why was an agreement for the payment of a commission at all necessary? And further, why was such commission expressly limited to such stock as might be sold? Why, indeed, should the agreement stipulate the price at which the broker should sell and must sell? These provisions are inconsistent with





the idea of an absolute obligation.

The second paragraph states that defendant may at its option sell either for all cash or on terms for part cash and the balance in deferred payments; that where the stock is sold on the deferred payment plan, not less than 25% of the sales price shall be collected by the purchaser at the time of making the sale, and that the balance of the purchase price shall be divided into ten equal monthly installments, all of which shall become due and payable within eleven months from the date of sale. These stipulations are also inconsistent with the idea that the broker was under an absolute obligation to sell and to pay. If that had been the intention of the parties, why should the owner retain the right to define with such particularity the terms upon which the stock should be sold?

Again, by the third paragraph it is provided that the sales made shall be evidenced by contracts entered into between defendant and the purchasers; that each contract shall contain a clause by which it shall be provided that no purchaser shall be entitled to receive dividends until after the stock shall have been paid for in full, and that no certificates evidencing the ownership shall be delivered until after payment has been made in full. These stipulations also seem inconsistent with the view of an absolute undertaking or an absolute obligation to sell and pay in all events.

In the fourth paragraph it is stipulated that defendant is limited to making sales in units of one share of common and one of preferred, and in the fifth paragraph, that where stock has been sold for all cash, defendant will collect from the purchaser and remit the sum of \$85 per share within ten days after the receipt thereof; that on stock sold on the deferred payment plan defendant will collect from the purchaser the initial payment and within ten days remit at least \$10 per share, and that thereafter



The list of an absolute obligation.

The second paragraph states that defendant may at the

option sell either for all cash or on terms for cash and the

balance in deferred payments; that where the stock is sold on the

deferred payment plan, not less than 25% of the sales price shall

be collected by the purchaser at the time of making the sale, and

that the balance of the purchase price shall be divided into ten

equal monthly installments, all of which shall become due and pay-

able within eleven months from the date of sale. These obligations

are also liquidated with the idea that the broker was under an

absolute obligation to sell and to pay. It thus had been the in-

tervention of the parties, who would the owner retain the right to

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should be sold?

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entitled to receive dividends until after the stock shall have been

paid for in full, and that no certificate evidencing the ownership

shall be delivered until after payment has been made in full. These

obligations also were liquidated with the view of the absolute

liquidation of an absolute obligation to sell and pay in all events.

In the fourth paragraph it is stipulated that defendant

and is limited to making sales in order at his office at 1000 Broadway

and at his private, and at the City Exchange, and at the stock

board and for all such, defendant will collect from the purchaser

and remit the sum of \$25 per share within ten days after the re-

ceipt thereof; that on stock sold on the deferred payment plan de-

fendant will collect from the purchaser the initial payment and

within ten days remit at least \$20 per share, and that thereafter

defendant will collect from the purchaser the several successive installments and remit in each instance within ten days until the owner shall have received the full amount of \$85 per share; that when the payments were made certificates shall be delivered to defendant and at the same time a delivery shall be made to the Industrial Credits Corporation of an equal number of shares of non par common capital stock. Why these limitations upon the power and authority of the broker should have been imposed it is difficult to understand if, as plaintiffs contend, the obligation of the broker to sell and pay was unconditional. In that case the stipulations would have been entirely unnecessary.

Again, by the sixth paragraph, it is stipulated that defendant will assume responsibility and expense of making adjustments and settlements with purchasers who may default, and that in case a purchaser fails to make payment within a period of two years, defendant will either pay the full amount of all unpaid installments and accept certificates in each instance for the amount of stock specified in the defaulted contract, or agree that all moneys that may have been paid to the owner shall be held as liquidated damages. This last stipulation is utterly inconsistent with the idea that it was the intention of the parties to impose upon the broker an absolute liability.

The seventh paragraph, as already stated, recites that defendant is under a contract to sell to the Davis Sewing Machine Company 32,780 shares of this preferred stock; that the sale of the 975 shares here described "shall begin at the time when there shall have been sold for said The Davis Sewing Machine Company, a Delaware corporation, twenty thousand (20,000) of said shares," and that thereafter the sale of all such stock as may be made shall be deemed to be made contemporaneously for the Delaware corporation, for other



defendant will collect from the purchaser the several successive installments and remit in each instance within ten days until the owner shall have received the full amount of \$22 per share; that when the payments were made certificates shall be delivered to defendant and at the same time a delivery shall be made to the Industrial Credit Corporation of an equal number of shares of non-put common capital stock. Why these limitations upon the power and authority of the broker should have been imposed it is difficult to understand it, as plaintiff's counsel, the obligation of the broker to sell and pay was undisputed. In that case the restrictions would have been entirely unnecessary.

Again, by the sixth paragraph, it is stipulated that defendant will assume responsibility and expense of making adjustments and settlements with purchasers who may default, and that in case a purchaser fails to make payment within a period of ten days, defendant will either pay the full amount of all unpaid installments and accept certificates in each instance for the amount of stock specified in the defaulted contract, or agree that all money that may have been paid to the owner shall be held as liquidated damages. This last stipulation is utterly inconsistent with the idea that it was the intention of the parties to impose upon the broker an absolute liability.

The seventh paragraph, as already stated, recites that defendant is under a contract to sell to the Davis Sewing Machine Company 38,750 shares of this preferred stock; that the sale of the 975 shares here described "shall begin at the time when there shall have been sold for said the Davis Sewing Machine Company, a Delaware corporation, twenty thousand (20,000) of said shares," and that thereafter the sale of all such stock as may be made shall be deemed to be made contemporaneously for the Delaware corporation, for other



parties of whom there may be as many as 20,000, "and for the account of this contract." The writing then provides that it is agreed that one-tenth of all the sales of Davis stock made by defendant after 20,000 shares shall have been sold for the Delaware corporation shall be applied to the sale of the stock "under this contract until the entire amount of nine hundred and seventy-five (975) shares of Preferred stock shall have been sold."

VI. There is no allegation in any count of the declaration that defendant sold these 20,000 shares of this stock for the Davis Sewing Machine Company. It would therefore appear, notwithstanding any fact alleged in the declaration, that the condition upon which defendant would undertake to make these sales has never in fact come into existence. In this connection plaintiffs argue <sup>if</sup> that this clause is regarded as inconsistent with the provision of the fourth paragraph, which states, "and sale of stock hereunder concluded by September 1, 1922;" then the fourth paragraph, as the prior one, must prevail over the provisions of the seventh, which is the later provision. Straus v. Wanamaker, 175 Pa. St. 213; Fairbanks Morse & Co. v. Miller, 195 Pac. 1083; Wisconsin Bank v. Wilkin, 95 Wis. Ill, and other cases are cited. The rule announced in these cases has been applied by some courts only as a last resort and when it is considered impossible otherwise to ascertain the intention of the parties as determined by the whole instrument. Williston on Contracts, sec. 624, vol. 1, 2nd ed.; Union Water Power Co. v. Lewiston, 101 Me. 564; 13 Corpus Juris, p. 536, sec. 497; 6 R. C. L. 847.

There is no necessity to apply that rule here. Upon a consideration of this whole contract, we do not think there can be any doubt as to what was the real intention of the parties. The declaration in each of its counts discloses a simple case of an agency employment as a broker undertaken without any absolute and



unqualified obligation to sell. The application of any rule of last resort seems entirely unnecessary.

VII. Under the written agreement, for aught that is alleged in any count of the declaration, the owner of this stock could have withdrawn it from the control of defendant at any time. The owner could have revoked defendant's authority as a broker at any time. As a matter of fact, it does not appear that the stock was ever actually placed in defendant's possession and control. There is not a provision in the contract which obligates any one to deliver to defendant the stock which under this agreement it undertook to sell.

Defendant contends that the contract is unilateral and void for want of mutuality, and that inasmuch as the same was executory, no right of action could arise thereunder. It is unnecessary to discuss that question. It is not alleged in any count that there was a market on which the stock could have been sold at any time for the price named in the agreement.

The demurrers were properly sustained and the judgment of the trial court is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.



unqualified obligation to sell. The application of any rule of

last resort seems entirely unnecessary.

VII. Under the written agreement, the court finds that

alleged in any event of the defendant, the owner of this stock

could have withdrawn it from the control of defendant at any time.

The owner could have revoked defendant's authority as a broker at

any time. As a matter of fact, it does not appear that the stock

was ever actually placed in defendant's possession and control.

There is not a provision in the contract which obligates any one to

deliver to defendant the stock which under this agreement is under-

stood to sell.

Defendant contends that the contract is unilateral and

void for want of mutuality, and that inasmuch as the name was neces-

sary, no right of action could arise thereunder. It is unnecessary

to discuss that question. It is not alleged in any count that

there was a market on which the stock could have been sold at any

time for the price named in the agreement.

The documents were properly executed and the in-

terest of the trial court is affirmed.

APPEAL.

McGraw-Hill and O'Connor, Inc., Appellants.

34556

PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

v.

DAVID BAER,

Plaintiff in Error.

ERROR TO MUNICIPAL

COURT OF CHICAGO.

259 I.A. 648

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Baer, was arraigned and pleaded not guilty to an information which charged that on July 2, 1930, at the City of Chicago, in the County of Cook and State of Illinois, he unlawfully and unjustly for his own gain and to prevent the owner from again possessing its property, did buy, receive and aid in concealing 65 feet of telephone cable of the value of \$14 of the personal goods, property and chattels of the Illinois Bell Telephone Company, a corporation, said goods, property and chattels having been lately before then wrongfully and unlawfully stolen, taken and carried away from the said Illinois Bell Telephone Company, by a certain evil disposed person or persons, the said Baer then and there well knowing the personal goods, property and chattels to have been unlawfully stolen, taken and carried away, contrary to the form of the statute, etc.

He waived a trial by jury, and the cause was submitted to the court, which after hearing the testimony of the witnesses found him "guilty in manner and form as charged in the information." Final judgment was entered upon this finding of guilty, and plaintiff in error was sentenced to confinement at labor in the house of correction for a term of one year and fined \$100 and costs.

It is urged for reversal that the court failed to find

24586

REPORT BY THE JURY ON  
ILLINOIS

Defendant in error

State of Illinois

County of Cook

2531 A. 648

Defendant in error

IN SENATE  
JANUARY 10, 1930

Witness in error, name, was assigned and placed on

only to an information which charged that on July 1, 1929, at

the City of Chicago, in the County of Cook and State of Illinois,

he unlawfully and unlawfully for his own gain and to prevent the owner

from again possessing his property, did buy, receive and aid in con-

cealing \$5,000 of telephone cable of the value of \$14 of the personal

goods, property and chattels of the Illinois Bell Telephone Company,

a corporation, and goods, property and chattels having been taken

before them respectively and unlawfully stolen, taken and carried away

from the said Illinois Bell Telephone Company, by a certain evil

disposed person or persons, the said person then and there well knowing

the personal goods, property and chattels to have been unlawfully

stolen, taken and carried away, contrary to the form of the statute,

etc.

He waived a trial by jury, and the cause was submitted to

the court, which after hearing the testimony of the witnesses found

him "guilty in manner and form as charged in the information." When

judgment was entered upon this finding of guilty, and plaintiff in

error was sentenced to imprisonment at labor in the house of correction

for a term of one year and three months and costs.

It is urged for reversal that the court failed to find



the material elements of the crime charged, in that there is neither finding nor proof that plaintiff in error knew that the property was stolen and further in that there was no proof offered that the Illinois Bell Telephone Company was a corporation or that it owned the property alleged to have been received by plaintiff in error. Proof and findings of these material facts were necessary. An examination of the records fails to disclose either proof or findings of these material facts. Aldrich v. People, 225 Ill. 610; People v. Israel, 240 Ill. 375; People v. Struble, 275 Ill. 162; People v. Lardner, 296 Ill. 190; People v. Jackson, 312 Ill. 611; People v. Ellison, 185 Ill. App. 287. These cases are only a few of those cited in the brief of plaintiff in error, and the state's attorney has made no reply thereto.

The judgment of the Municipal court will therefore be reversed.

REVERSED.

McSurely and O'Connor, JJ., concur.

the material elements of the crime charged, in that there is  
nothing tending nor tending that plaintiff in error knew that the  
property was stolen and further in that there was no proof offered  
that the Illinois Bell Telephone Company was a corporation or that  
it owned the property alleged to have been received by plaintiff  
in error. Proof and findings of these material facts were necessary.  
An examination of the records fails to disclose either proof or find-  
ings of these material facts. Albright v. Fennell, 228 Ill. 414;  
People v. Larnet, 226 Ill. 378; People v. Fennell, 228 Ill. 414;  
People v. Larnet, 226 Ill. 378; People v. Larnet, 226 Ill. 378;  
People v. Larnet, 226 Ill. 378. These cases are all in line  
of those cited in the brief of plaintiff in error, and the  
attorney has made no reply thereto.  
The judgment of the Appellate Court will therefore be

reversed.

McNulty and O'Connor, JJ., concur.

34192

THOMAS E. POWERS, Administrator  
of the Estate of Marie Powers,  
Deceased,

Plaintiff in Error,

vs.

ERROR TO CIRCUIT COURT  
OF COOK COUNTY.

CHICAGO CITY RAILWAYS COMPANY,  
CALUMET & SOUTH CHICAGO RAILWAY  
COMPANY, THE SOUTHERN STREET  
RAILWAY COMPANY, Corporations,  
and HENRY A. BLAIR and FREDERICK  
RAWSON, as Receivers of the CHICAGO  
RAILWAYS COMPANY, a Corporation,  
Doing Business as CHICAGO SURFACE  
LINES,

Defendants in Error.

259 I.A. 648<sup>2</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Marie Powers, 23 years of age, was struck by one of defendants' street cars, receiving injuries which caused her death. Suit was brought for damages and upon trial at the conclusion of plaintiff's evidence, upon motion of the defendants, the court instructed the jury to find them not guilty, and judgment was entered accordingly. Plaintiff seeks a reversal.

Defendants' first point is that the action of the court in granting defendants' motion to instruct the jury is not open to review; that the bill of exceptions states that the ground for the motion for a new trial was "that the verdict of the jury was contrary to the law and the evidence;" that when a party specifies the grounds for his motion for a new trial he is confined to them, and therefore, in the instant case, cannot argue here the propriety of the ruling of the court and the giving of the peremptory instruction. It is sufficient to say in reply that the motion for a new trial was not in writing, in which case the party moving for a new trial may avail himself of any ground which may appear in the record. People v. Melnick, 263 Ill. 24; Yarber v. Chicago &



THOMAS E. POWERS, Administrator  
of the Estate of Katie Powers,  
Plaintiff in Error,  
vs.  
CHICAGO CITY RAILWAY COMPANY,  
CARRIAGE & TRUCK CHICAGO RAILWAY  
COMPANY, THE SOUTHERN RAILWAY  
RAILWAY COMPANY, GOVERNMENT  
and HENRY A. BLAIR and THOMAS  
KATHEIMER, as Defendants of the Chicago  
Railway Company, a corporation,  
Doing Business as Chicago Railway  
Lines,  
Defendants in Error.

IN THE COURT OF THE CITY OF CHICAGO.

2531A. 648

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

Katie Powers, 32 years of age, was struck by one of  
defendants' street cars, receiving injuries which caused her death.  
Said car was driven by driver and upon trial at the conclusion of  
plaintiff's evidence, upon motion of the defendant, the court in-  
structed the jury to find the car guilty, and judgment was entered  
accordingly. Plaintiff seeks a reversal.

Defendants' first point is that the motion of the court  
in granting defendants' motion to instruct the jury is not open  
to review; that the bill of exceptions states that the ground for  
the motion for a new trial was "that the verdict of the jury was  
contrary to the law and the evidence;" that when a party moves  
the grounds for his motion for a new trial as he certifies to them,  
and therefore, in the instant case, cannot argue here the propriety  
of the ruling of the court and the giving of the verdict in-  
question. It is sufficient to say in reply that the motion for a  
new trial was not in writing, in which case the party moving for  
a new trial may avail himself of any ground which may appear in  
the record. People v. Reimer, 263 Ill. 241; Reimer v. Chicago &

Alton Ry. Co., 235 Ill. 566. The bill of exceptions indicates that an oral motion was made.

The decisive question is whether plaintiff's intestate was guilty of contributory negligence as a matter of law. It is conceded that the evidence as to the negligence of the defendants was sufficient to go to the jury. The well known rule is that, if there is any evidence in the record from which, if it stood alone, the jury could, without acting unreasonably in the eye of the law, find that the material averments of the declaration had been proved, the case must be submitted to the jury. Libby, McNeil & Libby v. Cook, 222 Ill. 206.

The accident happened about seven o'clock on the evening of January 10, 1927, at the intersection of Ashland avenue, running north and south, with 65th street, running east and west in Chicago. Marie Powers lived east of Ashland avenue. Street cars run on Ashland avenue, and she had apparently alighted from a south-bound street car which stopped near the north cross-walk of the intersection, and she was proceeding eastward across Ashland avenue when struck by a north-bound street car.

There were two occurrence witnesses. James McKeag testified that he saw the south-bound car on Ashland avenue and the girl came from behind this car going east; that she was about in the south-bound street car tracks when he saw her look to the south and also to the north; that at this time a second street car was coming south, following the one from which apparently she had alighted, and about 50 or 60 feet away from her; there was also a car coming north which, the witness estimated, was then about 150 or 175 feet away; that when he first saw this north-bound car it was about 125 feet south of the south crosswalk of 65th street and traveling about 30 miles an hour. This estimate of speed was based upon the witness' experience as a former street car motorman;



Alfred W. Cook, Dec. 1931. The bill of exceptions indicates

that an oral motion was made.

The decisive question is whether defendant's testimony

was guilty of contradictory negligence as a matter of law. It is conceded that the evidence as to the negligence of the defendant was sufficient to go to the jury. The well known rule is that, if there is any evidence in the record from which it is clear that the jury could, without making any inference in the case of the law,

find that the material elements of the negligence had been proved, the case must be submitted to the jury. Alfred W. Cook

Alfred W. Cook, Dec. 1931. The

The accident happened about seven o'clock on the evening of January 12, 1931, at the intersection of Ashland Avenue, running north and south, with 17th Street, running east and west in Chicago. Marie Peters lived east of Ashland Avenue, about 400 feet from Ashland Avenue, and was eastbound at the time of the accident. She was proceeding eastward across Ashland Avenue when struck by a northbound street car.

There were two eyewitnesses. James McGee testified that he saw the northbound car on Ashland Avenue and the girl come from behind this car going away; that she was about 100 feet from the car when he saw her look to the south and also to the north; that at that time a second street car was coming south, following the one from which apparently she had alighted, and about 50 or 60 feet away from her; that there was also a car coming north while, the witness estimated, was then about 100 or 125 feet away; that when he first saw this northbound car it was about 125 feet south of the south crosswalk of 17th Street and traveling about 30 miles an hour. This evidence of speed was based upon the witness' experience as a former street car motorist;



the north-bound car did not stop at 65th street nor slacken its speed as it approached; the girl hesitated and looked back and then looked south and then started to run across the street toward the east side of Ashland and was hit by the north-bound car; that she started to run from the middle of the south-bound track and had reached just about the middle of the north-bound track when she was struck.

Melville Oliver, another occurrence witness, testified that he was driving a truck, going west on 65th street, and pulled up to Ashland avenue and stopped; that he saw the girl crossing the street, coming from the west to the east side of Ashland; that there was a second car coming from the north, possibly 50 or 60 feet north of the north cross-walk; that when he first saw her she was between the street car tracks; when he first saw the north-bound street car it was about 150 feet south of 65th street, traveling between 20 and 25 miles an hour, and that about the time he saw the girl the north-bound car was crossing the south cross-walk of the intersection; it was the ordinary large street car and was lighted.

We thus have the situation of the young woman, apparently alighting from a south-bound street car, going behind it and starting eastward on the cross-walk across Ashland avenue toward her home. Before she had entirely crossed the south-bound track, or as she is between the tracks, she looks to the north and sees a second south-bound car approaching 50 or 60 feet away. On looking to the south she sees a north-bound car some distance farther away - one of the witnesses says some 150 or 175 feet away. Finding herself in a place of danger, she must determine whether the better way is to run westerly to avoid the nearer south-bound car, or to continue easterly with the expectation of crossing the north-bound

the north-bound car did not stop at 63rd street but passed it  
 speed as it approached; the girl hesitated and looked back and  
 then looked north and then stepped to the corner of the street  
 toward the east side of Ashland and was hit by the north-bound  
 car; that she started to run from the middle of the south-bound  
 track and had remained just about the middle of the north-bound  
 track when she was struck.

William Miller, witness, testified that he was driving a truck, going west on 63rd street, and called  
 up to 63rd street and stopped; that he saw the girl standing  
 the street, seeing that she went to the east side of Ashland; that  
 there was a second car coming from the north, possibly an 80  
 foot north of the north street-car; that when he first saw the car  
 was between the first car and the girl; that he did not see the north-  
 bound street car if it was about 100 feet west of 63rd street,  
 traveling between 80 and 85 miles an hour, and that about the time  
 he saw the girl the north-bound car was crossing the north street-  
 car at the intersection; it was the extremely large street car and  
 was lighted.

It must have been situated at the young woman, ap-  
 proximately 100 feet from a north-bound street car, going south on  
 and starting on west on the street-car and was located about 100 feet  
 at 63rd street. That he saw the girl standing on the north-bound track  
 at 63rd street, and looking toward the north and seeing a  
 second north-bound car approaching 80 or 85 feet away. On looking  
 at the south side a north-bound car some distance farther away -  
 one of the witnesses says some 150 or 175 feet away. Finding that  
 she was in a place of danger, she was looking toward the north  
 way in as far west as the street-car was, or so  
 certain exactly with the suggestion of crossing the north-bound



track before the more distant north-bound car can reach her. In this emergency she chose to follow the latter course, with the resulting accident.

It is not every case of mistaken judgment that is negligence. Such mistakes are frequent incidents to an ordinarily prudent person.

"Persons who have to act in a sudden emergency are not to be judged in the light of after-events, but are to be judged, under all the circumstances of the case, by the standard of what a prudent person would have been likely to do under the same circumstances." Barnes v. Danville Street Ry. Co., 235 Ill. 566.

In Loftus v. Chicago Railway Co., 293 Ill. 475, it was held, where the approaching street car was as much as 75 feet from the deceased when he arrived at the conclusion to cross in front of it:

"We could not possibly declare that a reasonably prudent person under like circumstances and in the same situation as the deceased would have drawn the conclusion that by crossing in front of the car he was putting himself in a place of peril, but, on the other hand, that he believed and had reasonable ground for believing, that he could cross in safety."

It was there held that the question of contributory negligence was for the jury to determine. In the instant case Marie Powers had the alternative of moving to avoid the south-bound car or the north-bound car by crossing one or the other of their respective tracks. She chose to cross the north-bound tracks while the car was - as one witness said - 150 or 175 feet away - a much greater distance than the 75 feet between the deceased and the approaching car mentioned in the Loftus case.

We are aware that there are numerous cases where it has been held under a somewhat similar state of facts that the injured party was guilty of negligence; but, as has been observed frequently, in such cases very rarely, if ever, are all the circumstances surrounding the incident wholly alike. There is





always some distinguishing difference. It would unduly lengthen this opinion to point out wherein the circumstances involved in the cases cited by defendants are materially different from those now under consideration. On the other hand, a long list of cases might be cited wherein it has been held that ordinarily the question of contributory negligence should be submitted to the jury.

Defendant argues from measurements as to the physical impossibility of the north-bound car being as far away as testified to by the witnesses. We are not impressed by the attempted mathematical demonstration for two reasons: First, the exact distance is not so important as it is important what the distance appeared to be to the witnesses, for, if the car appeared to an experienced motorman to be 175 feet away, in all probability it appeared to Marie Powers to be this far away; and, second, accidents of this sort happen so quickly and unexpectedly as to render the observation and statement of bystanders too uncertain to draw therefrom any reliable mathematical conclusions. Nelson v. Fend, 203 Ill. 120; Skala v. Lehon, 258 Ill. App. 252.

We have read with interest the earnest brief of counsel for defendants and have no reluctance in yielding our assent to the general principles therein so well expressed and, in a proper case, would unhesitatingly apply them.

A motion has been made by the defendants to strike the reply brief filed by plaintiff on the ground that it raises new questions not mentioned in the first brief, citing Harrow v. Oregon, 219 Ill. 288, and many other cases. The reply brief does violate our Rule 19 in this and other respects and it might well have been stricken. However, as our conclusion is not based upon any matter improperly contained in the reply brief, action upon the motion is unnecessary and it will not be considered.

We hold that the question of the contributory negli-





gence of Marie Powers should have been submitted to the jury, and therefore the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

...the fact that the ... is ...

RECEIVED THE DIRECTOR

.....

34250

RICHARD W. BOCK,  
Appellee.

vs.

LOUIS A. HIPBACH,  
Appellant.

10  
APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

259 I.A. 648<sup>3</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for professional services as a sculptor, claiming that his work was worth \$21,650, on which \$3,000 had been paid, leaving a balance due him of \$18,650. The court found that the work was worth \$11,000 and after deducting the \$3,000 paid on account entered judgment against defendant for \$8,000, from which defendant appeals.

The work done by plaintiff was sculptural work in connection with the erection of a chapel which defendant was building as a memorial to his parents in a private cemetery near Villa Park in DuPage county, Illinois. Defendant employed Arthur Woltersdorf as the architect of the chapel and claimed as one defense that it was agreed between Woltersdorf and plaintiff that the latter's compensation should be left to the architect Woltersdorf who had estimated the work as worth \$7,000, of which \$3,000 having been paid, defendant admitted a balance due of \$4,000. Woltersdorf gave testimony tending to support defendant's version, but plaintiff denied that there was any agreement that Woltersdorf should fix the amount of his compensation.

Plaintiff testified that Woltersdorf had told him, in substance, not to bother about the money "because we are anxious to have the very best work in this matter. This is a memorial for Mr. Hippach's parents and should be the best that art can produce," and that the matter of compensation should await the conclusion of the work. There were other circumstances



LEWIS A. KIRKPATRICK,  
Appellant.  
vs.  
RICHARD W. BAKER,  
Appellee.

OFFICE OF THE CLERK  
OF THE COURT

MR. JUSTICE McREYNOLDS DELIVERED THE OPINION OF THE COURT.

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Plaintiff testified that Wolfersdorf had told him, in substance, not to bother about the money "because we are anxious to have the very best work in this matter. This is a memorial for Mr. Kirkpatrick's parents and should be the best that art can produce," and that the matter of compensation should await the conclusion of the work. There were other circumstances

in evidence tending to support plaintiff's version. In any event we cannot say that the conclusion of the trial court to accept plaintiff's version was manifestly wrong.

Plaintiff and one other witness testified, giving opinion evidence as to the value of the work, and three witnesses testified for defendant on this point. Defendant argues that plaintiff's witnesses were not qualified to testify as to values.

Plaintiff had been practicing his profession for about fifty years, going through the usual preliminary studies for such profession, such as drawing, architecture, perspective, anatomy, designing, modeling, etc.; had studied at various institutions, among them the Berlin Academy of Fine Arts and the National Art School of France, and had traveled extensively abroad to acquire greater artistic knowledge. He had done considerable memorial work in this country, a list of which was included in his testimony. He did the sculpturing work on some of the buildings of the Columbian Exposition of 1893 in Chicago, for which he received a medal as a designer; work in bronze for the Indianapolis Public Library building; the Lovejoy monument at Alton, Illinois; elaborate groups of sculpture on buildings in Omaha; the Illinois Shiloh monument on the battlefield of Shiloh, for which he received the first prize in<sup>a</sup> competition of twenty-seven artists; memorial bronze busts for Northwestern University; soldiers monuments in various parts of the country. At the time of the trial he was a professor of sculpture at the University of Oregon and was designing decorations for the Art Museum for the Oregon University.

Emory Seidel, plaintiff's other witness, had studied and practiced his profession for about thirty-eight years, studying at various art schools in the country and maintaining a studio



in evidence tending to support Plaintiff's version. In any event we cannot say that the conclusion of the trial court to accept Plaintiff's version was manifestly wrong.

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Plaintiff had been practicing his profession for about fifty years, going through the usual professional studies for such profession, such as drawing, engineering, perspective, anatomy, designing, modeling, etc.; had studied at various institutions, among them the Berlin Academy of Fine Arts and the National Art School of France, and had traveled extensively abroad to acquire greater artistic knowledge. He had some considerable practical work in this country, a list of which was included in his testimony. He did the sculpturing work on some of the pillars of the Wisconsin Exposition of 1893 in Chicago, for which he received a medal as a designer; work in bronze for the Indianapolis Public Library Building; the bronze monument at Alton, Illinois; aluminum groups of sculptors on buildings in Omaha; the Illinois English monument on the building at Alton. For which he received the Elmer Price competition of twenty-seven articles; several bronze casts for Northwestern University; religious monuments in various parts of the country. At the time of the trial he was a professor of sculpture at the University of Oregon and was designing monuments for the Art Museum for the Oregon University.

Henry Seidel, Plaintiff's other witness, had studied and practiced his profession for about thirty-eight years, working at various art schools in the country and maintaining a studio



since 1910. He had exhibited his work in many places and had a permanent exhibit in New York City. This witness testified that he was estimating work of this character at all times. These witnesses were amply qualified to give their opinion as to the value of the work in question.

Defendant in his brief attacks the finding of the court as clearly against the weight of the evidence. The sculptural work of plaintiff in marble consisted of a relief angel with extended wings; an allegorical panel; a panel of two life-sized figures in relief; four symbolical busts of different subjects, the heads of these models being double life size. The sculptural features of the work in granite consisted of a certain symbolical Hermes obelisk about seven feet high. The process of modeling such a work was described by plaintiff at length. It is quite elaborate and too lengthy to repeat here. There was also a large bronze memorial urn 5½ feet high by 3 feet in diameter, with many decorative features; also an allegorical panel of two life-sized figures; certain bronze interior tablets; also an angel's head decoration near the top of the tower about 6 feet in height carried out in marble; also an allegorical tablet in marble 6 X 6 feet; and six interior corbels carved in wood, each different. Plaintiff testified that he commenced the work in the fall of 1925 and the last piece was completed in December, 1927; that the casting of the work cost \$1700, and there was an expense of about \$600 for overhead; that he made approximately twelve trips to Joliet, Illinois, to supervise the stone work, sometimes staying there three or four hours and sometimes staying over night.

The artistic character of plaintiff's work does not seem to be questioned. The record contains photographs of much of it and a plaster model of the head of Hermes is before us as an exhibit. So far as we are competent to judge from an inspection

since 1910. He had exhibited his work in many places and had a permanent exhibit in New York City. This witness testified that he was estimating work of this character at all times. These witnesses were merely qualified to give their opinion as to the value of the work in question.

Defendant in his brief attacks the finding of the court as clearly against the weight of the evidence. The weight of work of plasticity in marble consisted of a relief upon which extended wings; an allegorical panel; a group of two life-sized figures in relief; four symmetrical heads of different subjects. The heads of these models being double life size. The composition of the work in question consisted of a certain quantity of marble about seven feet high. The process of making such a work was described by plaintiff as lengthy. It is quite elaborate and too lengthy to repeat here. There was also a large bronze memorial was 8 1/2 feet high by 3 feet in diameter, with many decorative features; also an allegorical panel of two life-sized figures; certain bronze interior tablets; also an angel's head decoration near the top of the tower about 6 feet in height carried out in marble; also an allegorical tablet in marble 3 1/2 feet; and six interior panels carved in wood, each 4 1/2 feet. Plaintiff testified that he commenced the work in the fall of 1925 and the last piece was completed in December, 1927; that the cost of the work cost \$1700, and there was an expense of about \$400 for overhead; that he made approximately twelve trips to Joliet, Illinois, to supervise the stone work, sometimes staying there three or four hours and sometimes staying over night. The artistic character of plaintiff's work does not seem to be questioned. The record contains photographs of much of it and a plaster model of the head of Hermes is before us as an exhibit. So far as we are competent to judge from an inspection

of these exhibits, plaintiff's work was of a high order of merit.

The architect Woltersdorf and two other witnesses testified for defendant, giving their opinion that the work done by plaintiff was of considerably less value in money than the amount claimed by plaintiff. It is unnecessary to detail their evidence as to their experience in this particular class of work or their opinion as to its value. It does not impress us as having the same value as the testimony on behalf of plaintiff. Plaintiff is shown to be an artist of exceptional talent, if not genius. It is commonplace to say that the work of the true artist may be beyond price. Seidel testified that of the fifty or sixty sculptors in Chicago there were only about six capable of doing work of the character involved in this suit, and that plaintiff is one of the six.

The trial court did not give plaintiff all he claimed but reduced it almost one-half and we cannot say that this conclusion was contrary to the weight of the evidence.

The judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.



of these exhibits, Plaintiff's work was of a high order of merit.  
The evidence was presented and the other witnesses  
testified for defendant, giving their opinion that the work done  
by Plaintiff was of considerably less value in money than the  
amount claimed by Plaintiff. It is unnecessary to detail their  
evidence as to their experience in this particular class of work  
or their opinion as to its value. It does not appear as if  
paying the same value as the testimony on behalf of Plaintiff.  
Plaintiff is shown to be an artist of exceptional talent. It was  
found. It is common place to say that the work of the two artists  
may be beyond price. Indeed, several of the City of Chicago  
sculptors in Chicago there were only about six months of doing  
work of the character involved in this suit, and that Plaintiff  
is one of the six.

The trial court did not give Plaintiff all he  
claimed but reduced it almost one-half and we cannot say that  
this conclusion was contrary to the weight of the evidence.  
The judgment is affirmed.

ATTORNEYS.

Hatchett, F. J., and O'Connor, J., for defendant.

34275

JOSEPH A. WINNER,  
Appellee.

vs.

CENTRAL TRUST COMPANY OF  
ILLINOIS, a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 648<sup>4</sup>

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Defendant by this appeal seeks the reversal of a judgment against it for \$656.01 entered after trial by the court.

The case was brought as a fourth class action in tort, plaintiff alleging in his statement of claim that defendant was guilty of wrongfully converting to its use a certified check for \$415 and a promissory note for \$160 belonging to plaintiff, and that defendant wrongfully permitted a purchaser of said note to obtain a judgment thereon against plaintiff. Defendant denied the wrongful conversion and alleged that the note and check were given to its agent pursuant to the terms of a written contract between the parties, whereby plaintiff agreed to buy and defendant agreed to sell certain real estate.

Plaintiff's theory is that the note and check were given conditionally to defendant when he signed a written offer to purchase real estate, which offer was subject to the written approval of the general manager of defendant; that the contract was subsequently altered before it was signed by defendant; that before plaintiff was notified that it was signed by defendant, plaintiff revoked said offer to purchase, and therefore he was entitled to a return of his check and note or the equivalent in money.

Plaintiff is a tailor in Chicago, and on March 6, 1939, was approached by Simon P. Wolfson, a real estate agent employed by a Mr. Idol who had charge of the sale of a subdivision belonging





to defendant. Wolfson proposed that plaintiff buy one of the lots, to which plaintiff agreed and gave Wolfson as earnest money his certified check for \$415 and his promissory note for \$160. Wolfson gave plaintiff a receipt for the same which provided that the sale was subject to the approval of the general manager, and if not approved payment was to be returned, but if approved, to be closed or deposit forfeited. On the same day a contract in writing was presented to plaintiff who signed it. The contract was in duplicate and plaintiff signed both copies; it was then unsigned by defendant. As an inducement to plaintiff to buy the lot, Wolfson agreed that the \$160 note which represented his commission for making the sale might be paid by plaintiff making two suits of clothes for him, and plaintiff measured Wolfson for these suits on the same day.

Both copies of the contract were signed by defendant on March 7, 1929, and one copy was retained in its files and the other returned to Idol for delivery to plaintiff. The certified check was deposited by defendant on the following day. March 12th defendant received a letter from plaintiff to the effect that he withdrew his offer to purchase the lot and demanded a return of his note for \$160 and of his certified check for \$415, or the equivalent thereof in money. March 13th Wolfson delivered an executed copy of the contract to plaintiff but plaintiff told him he had cancelled the contract.

Wolfson testified that he saw plaintiff in his place of business on March 7th and told him that the contract was accepted and that "everything would go through as we agreed upon." Plaintiff admitted that he had a conversation on this date, but says that Wolfson only said that he wanted "to be friendly with me so that I can get some friends of mine as his customers," so he could sell some lots. Wolfson testified that it was on March 8th that he was measured by plaintiff for the two suits of clothes

at defendant. Wolfson proposed that plaintiff buy one of the lots  
to which plaintiff agreed and gave Wolfson an earnest money  
certified check for \$100 and his attorney made the \$100. Wolf-  
son gave plaintiff a receipt for the same which provided that the  
same was subject to the approval of the general manager, and if  
not approved payment was to be returned, but it happened, in the  
closed or default territory. On the same day a contract in  
writing was presented to plaintiff and signed by him. The contract  
was in duplicate and plaintiff signed both copies; it was then  
unwitnessed by defendant. As an inducement to plaintiff to sign the  
lot, Wolfson agreed that the lot was to be given to plaintiff making  
mission for making the sale right in front of plaintiff making  
two miles of distance for him, and plaintiff accepted Wolfson for  
these miles on the same day.

Both copies of the contract were signed by defendant  
on March 7, 1935, and one copy was retained in his files and the  
other retained as proof for delivery to plaintiff. The certified  
check was cashed by defendant on the following day. When  
1935 defendant received a letter from plaintiff to the effect  
that he withdrew his offer to purchase the lot and demanded a  
return of his note for \$100 and of his certified check for \$100,  
or the equivalent thereof in money. Thereafter Wolfson delivered  
an executed copy of the contract to plaintiff and plaintiff said  
that he had cancelled the contract.

Wolfson testified that he saw plaintiff in his office  
at defendant on March 7th and that the contract was sig-  
nated and that "everything would be arranged as we agreed upon."  
Plaintiff admitted that he had a conversation on this date, but  
says that Wolfson only said that he wanted "to be friendly with  
me so that I can get some friends of mine as his customers," and  
he would sell some lots. Wolfson testified that it was on March  
7th that he was retained by plaintiff for the two miles of distance



and that plaintiff then said he would call at the office of Idol to get his copy of the contract. Wolfson further says that he went in a day or two thereafter - which would be about the 9th or 10th - and found that plaintiff was making no progress with his suits and gave as an explanation that he did not have the money with which to buy the material; that on the 12th he called again and was then told by plaintiff that he did not want the lot for the reason that the assessments were higher than he could afford to pay and that his attorney had advised against it.

Defendant first argues that the pleadings and the finding of the court are based upon an alleged tort committed by defendant, while the proof shows that defendant's liability, if any, is contractual. While, as a general rule, an action of the fourth class is whatever the evidence makes it and it is only necessary in the statement of the claim to set forth the nature of the tort so as to reasonably inform the defendant of the nature of the case he will be called upon to defend, yet it seems to be contrary to good practice to have the statement of claim allege one cause of action with a judgment of the court that the defendant is guilty as charged, when the evidence shows an entirely different cause of action. Pitte v. Kelly, 234 Ill. App. 403; Walter Cabinet Co. v. Russell, 250 Ill. 416. Here, the evidence shows that the relation between plaintiff and defendant was that of debtor and creditor and an action in assumpsit would seem to have been the proper form. Kerwin v. Barnatchett, 147 Ill. App. 561; Strauss v. Gilbert, 135 Ill. App. 130. Defendant's brief suggests the injustice of permitting plaintiff to declare in an action ex delicto and thus preclude defendant from filing a set-off for payments due under the contract.

While we are inclined to hold the judgment erroneous in this respect, we prefer to rest our decision upon the facts presented by the record.



and that plaintiff then said he would call at the office of 1211  
to get his copy of the contract. Witness Turner says that he  
went in a day or two thereafter - which would be about the 7th or  
10th - and found that plaintiff was making no progress with the  
wife and gave an explanation that he did not have the money  
with which to pay the material; that on the 12th he called again  
and was then told by plaintiff that he did not want the job for  
the reason that the contract was signed with the wife and  
to pay and that his attorney had advised against it.

Defendant first argues that the plaintiff was not

liable of the count as based on alleged facts admitted by  
defendant, while the first count was based on plaintiff's testimony, it  
any, is contradictory. While, as a general rule, an action of the

fourth class is whatever the evidence shows it to be.

necessary in the statement of the claim in the fourth class  
of the case as to the plaintiff's liability. The statement of the nature  
of the case will be defined when it is shown that it is a case of an  
action of good practice to have the statement of claim allege

one count of action with a judgment of the court and the other  
and is fully as correct, when the evidence shows as admitted.

It is the cause of action. Winn v. Winn, 221 Ill. 405, 406;

Winn v. Winn, 221 Ill. 405, 406; Winn v. Winn, 221 Ill. 405, 406;

from that the relation between plaintiff and defendant was that

of debtor and creditor and an action in assumpsit would seem to

have been the proper form. Winn v. Winn, 221 Ill. 405, 406.

Winn v. Winn, 221 Ill. 405, 406; Winn v. Winn, 221 Ill. 405, 406;

suggests the instruction of permitting plaintiff to declare in an

action on behalf and two proceeds defendant from filing a

check-off for payments due under the contract.

While we are inclined to hold the judgment erroneous

in this respect, we prefer to leave our decision upon the issue

presented by the record.

It is argued by plaintiff that the contract was not binding upon him until he received notice that it had been accepted by defendant or approved by the general manager; that it was an offer subject to revocation by him until such notice was received. We do not find any decided cases supporting this contention. The general rule is that a contract is binding when signed by both parties and we know of no cases holding that in the absence of any provision in the contract notice must be given to render it binding. In Brach v. Matteson, 298 Ill. 387, cited by plaintiff, the contract contained an express provision that the acceptance must be made in writing within 48 hours, and acceptance was made within the time limit. In Weber v. Hulbert, 225 Ill. App. 321, cited by plaintiff, it was held that there never was any binding agreement either of the purchaser to buy or of the seller to sell, but that the contract was conditional in its terms.

Defendant presents many cases tending to support the proposition that, where one party presents a contract for signature to the other which is accepted by the person to whom it is tendered, such person is thereby bound, even though the other party may not sign it. Whether or not this is the rule applicable in some cases, it is unnecessary to discuss. The record before us shows that the plaintiff executed the contract on March 6th in duplicate and on the following day, March 7th, defendant executed it. It thereby became a valid, unconditional contract between the parties. If we should consider the provision in the receipt that the sale was subject to the approval of the general manager, the execution of the contract by defendant on March 7th operated as such approval and made the contract unconditional and binding upon both parties. The notice of revocation was not received until March 12th, which was too late to operate as a revocation.



It is argued by plaintiff that the contract was not binding upon him until he received notice that it had been accepted by defendant or approved by the general manager; that it was an offer subject to revocation by him until such notice was received. We do not find any decided cases supporting this contention. The general rule is that a contract is binding when signed by both parties and we know of no cases holding that in the absence of any provision in the contract notice must be given to render it binding. In Woods v. Harrison, 229 Ill. 387, cited by plaintiff, the contract contained no express provision that the acceptance must be made in writing within 48 hours, and acceptance was made within the time limit. In Wheat v. White, 229 Ill. 421, cited by plaintiff, it was held that in the absence of any binding agreement of the plaintiff to pay or of the seller to sell, but that the contract was conditional in its terms.

Defendant presents many cases tending to support the proposition that, where one party presents a contract for signature to the other which is accepted by the other as such it is binding, even though it is merely executory, even though the other party may not sign it. Whether or not this is the rule applicable in some cases, it is unnecessary to discuss. The record before us shows that the plaintiff executed the contract on March 28th in full and on the following day, March 29th, defendant executed it. It thereby became a valid, unconditional contract between the parties. If we should consider the provision in the contract that the sale was subject to the approval of the general manager, the obligation of the contract is absolute in favor of the party who made approval and made the contract unconditional and binding upon both parties. The failure of registration has not rendered it null and void, which was too late to operate as a rescission.



Kellomä v. Martte, 323 Ill. 443; Ullsperger v. Meyer, 217 Ill. 262; Forthman v. Detert, 206 Ill. 159.

Plaintiff claims that after he signed the contract a change was made in the terms. The contract was upon a printed form which provided that the purchaser should pay all general taxes due and payable on and after "January 1, 1926;" this year was changed to "1930." As the contract was made in March, 1929, it is apparent that the purchaser would hardly pay the back taxes which, as the record shows, had already been paid. Wolfson testified that he called plaintiff's attention to the year 1926 printed in the contract and told him that he would have this corrected by some one who had authority to do so. Mr. Handley, a trust officer of defendant and in charge of this particular matter, testified that he struck out the printed date "1926" and wrote in lieu thereof the year "1930," as the taxes for 1926 and 1927 had been paid and it was not fair to the purchaser to ask him to assume all the taxes paid after January 1, 1926.

The facts call for the application of McCrystall v. Connor, 331 Ill. 107, where a similar alteration was made, the court holding this was for the benefit and interest of the purchaser and therefore did not change the legal effect of the contract to his injury. In Page on The Law of Contracts, 2nd ed., vol. I, sec. 179, page 263, the author says:

"The addition of a gratuitous promise to the acceptor does not render it inoperative as an acceptance."

See also Warren Bros. Co. v. King, 96 Minn. 190. The change was to the advantage of the plaintiff and did not make the contract void.

We held that the contract was binding upon the parties and that the attempt by plaintiff to revoke it was not effectual.

Reynolds v. United States, 98 U.S. 145; Ex parte Jackson, 9 U.S. 715; Ex parte

Reynolds, 9 U.S. 715; Ex parte

Plaintiff claims that after he signed the contract

a contract was made in the State. The contract was given a signed

form which provided that the partnership should not be dissolved

unless the two parties or one of them "dies," "becomes

insane," "is convicted of a crime," "is absent from the State," "is

incapacitated," "is a minor," "is a married woman," "is a

minor," "is a married woman," "is a minor," "is a married

woman," "is a married woman," "is a minor," "is a married

woman," "is a married woman," "is a minor," "is a married

woman," "is a married woman," "is a minor," "is a married

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woman," "is a married woman," "is a minor," "is a married

woman," "is a married woman," "is a minor," "is a married

woman," "is a married woman," "is a minor," "is a married

The contract provides that, in case of default of the contractor to make any payments or perform any of its covenants, all payments made thereunder should be retained by the defendant as liquidated damages.

The judgment is reversed with a finding of fact and judgment that plaintiff take nothing will be entered in this court.

REVERSED WITH FINDING OF FACT.

Matchett, P. J., and O'Connor, J., concur.

#### FINDING OF FACT.

We find that the contract in question was binding upon both parties thereto; that it was not revoked and that the alteration did not make the contract void.



The contract provides that, in case of default of the purchaser to make any payments or perform any of its covenants, all payments made hereunder shall be retained by the mortgagee as liquidated damages.

The instrument is returned with a finding of fact and judgment that plaintiff's claim should be entered in this court.

REVEREND THE VENERABLE OF THE COURT  
In testimony whereof, I have hereunto set my hand and the seal of the Court at New York, this 1st day of January, 1900.

VERIFIED BY THE COURT  
To this that the contents of the petition are true and correct, I, the undersigned, Clerk of the Court, do hereby certify.

34419

LOUIS GOLDBERG,  
Appellee.

vs.

CHICAGO ASSOCIATION OF  
CREDIT MEN, a Corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 649

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for injuries sustained as a result of a fall into an elevator shaft operated by defendant and upon trial by a jury had a verdict of \$3,000. From the judgment thereon defendant appeals.

Plaintiff, together with his father, Abe Goldberg, and two brothers, Ben and Mandel, were engaged in the trucking business. Defendant is engaged in the storage and sale of stocks of goods for the benefit of creditors acquired in connection with the liquidation of insolvent estates. The building in which the accident happened is 69 East South Water street, four stories high, with a basement, about 130 feet long and 30 or 32 feet wide. The third and fourth floors were occupied by defendant. The elevator shaft in question located next to the east wall at the rear of the building ran down to a loading platform opening into an alley. From the outer edge of this platform to the elevator was approximately 10 feet. There was a slight decline from the outer edge to the elevator. At each floor the elevator shaft was equipped with mechanical wooden gates which were opened and closed by an operator and it was possible for the operator to start the elevator from the first floor without closing the gates.

On the afternoon of Saturday, September 26, 1925, plaintiff was injured by falling from the loading platform into the elevator shaft as he was engaged in loading certain goods

34412

LOCAL OFFICE

APPEALS

VS.

UNION ASSOCIATION OF  
CREDITORS, a corporation,  
Appellant.

OF THE COURT

259 L.A. 648

MR. JUSTICE McREYNOLDS DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for injuries sustained as a result of a fall into an elevator shaft operated by defendant and upon trial by a jury had a verdict of \$1,000. From the judgment thereon defendant appeals.

Plaintiff, together with his father, the defendant,

and two brothers, Ben and Harold, were engaged in the trucking business. Defendant is engaged in the storage and sale of stacks of goods for the benefit of creditors accepted in connection with the liquidation of insolvent estates. The building in which the

accident happened is 69 East South Water Street, four stories high, with a basement, about 130 feet long and 30 or 32 feet wide. The third and fourth floors were occupied by defendant. The ele-

vator shaft in question located next to the east wall of the rear of the building ran down to a loading platform opening into an alley. From the outer edge of this platform to the elevator was approximately 10 feet. There was a slight decline from the outer

edge to the elevator. At each floor the elevator shaft was equipped with mechanical wooden gates which were opened and closed by an operator and it was possible for the operator to start the elevator from the first floor without closing the gates.

On the afternoon of Saturday, September 28, 1925,

plaintiff was injured by falling from the loading platform into the elevator shaft as he was engaged in loading certain goods



into the elevator to be taken to the floors occupied by the defendant.

Plaintiff was lawfully on defendant's premises as an invitee. A Mr. Harry Bloom had bought some goods from defendant but because of some misunderstanding or dissatisfaction stopped payment on his check to defendant for the goods purchased and made complaint to Mr. Crowley, defendant's manager, who told him that if Bloom would return the goods at his own expense, defendant would accept them. Thereupon Bloom took the keys of the store where he had placed the goods to defendant's office and left them there.

Benjamin Goldberg testified that on Friday afternoon, the day before the accident, Crowley gave him the keys left by Bloom for the premises where the goods were stored. The witness told Crowley that he was going to get the goods the first thing in the morning, to which Crowley assented. Mandel Goldberg testified that on the following morning he took a truck load of the goods to defendant's place of business, arriving about ten o'clock a. m., and that Crowley gave him the use of a flat truck and the witness took the goods on the elevator to the third floor; that the elevator was run by James Evans, but the witnesses refer to him as "Dad." Mandel Goldberg finished his work about 12:15 p. m., and his brother Louis, the plaintiff here, was to bring the balance of the stuff.

Louis Goldberg testified that he got the keys of the Bloom premises from his older brother, Ben, and after loading all the goods not taken by Ben on a motor truck he started for defendant's premises; that when he got there he saw his brother, Mandel, pulling out; that plaintiff had a colored boy with him, George Scott, as a helper, but when he met Mandel at the premises Scott went away with Mandel; that plaintiff went up to the third floor of defendant's premises and reported to Crowley that he had a load

into the elevator to be taken to the floor occupied by the defendant.

Plaintiff was traveling on defendant's premises as an

invited. A Mr. Henry Bloom had bought some goods from defendant

but because of some misunderstanding or dissimulation stopped

payment on his order to defendant for the goods purchased and made

complaint to Mr. Crowley, defendant's manager, who told him that

if Bloom would return the goods at his own expense, defendant would

accept them. Thereupon Bloom took the keys of the store where he

had placed the goods to defendant's office and left them there.

Defendant's witness testified that on this day at 12:15 p. m.,

the day before the accident, Crowley gave him the keys left by

Bloom for the premises where the goods were stored. The witness

told Crowley that he was going to get the goods and that he was in

the store, at which Crowley assented. Mendel Goldberg testified

that on the following morning he took a front load of the goods to

defendant's place of business, arriving about ten o'clock a. m.,

and that Crowley gave him the use of a lift truck and the witness

took the goods on the elevator to the third floor; and the eleva-

tor was run by James Evans, and the witness never to him as "Doc."

Mendel Goldberg testified his work about 12:15 p. m., and his

brother Lewis, the plaintiff here, was so doing the same at the

store.

Lewis Goldberg testified that he got the keys of the

Bloom premises from his older brother, Sam, and after loading all

the goods not taken by Sam on a motor truck he started for defendant's

place of business; that when he got there he saw his brother, Mendel,

standing there; that plaintiff had a colored boy with him, George

Good, as a helper, but when he saw Mendel at the premises he

went away with Mendel; that plaintiff went up to the third floor

of defendant's premises and reported to Crowley that he had a load



for him from Bloom's and was told by Crowley to take the small truck called a "dolly" and use it in bringing up the goods; that Crowley told Evans to run the elevator for plaintiff. Plaintiff did not know how to operate the elevator. Evans, about 73 years of age at this time, died some two years thereafter and before the trial. This small truck or "dolly" is about two feet by one and a half feet wide, about three inches high from the floor, on four casters, without sides and with a rope attached to one end.

Plaintiff testified that, as he loaded the goods onto the "dolly" from his truck he would walk backwards towards the elevator shaft on account of the incline in the loading platform and for the purpose of holding the goods onto the "dolly." These goods were small pieces which would seem to require some such care to prevent them from falling off the "dolly." As plaintiff would approach the elevator shaft and was three or four feet from it, he would turn to see if Evans, the operator, was there and would receive a signal from him to come ahead and then he would pull the "dolly" onto the elevator and be taken to defendant's third floor. He had made 12 or 13 trips in this manner before the accident and the last load was handled in the same way; he walked backwards towards the elevator with his hands and arms supporting the load and when he was a distance of three or four feet from the elevator he turned to see if Evans was there and saw Evans at the elevator, and Evans indicated he should come ahead, whereupon plaintiff continued backwards, but when he arrived at the entrance to the elevator shaft the elevator had in the meantime ascended and plaintiff fell into the shaft together with the goods on the "dolly". Plaintiff received injuries to the left foot and ankle joint.

It is argued that plaintiff was guilty of contributory negligence both as a matter of law and as a matter of fact. The



for him from Brown's and was told by Crowley to take the small  
 truck called a "dolly" and use it in bringing up the goods; that  
 Crowley told Evans to run the elevator for plaintiff. Plaintiff  
 did not know how to operate the elevator. Evans, about 25 years  
 of age at this time, died some two years thereafter and before the  
 trial. This small truck or "dolly" is about two feet by one and  
 a half feet wide, about three inches high from the floor, on four  
 casters, without sides and with a rope attached to one end.  
 Plaintiff testified that, as he loaded the goods onto  
 the "dolly" from his truck he would walk backwards toward the el-  
 evator shaft on account of the incline in the loading platform and  
 for the purpose of holding the load onto the "dolly". These goods  
 were small pipes which would seem to require some work and to  
 prevent the load falling off the "dolly". As plaintiff would ap-  
 proach the elevator shaft and was about to load the load, he  
 would turn to see if Evans, the operator, was there and would re-  
 ceive a signal from him to come ahead and then he would push the  
 "dolly" onto the elevator and be taken to defendant's third floor.  
 He had made 12 or 13 trips in this manner before the accident and  
 the last load was handled in the same way; he walked backwards  
 toward the elevator with his hands and arms supporting the load  
 and when he was a distance of three or four feet from the elevator  
 he turned to see if Evans was there and saw Evans at the elevator,  
 and Evans indicated he should come ahead, whereupon plaintiff con-  
 tinued backwards, but when he arrived at the entrance to the el-  
 evator shaft the elevator had in the meantime descended and plaintiff  
 fell into the shaft together with the goods on the "dolly".  
 Plaintiff received injuries to the left foot and ankle, fatal.  
 It is argued that plaintiff was guilty of contributory  
 negligence both as a matter of law and as a matter of fact. The

question of contributory negligence was properly submitted to the jury. From the fact that plaintiff stepped backwards into the shaft when he had seen the elevator in place a few seconds before and had received the operator's signal to come ahead and from the fact that this movement had been performed by plaintiff some 12 or 15 times immediately before with safety, it cannot be said that all reasonable minds would conclude that plaintiff was guilty of contributory negligence. The jury also could properly conclude that under the circumstances, in the exercise of due caution, plaintiff had a right to rely upon the evidence of his eyes and ears that the elevator would remain in position until he had entered it and that in thus doing he was not guilty of contributory negligence.

Was the defendant guilty of negligence as charged? The jury evidently accepted plaintiff's version of the accident. There was some evidence tending to show that Evans was not operating the elevator at the time and some surmise that plaintiff's helper, Scott, was operating it. There was sufficient evidence from which the jury could conclude that Scott was not on the premises at the time of the accident and that plaintiff's testimony that Evans, defendant's employee, operated it that afternoon was the true version. Upon this theory it is self-evident that the accident happened because defendant's employee negligently started the elevator upward before plaintiff could step into it with the truck.

Plaintiff argues somewhat at length that, if the jury accepted his version as true, it established a case of wilful and wanton negligence based upon the assumption that Evans lured plaintiff to the elevator and then caused it to ascend so that plaintiff would fall into the shaft. This is based solely on surmise. The jury could believe that Evans, an elderly man, more likely through inadvertence or inattention caused the elevator to



question of contributory negligence was properly submitted to the jury. From the fact that plaintiff stepped backwards into the shaft when he had seen the elevator in place a few seconds before and had received the operator's signal to come ahead and from the fact that this movement had been performed by plaintiff some 15 or 16 times immediately before with safety, it cannot be held that all reasonable minds would conclude that plaintiff was guilty of contributory negligence. The jury also could properly conclude that under the circumstances, in the exercise of the duties, plaintiff had a right to rely upon the evidence of his eyes and ears that the elevator would remain in position until he had entered it and that in doing so he was not guilty of contributory negligence. Was the defendant guilty of negligence as charged? The jury entirely accepted plaintiff's version of the accident. There was some evidence tending to show that Evans was not standing on the elevator at the time and some evidence that plaintiff's version, was operating it. There was substantial evidence from which the jury could conclude that Scott was not at the controls at the time of the accident and that plaintiff's testimony that Evans, defendant's employee, operated it that afternoon was the true version. Upon this theory it is self-evident that the accident happened because defendant's employee negligently started the elevator upward before plaintiff could step into it with the trunk. Plaintiff argues somewhat at length that, if the jury accepted his version as true, it established a case of willful and wanton negligence based upon the assumption that Evans knew plaintiff to be on the elevator and knew it was unsafe to start the elevator would fall into the shaft. This is based solely on surmise. The jury could believe that Evans, an elderly man, who likely never had any experience in handling the elevator in



ascend. Furthermore, we do not find any cases deciding that where the evidence tends to prove a case of wilful negligence which is not alleged in the declaration, the defendant is not therefore liable for simple negligence. Defendant cites Illinois Central R. R. Co. v. Richer, 202 Ill. 556, but this merely holds that, where it is essential to recovery to allege and prove wilful negligence, an allegation and proof of simple negligence are not sufficient. In Robbins v. Illinois Power & Light Corp., 255 Ill. App. 106, where the declaration contained a count alleging wilful negligence, it was held the proof did not support this count. No case has been cited which supports defendant's contention in this respect. Furthermore, if, as defendant contends, a different case was made out than alleged in the declaration, this amounts to a variance and the question of variance cannot be raised for the first time upon appeal. Babcock v. Harresh, 310 Ill. 413, and many other cases.

At the close of the evidence defendant filed an additional plea to the effect that both defendant and plaintiff were automatically subject to the provisions of the Workmen's Compensation act, and that therefore plaintiff could not recover against defendant in a common law action. No evidence was introduced to support this plea, but defendant argues that, as it operates a warehouse it comes within the classification of business declared by the Workmen's Compensation act to be extra-hazardous. While paragraph 4, section 3 of the act declares the operation of warehouses or general or terminal storehouses extra-hazardous, the Supreme court has held that this does not apply indiscriminately to all warehouses but only to those which, as a matter of fact, are extra-hazardous, saying that the legislature did not mean to include under such section any storehouse or place where goods and articles are stored when, in fact, there is no hazardous occupa-

second. Furthermore, we do not find any cases deciding that where the evidence tends to prove a case of willful negligence which is not alleged in the declaration, the defendant is not therefore liable for simple negligence. Defendant cites Illinois Central R. Co. v. Chicago, St. P. & N.W. Ry. Co., 208 Ill. 580, but this merely holds that, where it is essential to recovery to allege and prove willful negligence, an allegation and proof of simple negligence are not sufficient. In Robinson v. Illinois Power & Light Corp., 230 Ill. App. 100, where the declaration contained a count alleging willful negligence, it was held the proof did not support this count. No case has been cited which suggests defendant's contention in this respect. Furthermore, if, as defendant contends, a different case was made out than alleged in the declaration, this amounts to a variance and the question of variance cannot be raised for the first time upon appeal. Illinois v. Chicago, St. P. & N.W. Ry. Co., 230 Ill. 580, and many other cases.

As the issue of the evidence defendant filed an affidavit filed to the effect that both defendant and plaintiff were automatically subject to the provisions of the Workmen's Compensation Act, and that therefore plaintiff could not recover against defendant in a common law action. No evidence was introduced to support this plea, and defendant argues that, as it operated a warehouse it comes within the classification of business declared by the Workmen's Compensation Act to be a business. This paragraph 4, section 3 of the act declares the operation of warehouses or general or terminal storerooms such as defendant, the Supreme Court has held that this does not apply individually to all warehouses but only to those which, as a matter of fact, are extra-business, saying that the legislature did not mean to include under such section any storerooms or places where goods and articles are stored when, in fact, there is no business connection.



tion of any employee working therein. Omaha Supply Co. v. Indus. Com., 306 Ill. 384; Armour & Co. v. Indus. Board, 275 Ill. 328. Defendant's warehouse room extends the entire length of the building and is lined with shelving on either side and has an office in the rear. There is no dangerous machinery or equipment for the conduct of its business. The premises seem to have been used more as a salesroom than as a storage warehouse.

Defendant's plea further alleged that defendant was within the provisions of the Compensation act by reason of paragraph 8 of section 3. We are not told by defendant's first brief in just what respect this section of the act is applicable. Paragraph 8 of this section refers to any enterprise in which there are municipal ordinances regulating the machinery or appliances, but no ordinance was introduced on the trial and none is in the record before us. We do not understand how we can take judicial notice of an ordinance which, so far as the record shows, was not brought to the attention of the trial court.

However, the best answer to the argument that defendant and plaintiff are under the Workmen's Compensation act is the evidence of plaintiff that he was not an employee of A. Goldberg and Sons, but that he was a partner. He testified that he received no weekly wage, but draw by check whatever he needed and whatever money any partner drew was charged against him. Defendant argues that plaintiff could not have been a partner because there was no accounting, but the jury was justified from plaintiff's uncontradicted evidence that "we all had charge of the money of the business so far as money is concerned - just my Dad, my older brother and myself," in believing that plaintiff was a partner in the concern and therefore did not come under the provisions of the Compensation act.



list of my employees working for me. (Exhibit 100, N.Y. 100-10000)

Vol. 100, N.Y. 100-10000; Exhibit 100, N.Y. 100-10000, 200 N.Y. 100-10000.

Defendant's witnesses from outside the office of the building are in line with everything on either side and has an office in the room. There is no independent testimony or evidence for the content of the business. The witnesses seem to have been used more as a witness than as a witness themselves.

Defendant's plan further alleged that defendant was

within the provisions of the Constitution and by reason of paragraph

2 of section 1. It was not left by defendant's first party in

just what respect this section of the act is applicable. Paragraph

2 of this section refers to any order, plan or policy which was made

which defendant testified the defendant, or defendant, but no

evidence was introduced on the bill and none is in the record

before us. It is not understood how we can also include evidence

of an employee which, as far as the record shows, was not brought

to the attention of the trial court.

However, the first answer to the argument that defendant

and the plaintiff are under the defendant's Constitution and is the

evidence of plaintiff that he was not an employee of A. Defendant

and then, but that he was a partner. He testified that he received

no money at all, but that he was a partner and received

money and property from the defendant and his. Defendant argues

that plaintiff would not have been a partner because there was no

agreement, but the jury was testified from plaintiff's answer

testified evidence that "we all had shares of the money of the

business as far as money is concerned - just my and, my share

for me and myself." In believing that plaintiff was a partner in

the business and therefore all the same under the provisions of

the Constitution and.

The court ruled properly in sustaining plaintiff's objection to the offer of proof of the prior habits of Evans, defendant's elevator operator. Evidence of habits are admissible under certain circumstances, where there are no eye witnesses to the accident. That is not this case.

Complaint is made that the court improperly modified instructions numbers 8 and 15 given at defendant's request. We have examined these instructions and are of the opinion that these criticisms are without merit.

Upon the facts we cannot say that the jury was not justified in reaching the conclusion that plaintiff had sufficiently proven the allegations of his declaration, and as there were no procedural errors upon the trial the judgment must be affirmed.

**AFFIRMED.**

**Hatchett, P. J., and O'Connor, J., concur.**

The court ruled properly in sustaining plaintiff's objection to the offer of proof of the prior habits of Brown, defendant's sister's operator. Evidence of habits are inadmissible under certain circumstances, where there are no witnesses to the accident. That is not this case.

Complaint is made that the court improperly admitted instructions number 1 and 15 given as defendant's request. We have examined these instructions and are of the opinion that these instructions are without merit.

Upon the facts we cannot say that the jury was not justified in reaching the conclusion that plaintiff had negligently gotten the allegation of his declaration, and as there were no material facts upon the trial the jury was not so misled.

REVEREND.

Witness, R. J. and O'Connor, J., court.



34448

SUSANNA TATTER and GUSTAV TATTER,  
Appellants,

vs.

BASIL MAXANT,  
Appellee.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 649<sup>2</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by complainants from an order which sustained defendant's demurrer to their fourth amended bill of complaint and dismissed the bill for want of equity.

Complainants in their brief filed in this court have so completely ignored the requirements of our Rule 19 as to justify us in striking the same. However, to avoid delay and expense to complainants, we have considered the matter upon the briefs presented.

The bill of complaint is an attempt to state a case which would warrant a decree for an accounting and makes as a part thereof a trust agreement executed October 10, 1923, between Gustav Tatter, party of the first part, Henry W. Pfaff, party of the second part, and Basil Maxant, party of the third part, in which the first and second parties agreed to sell to the third party an undivided one-third of their interest in certain real estate in Cook county. This agreement is rather lengthy but purports to provide for the management of the property and the disposition of certain bonds, securities and moneys. The bill attempts to charge the defendant Maxant with misappropriation or improper disposition of certain moneys, bonds and securities, contrary to the trust agreement.

Two grounds of demurrer were presented and are argued by the defendant. The first is that the bill is uncertain, confused and obscure, and therefore demurrable. Falor v. Doubet,

DEPARTMENT OF JUSTICE  
WASHINGTON, D. C.

1913

RECEIVED  
JANUARY 10, 1913

DEPARTMENT OF JUSTICE  
WASHINGTON, D. C.

RECEIVED  
JANUARY 10, 1913

RECEIVED  
JANUARY 10, 1913

This is an appeal by complainant from an order which sustained defendant's demurrer to their fourth amended bill of complaint and dismissed the bill for want of equity. Complainant in their brief filed in this court have so completely ignored the requirements of our Rule 17 as to justify us in striking the same. However, to avoid delay and expense in complaints, we have considered the matter upon the briefs presented.

The bill of complaint is an attempt to state a case which would warrant a decree for an accounting and make as a part thereof a trust agreement executed October 10, 1903, between George Foster, party of the first part, Henry W. Hall, party of the second part, and Basil Moxam, party of the third part, in which the first and second parties agreed to sell to the third party an undivided one-third of their interest in certain real estate in Cook county. This agreement is rather lengthy but purports to provide for the management of the property and the disposition of certain bonds, securities and money. The bill attempts to charge the defendant agent with misappropriation or improper disposition of certain money, bonds and securities, contrary to the trust agreement.

Two grounds of demurrer were presented and are argued by the defendant. The first is that the bill is uncertain, vague and obscure, and therefore demurrable. Wainwright v. Wainwright.



164 Ill. App. 433. We are inclined to hold the point well taken, as appears in the following particulars:

After setting forth that under the trust agreement the defendant should sell \$52,000 worth of bonds, the bill, without alleging that he ever had or sold said bonds, charges that "he did appropriate the proceeds therefrom to his own personal use and benefit so far as your petitioners herein are advised or able to ascertain without the aid of this Honorable court."

From the trust agreement it appears that \$42,000 worth of these bonds were held by the Suburban Trust & Savings Bank as collateral security for a note of Gustav Tatter and Henry W. Pfaff, and there is no allegation that said note was ever paid or said collateral ever delivered to or received by defendant. The trust agreement further provided that said bonds should be deposited in the Maxant-Tatter Building Account when the indebtedness for which they were being then held had been paid, and held by defendant as trustee when the obligations for which they were pledged had been satisfied, but there is no allegation that these obligations were satisfied.

The bill further alleges that defendant did not deposit some \$15,000 in cash in the Foreman Bros. Banking Company into the Maxant-Tatter Building Account, but that "he has appropriated said sum to his own personal use and benefit so far as your petitioners are advised or able to ascertain." The bill does not allege that defendant ever received said money or could have drawn it from the deposit with the Foreman Bros. Banking Company so as to transfer the same into the Maxant-Tatter Building Account.

The bill attempts to charge that defendant did not deposit the sum of \$2,000 into the Maxant-Tatter Building Account but appropriated it to his own personal use "so far as your



144 Ill. App. 433. We are inclined to hold the point well taken.

as appears in the following particulars:

After setting forth that under the trust agreement

the defendant should sell the two lots of land, the bill, without

alleging that he ever had or sold bonds, charges that "he

did appropriate the proceeds therefrom to his own personal use and

benefit as far as your petitioners herein are advised or able to

ascertain without the aid of this Honorable court."

Then the first paragraph is amended that the two

lots of land were sold by the defendant to the defendant

and he collected therefrom the sum of \$10,000 and he

is guilty, and there is no allegation that said money was ever paid

or sold collected over delivered to or received by defendant.

The first paragraph further provided that said bonds should be

deposited in the Mercantile Building account when the interest-

ness for which they were being then held had been paid, and that

by defendant as trustee when the obligations for which they were

pledged had been satisfied, but there is no allegation that those

obligations were satisfied.

The bill further alleged that defendant did not de-

posit said \$10,000 in cash in the Mercantile Building Company

have the Mercantile Building account, but that "he has appropri-

ated said sum to his own personal use and benefit as far as your

petitioners are advised or able to ascertain." The bill does not

allege that defendant ever received said money or could have drawn

it from the deposit with the Mercantile Bldg. Building Company as an

to transfer the same into the Mercantile Building account.

The bill attempts to charge that defendant did not

deposit the sum of \$10,000 into the Mercantile Building account

but appropriated it to his own personal use "as far as your

petitioners are able to ascertain." The bill does not allege who held said deposit or that it was ever received by defendant.

There is also a similar allegation with reference to a sum of \$6992, which charges that defendant did not deposit the same into the Maxant-Tatter Building Account, "but has appropriated said moneys to his own personal use and benefit so far as your petitioners are able to ascertain or know." There is no allegation that defendant had this money in his possession.

It will be noted that there are no direct charges of misappropriation, neither directly nor upon information or belief. They are wholly negative in character, to the effect that complainants do not know whether misappropriations have occurred.

There is also a charge that defendant did not make a quarterly distribution of a surplus, as provided for in the trust agreement, but the bill does not allege that there ever was any surplus.

In this and other particulars the bill was properly held demurrable as uncertain and obscure.

Another ground presented by the demurrer and argued by defendant is that Gustav Tatter is not qualified to file this bill for the reason, as shown on the face of the bill itself, that he was adjudged a bankrupt in the United States District Court for the Northern District of Illinois, on or about May 1, 1939; that he was a voluntary bankrupt; that Harold G. McKey was appointed trustee in bankruptcy and was still acting as such trustee when the fourth amended bill was filed.

It has been held in a number of cases that, where a bill shows upon its face a want of capacity on the part of a complainant to file the bill, the proper method of taking advantage of this defect is by demurrer. Franklin Union v. People, 220 Ill. 355; City of Chicago v. Cameron, 22 Ill. App. 91.

In Scheidt v. Goldsmith, 103 Ill. App. 623, this







court said of a bankrupt plaintiff that "being civilliter mortuus, appellee could not commence or prosecute his suit against appellant, and had such fact been made known to the court the suit would have been dismissed." In Johnson v. Collier, 222 U. S. 538, it was held that, while there may be some conflict in the decisions as to whether a bankrupt may begin a suit in the time which intervenes between the filing of the petition of the bankrupt and the election of the trustee, upon the appointment and qualification of the trustee such trustee becomes vested by operation of the law with the title of bankrupt. This was followed in Daniger, etc. Oil Co. v. Smith, 276 U. S. 542.

Complainants' brief does not present any cases holding to the contrary, but argues upon general principles for the right of a bankrupt to proceed to recover property which was not in his possession at the time he was adjudicated a bankrupt and therefore, it is claimed, not vested in the trustee. We cannot agree with this argument. Under the United States Bankruptcy Act the trustee is vested by operation of law with the title of the bankrupt to all "property which, prior to the filing of the petition, he could by <sup>any</sup> means have transferred or which might have been levied upon and sold under judicial process against him." Mason's U. S. Code, Annotated, vol. I, page 577, para. 110a. It is clear that the interest in the funds or properties, which Gustav Tatter seeks to recover in the instant bill, could have been transferred to another or might have been levied upon.

If complainant Gustav Tatter could maintain this bill in his own name and should succeed in recovering funds or property by reason of an agreement which antedates his bankruptcy and the appointment of a trustee, would there be any sound reason to permit Tatter to retain the amount recovered to the exclusion of the

...of a bankruptcy estate that "being a trustee, appellant could not commence or prosecute his suit against appellee and, and had such fact been known to the court the suit would have been dismissed." In Johnson v. Miller, 228 U. S. 525, it was held that, while there may be some conflict in the decisions as to whether a trustee may begin a suit in the state which intervenes between the filing of the petition of the bankrupt and the appointment of the trustee, upon the appointment and qualification of the trustee such trustee becomes vested by operation of the law with the title of bankrupt. This was followed in Hamilton, 241 U. S. 586.

Complainant's brief does not present any other authority to the contrary, but relies upon several provisions of the right of a bankrupt to proceed to recover property which was in his possession at the time he was adjudicated a bankrupt and, therefore, it is claimed, not vested in the trustee. We cannot agree with this argument. When the trustee is appointed and the trustee is vested by operation of law with the title of the bankrupt as all "property which, prior to the filing of the petition, he could by law have transferred or which might have been levied upon and sold under judicial process against him." Bankruptcy Act, U. S. Code, Annotated, Vol. 1, page 877, para. 1101. It is clear that the interest in the funds or properties, which under the Act were to recover in the instant bill, would have been transferred to another or might have been levied upon.

If complainant's brief could maintain this bill in his own name and should succeed in recovering funds or property by reason of an agreement which antedated his bankruptcy and the appointment of a trustee, would there be any sound reason to permit the trustee to retain the amount recovered as the exclusion of the

trustee? Whatever interest or right he had to recover from the defendant was the right of the trustee to recover for the benefit of the estate and its creditors.

For the reasons indicated we are of the opinion that the demurrer was properly sustained and the order dismissing the fourth amended bill for want of equity is affirmed.

AFFIRMED.

Katchett, P. J., and O'Conner, J., concur.



transferred. However, retained in right of him to recover from the  
defendant was the right of him to recover for the  
benefit of the estate and his creditors.

For the reasons indicated we are of the opinion that  
the defendant was properly maintained and the right to maintain the  
plaintiff's estate for the benefit of the estate is affirmed.  
AFFIRMED.

RECORDED, V. 1, and 2, 1902, 1, 1, 1902.

34034

ROSE CHIMPOULIS et al.,  
Defendants in Error.

vs.

JAMES H. HOOPER,  
Plaintiff in Error.

ERROR TO CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 649<sup>3</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error James H. Hooper seeks to reverse a decree of the Circuit court of Cook county by which a sale of certain real estate to him by the bailiff of the Municipal court was held to be null and void.

The record discloses that February 26, 1936, a judgment was entered by the Municipal court of Chicago in favor of the Hogg Coal Co., and against complainants in the sum of \$221.52. Afterwards an execution was issued on this judgment and the property, consisting of a two-flat building in Chicago, owned by complainants, was sold to James H. Hooper for \$269, being the full amount mentioned in the execution. The premises consisted of a two-flat building, one being occupied by the complainants as and for their homestead. The property was worth some \$18,000 and complainants alleged that there was an equity of \$8,000. The homestead was not set off at the time of the sale under the execution. Some time after the sale one of the complainants claimed to have entered into an oral agreement with the defendant, James H. Hooper, whereby the time within which the premises might be redeemed from the sale was extended, for which complainants were to pay \$100 in addition to the amount Hooper paid for the premises at the sale. Afterwards complainants made payments from time to time aggregating \$370.

Hooper's position was that the agreement between the parties was that he was to be paid \$800 by the complainants for which he was to give a quit claim deed to the premises in question.

FROM CHICAGO, ILL.  
JAMES H. HOGGER,  
Plaintiff in Error.

ORDER TO SHOW CAUSE  
IN CASE NO. 10,000.

3291A.640

RE. JAMES H. HOGGER, PLAINTIFF IN ERROR.

By this writ of error James H. Hogger seeks to reverse a decree of the Circuit Court of Cook County by which a sale of certain real estate to him by the Sheriff of the Municipal Court was held to be null and void.

The record discloses that February 28, 1926, a judgment was entered by the Municipal Court of Chicago in favor of the Home Coal Co., and against complainants in the sum of \$231.25. Afterwards an execution was issued on this judgment and the property, consisting of a two-flat building in Chicago, owned by complainants, was sold to James H. Hogger for \$200, below the full amount mentioned in the execution. The premises consisted of a two-flat building, one being occupied by the complainants and one for their homestead. The property was worth some \$10,000 and complainants alleged that there was an equity of \$7,000. The premises were not set off at the time of the sale under the execution. Some time after the sale one of the complainants claimed to have entered into an oral agreement with the defendant, James H. Hogger, whereby the time within which the premises might be redeemed from the sale was extended, for which complainants were to pay \$100 in addition to the amount Hogger paid for the premises at the sale. Afterwards complainants made payments from time to time aggregating \$37. Hogger's position was that the agreement between the parties was that he was to be paid \$600 by the complainants for which he was to give a quit claim deed to the premises in question.



The case was tried before the chancellor who found the facts substantially as contended for by the complainants. The sale in the execution was held to be null and void.

The defendant, Hooper, contends that the decree is wrong and should be reversed because the special prayer contained in the bill of complaint was that complainants be given the right to redeem the premises from the sale, while the relief granted was that the sale was void. In addition to the special prayer for relief there was a prayer for general relief. We have held that where the allegations of the bill and the proof entitle the complainants to relief, it may be granted under the prayer for general relief even though contrary to the special prayer. People v. Eisenberg, 302 Ill. App. 63; Casstevens v. Casstevens, 227 Ill. 547.

A further point is made that the sale was not void because the homestead was not set off as the statute requires, and the argument is that the evidence shows that the complainants had abandoned the premises as a homestead. The evidence is to the effect that the sale was made July 28, 1926; that at that time the complainants were occupying one of the flats as a homestead and that they did not move out of the flat until September, 1927. Where premises are occupied by homestead and the sheriff has attempted to sell the property without setting off the homestead, the abandonment of the premises after the sale will not operate to render the sale valid. Wiggins v. Chance, 54 Ill. 175. In the instant case the complainants being at the time of the sale in occupancy of part of the premises, and a homestead not having been set off as the statute requires, the attempted sale was void and the fact that some time after the attempted sale the part of the premises which were occupied were vacated, did not affect the invalidity of the attempted sale.

Counsel for complainants contend that this writ of

The case was tried before the chancellor who found  
the facts substantially as contended for by the complainants.  
The sale in the execution was held to be null and void.  
The defendant, Wagner, contends that the decree is  
wrong and should be reversed because the special prayer contained  
in the bill of complaint was that complainants be given the right  
to redeem the premises from the sale, while the relief granted was  
that the sale was void. In addition to the special prayer for re-  
lief there was a prayer for general relief. We have held that  
where the allegations of the bill and the proof entitle the com-  
plainants to relief, it may be granted under the prayer for general  
relief even though contrary to the special prayer. Franklin v. Wagner,  
100 N. D. 111, 187.  
A further point is made that the sale was not void  
because the mortgage was not set off as the statute requires, and  
the argument is that the evidence shows that the complainants had  
abandoned the premises as a mortgage. The evidence is to the ef-  
fect that the sale was made July 26, 1927, that at that time the  
complainants were occupying one of the tracts as a mortgage and  
that they did not move out of the first until September, 1927.  
Where premises are occupied by mortgage and the mortgage has al-  
ready been set off the property is not subject to the mortgage,  
the abandonment of the premises after the sale will not operate to  
prevent the sale valid. Franklin v. Wagner, 100 N. D. 111, 187.  
Instant case the complainants being at the time of the sale in  
possession of part of the premises, and a mortgage not having been  
set off as the statute requires, the attempted sale was void and  
the fact that some time after the attempted sale the part of the  
premises which were occupied were vacated, did not affect the in-  
validity of the attempted sale.  
Decree for complainants reversed and case with of

error was prosecuted for delay and therefore this court should assess damages against the defendant, Hooper, in accordance with the provisions of section 23, chapter 33 of the Revised Statutes. Two cases are cited in support of this, but in each of these cases a money judgment was entered. In the instant case there was no money judgment entered against the defendants except for costs. Section 23 provides that in case a judgment or decree is affirmed in whole or in part, the party prosecuting the writ of error or appeal shall pay to the opposite party "a sum not exceeding ten per centum on the amount of the judgment or decree so attempted to be reversed, at the discretion of the court \*\*\* Provided, the supreme court shall be of the opinion that such appeal or writ of error was prosecuted for delay."

From a reading of the statute it is plain that it does not apply to such a case as the one before us.

The decree of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.



error was prosecuted for delay and therefore this court should  
 assess damages against the defendant, Hedges, in accordance with  
 the provisions of section 33, chapter 33 of the Revised Statutes.  
 Two errors are cited in support of this, but in each of these cases  
 a money judgment was entered. In the instant case there was no  
 money judgment entered against the defendant except for costs.  
 Section 33 provides that in case a judgment or decree is affirmed  
 in whole or in part, the party prosecuting the writ of error or  
 appeal shall pay to the opposite party "a sum not exceeding ten  
 per centum on the amount of the judgment or decree so affirmed or  
 reversed, as the discretion of the court may require. The sum  
 so paid shall be at the expense of the party who caused the writ of  
 error to be prosecuted for delay."

From a reading of the statute it is plain that it

does not apply to such a case as the one before us.

The decree of the circuit court of Cook county is

affirmed.

ATTEST.

Notary, P. J. and Secretary, J. J. Hedges.

34204

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

v.

SAMUEL J. ANDALMAN,

Plaintiff in Error.

ERROR TO SUPERIOR COURT,

COOK COUNTY.

259 I.A. 649<sup>4</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error, the defendant, Samuel J. Andelman, seeks to reverse an order of the Superior Court of Cook County, adjudging him guilty of contempt of court and imposing a sentence that he be confined 120 hours in the county jail.

The record discloses that Samuel J. Andelman is an attorney at law, practicing in Cook county, Illinois, and that he represented Violet Healy in her divorce proceeding in the Superior court of Cook county, against Michael J. Healy. A decree for divorce was entered in favor of Violet Healy and she was awarded certain alimony. Afterwards, the alimony not having been paid, proceedings were had in the divorce suit whereby Michael J. Healy was found to be in contempt of court and it was adjudged that he be confined in the county jail for failure to pay the alimony. That order was entered by Judge Williams of the Superior court. A short time thereafter, Michael J. Healy filed a petition for a writ of habeas corpus praying that he be discharged from the custody of the sheriff on the ground that the order committing him to the county jail for nonpayment of alimony was void. The defendant was the sheriff of Cook county, who had Healy in custody. When that matter came on for hearing before Judge McKinley, Andelman was notified for the reason that he represented Mrs. Healy and a hearing was had, at the conclusion of which judgment was entered

THE PEOPLE OF THE STATE OF  
ILLINOIS,  
Respondent in Error,

vs.  
SAMUEL J. KENNELMAN,  
Plaintiff in Error.

IN THE  
COURT OF THE COMMONS,  
JANUARY 1, 1904.

MR. JUSTICE GIBSON delivered the opinion of the court.

By this writ of error, the defendant, Samuel J. Kennel-  
man, seeks to reverse an order of the Superior Court of Cook County,  
adjudging him guilty of contempt of court and imposing a sentence  
that he be confined 180 hours in the county jail.  
The record discloses that Samuel J. Kennelman is an  
attorney at law, practicing in Cook County, Illinois, and that he  
represented Violet Healy in her divorce proceeding in the Superior  
Court of Cook County, against Michael J. Healy. A decree for  
divorce was entered in favor of Violet Healy and she was awarded  
certain alimony. Thereafter, the alimony not having been paid,  
proceedings were had in the divorce suit whereby Michael J. Healy  
was found to be in contempt of court and it was adjudged that he  
be confined in the county jail for failure to pay the alimony.  
That order was entered by Judge Williams of the Superior Court.  
A short time thereafter, Michael J. Healy filed a petition for a  
writ of habeas corpus praying that he be discharged from the custody  
of the sheriff on the ground that the order committing him to the  
county jail for nonpayment of alimony was void. The defendant  
was the sheriff of Cook County, who had Healy in custody. When  
that matter came on for hearing before Judge McKinley, Kennelman  
was notified for the reason that he represented Mrs. Healy and  
a hearing was had, at the conclusion of which judgment was entered



discharging Healy. Some two weeks thereafter, January 21, 1930, Andalman prepared and served a notice on Robert E. Cantwell, Jr., and Harold Sullivan, who were the attorneys for Michael J. Healy in the habeas corpus proceeding. The notice stated that Andalman would appear before Judge McKinley on the next day, January 22, and "present a petition on behalf of Violet Healy, for leave to intervene" in the habeas corpus action and that he would move the court that the order releasing Healy from the custody of the sheriff be expunged from the record in accordance with the prayer of the petition. Andalman appeared before Judge McKinley on the 22nd and presented the matter but the court refused to entertain the motion stating that unless he was shown some authorities to the effect that Andalman's client had a right to intervene, the petition could not be filed and the motion would not be entertained. Afterwards, on the same day, another notice was served by Andalman on the same attorneys notifying them that on the following day, January 23rd, he would appear before Judge McKinley "and present a written motion and sworn petition on behalf of Violet Healy, copies of which have heretofore been served upon you, and shall ask for orders in accordance with said written motion and petition." On the next morning the parties appeared before Judge McKinley in open court and Andalman presented the motion. The court again asked if counsel had found any authorities that would warrant the intervention by Mrs. Healy in the habeas corpus action. The court said he would continue the matter until the following Saturday which was the 25th or two days later, but refused to enter an order continuing the matter and directed Andalman not to file the papers and the minute clerk not to receive them. Thereupon, Andalman left the court room on the 8th floor of the County building and went to the clerk's office on the 4th floor and filed the papers. When the matter came up Saturday morning, January 25th, the matter was again presented by Andalman who stated

discharging Weekly. Some two weeks thereafter, January 21, 1930,  
 Indalman proposed and served a notice on Robert H. Campbell, Jr.,  
 and Louis Sullivan, who were the attorneys for Michael J. Weekly  
 in the habeas corpus proceeding. The notice stated that Indalman  
 would appear before Judge McKelvey on the next day, January 22,  
 and present a petition on behalf of Victor Weekly, for leave to  
 intervene in the habeas corpus action and that he would move the  
 court that the order releasing Weekly from the custody of the sheriff  
 be expunged from the record in accordance with the prayer of the  
 petition. Indalman appeared before Judge McKelvey on the 22nd and  
 presented the matter but the court refused to entertain the motion  
 stating that unless it was shown some authorization by the clerk that  
 Indalman's client had a right to intervene, the petition could not  
 be filed and the motion would not be entertained. Thereupon, on  
 the same day, another notice was served by Indalman on the same  
 attorneys notifying them that on the following day, January 23rd,  
 he would appear before Judge McKelvey and present a written motion  
 and sworn petition on behalf of Victor Weekly, copies of which have  
 heretofore been served upon you, and shall ask for leave to inter-  
 vene with said written motion and petition. On the next morning  
 the parties appeared before Judge McKelvey in open court and Indalman  
 presented the motion. The court again asked if counsel had found  
 any authorities that would warrant the intervention by Mrs. Weekly  
 in the habeas corpus action. The court said he would consult the  
 matter until the following day, which was the 24th of the day  
 later, but refused to enter an order concerning the matter and  
 directed Indalman not to file the papers and the minute clock not to  
 receive them. Thereupon, Indalman left the court room on the 24th  
 floor of the County Building and went to the clerk's office on the 4th  
 floor and filed the papers. When the matter came up Monday morning,  
 January 25th, the matter was again presented by Indalman who stated



to the court that he had filed the papers on the 23rd so that there would be a record of them. The court thereupon entered an order that Andalman show cause why he should not be adjudged in contempt of court for filing the papers contrary to the court's direction.

Afterwards, when the matter came on, the respondent, Andalman, prepared a written answer which the court refused to consider, holding that the contempt was a direct contempt and therefore the answer was improper. The matter was heard and the order adjudging Andalman to be in contempt was entered as above stated.

The respondent contends that he had a right to file the petition on behalf of Violet Healy in the habeas corpus proceeding because she was not an interloper in that proceeding, being a party of interest although she was not technically a party of record. We think it unnecessary to pass upon this contention because it is obvious that the respondent was of the opinion that he had no right to intervene without leave of court, because on the 22 and 23 of January he appeared before the court and presented the petition of Mrs. Healy asking for leave to intervene. Obviously, the petition would have to be filed if she were allowed to intervene. On the 22nd and 23rd the court was of the opinion that Mrs. Healy had not the right to intervene not being a party to the habeas corpus proceeding but stated that if the relator, who was counsel for Mrs. Healy, would produce any authorities showing the court that his impression of the law was correct, the court would entertain the motion to intervene, that unless such authorities were produced, he would not entertain the motion. And on the 23rd, he told the parties to come back on Saturday morning, which was but two days later, and that in the meantime the papers should not be filed.

We think this was reasonable under the circumstances and that the conduct of the relator in deliberately filing the papers on the 23rd, after he left the court room, was wholly unwarranted and a



to the court that he had filed the papers on the 22nd so that there would be a record of them. The court thereupon entered an order that Anderson show cause why he should not be adjudged in contempt of court for filing the papers contrary to the court's direction. Thereupon, when the matter came on, the respondent, Anderson, prepared a written answer which the court refused to consider, holding that the answer was a direct contempt and therefore the answer was improper. The matter was heard and the order adjudging Anderson to be in contempt was entered as above stated.

The respondent contends that he had a right to file the petition on behalf of Violet Healy in the habeas corpus proceeding because she was not an interloper in that proceeding, being a party of interest although she was not technically a party of record. He thinks it unnecessary to pass upon this contention because it is obvious that the respondent was of the opinion that he had no right to intervene without leave of court, because on the 22 and 23 of January he appeared before the court and presented the petition of Mrs. Healy asking for leave to intervene. Obviously, the petition would have to be filed if she were allowed to intervene. On the 22nd and 23rd the court was of the opinion that Mrs. Healy had not the right to intervene without leave of court. Healy had not the right to intervene but being a party to the habeas corpus proceeding she stated that it was the petitioner, who was counsel for Mrs. Healy, would produce any authorities showing the court that his intervention of the law was correct, the court would allow in the motion to intervene, that unless such authorities were produced, he would not entertain the motion. And on the 22nd, he said the petition to come back on Saturday morning, which was two days later, and that in the meantime the papers should not be filed.

It is clear that the respondent under the circumstances and that the conduct of the petitioner in deliberately filing the papers on the 22nd, after he left the court room, was wholly unwarranted and a

contempt of court. The matters having occurred in the presence of the court, it was not necessary that any preliminary affidavit, process or interrogatory be filed. People v. Cochrane, 307 Ill. 126. And if it be conceded as it is argued by the relator, that the contempt, if any, was in the filing of the papers on the 4th floor, which was not in the presence of the court, yet we think this would be a direct contempt because the office of the clerk of court is but a part of the court. People v. Cochrane, supra. Holding, as we do, that the contempt was a direct contempt, the respondent could not be purged by the filing of his answer.

It is further contended that the court should have expunged the order discharging Healy from the custody of the sheriff in the habeas corpus action because Judge McKinley had no jurisdiction to review the order which was entered by Judge Williams, and that sec. 36, of the Habeas Corpus Act, under which the habeas corpus proceeding was brought, is unconstitutional and void. We think neither of these questions is before us. The constitutionality of sec. 36 is waived by the relator by bringing the case to this court. The question before us is not whether Judge McKinley had jurisdiction in the habeas corpus proceeding but whether there was committed a contempt of court by the relator.

The relator further contends that the sentence of 120 hours in jail violates the constitutional provision against cruel and inhuman punishment. We think there is merit in this contention. On the hearing of the contempt matter, the court, in examining the petition presented by the relator in behalf of Violet Healy said: "You have stated in here it is void, and I am going to ask you to show it. I am going to attempt in some way to eliminate the practice that has grown up of incorporating things that the law does not sustain in petitions, and if you will read the law there is any amount of law on contempt that the incorporation in a petition of facts



contempt of court. The matters having occurred in the presence of the court, it was not necessary that any preliminary steps be taken or intervention be filed. People v. Gorman, 207 Ill. 186. And it is conceded as it is agreed by the relator, that the contempt, if any, was in the filing of the papers on the 11th floor, which was not in the presence of the court, yet we think this would be a direct contempt because the office of the clerk of court is but a part of the court. People v. Gorman, supra. Holding, as we do, that the contempt was a direct contempt, the respondent could not be purged by the filing of his answer.

It is further contended that the court should have returned the order discharging Hoely from the custody of the sheriff in the papers origin action because Judge McKinley had no jurisdiction to review the order which was entered by Judge Williams, and that was 26. of the Ex parte ruling of, where when the papers going proceeding was brought, is unconstitutional and void. A check neither of these questions is before us. The constitutionality of sec. 26 is waived by the relator by bringing the case to this court. The question before us is not whether Judge McKinley had jurisdiction in the papers going proceeding but whether there was committed a contempt of court by the relator.

The relator further contends that the sentence of 120 hours in jail violates the constitutional provision against cruel and inhuman punishment. We think there is merit in this contention. On the hearing of the contempt matter, the court, in examining the petition presented by the relator in behalf of Violet Hoely said: "You have stated in here it is void, and I am going to ask you to show it. I am going to attempt in some way to eliminate the practice that has grown up of investigating things that the law does not say in petition, and if you will read the law there is only amount of law on contempt that the incorporation in a petition of facts



which cannot be supported is contempt." And in the order adjudging the relator to be in contempt, the court finds that the relator dictated the petition of Violet Healy and that it contained the following paragraph: "Your petitioner further respectfully represents unto the court that the entire proceedings for habeas corpus herein was void and of no effect and this Honorable Court had no jurisdiction in the said cause and that this Honorable Court had no jurisdiction to enter an order releasing the said Michael J. Healy from the custody of the Sheriff of said Cook County, Illinois."

In the brief filed on behalf of The People in the proceeding before us it is said: "Plaintiff in error says again under head C that none of the language in his motion or petition was objectionable. It is not contended that it was objectionable. The contention of The People is that the defendant sought to file a paper which he had no right to file; that the court denied him on two occasions at least the right to file it and that after being denied the right to file the paper plaintiff in error went from the court room directly to the clerk's office and filed the very papers that the court in the court room had refused to let him file and had ordered him not to file."

We think the admission by counsel for the People that the paragraph quoted from the petition was not objectionable is warranted. A consideration of the paragraph discloses that it merely alleged that the court had no jurisdiction of the habeas corpus matter and the order discharging it was therefore void. This is a mere legal conclusion and we think in no way contemptuous, although it might in law be entirely without merit. Since it is obvious that the court, in considering the extent of the punishment, took this paragraph of the petition into consideration, we think the punishment inflicted was more than the offense warranted or than the court would have ordered had this paragraph not entered into the matter.

which cannot be supported is contempt." and in the order adjudging the relator to be in contempt, the court finds that the relator disobeyed the petition of Victor Healy and that it contained the following paragraphs: "Your petition further respectfully represents unto the court that the entire proceedings for habeas corpus herein was void and of no effect and that Honorable Court had no jurisdiction in the said case and that this Honorable Court had no jurisdiction to enter an order releasing the said Michael J. Healy from the custody of the Sheriff of said Cook County, Illinois."

In the brief filed on behalf of The People in the proceedings before me it is said: "mistaken in error again under head 6 that none of the paragraphs in the motion or petition was objectionable. It is not contended that it was objectionable. The contention of The People is that the defendant sought to file a paper which he had no right to file; that the court denied him on two occasions at least the right to file it and that after being denied the right to file the paper himself in error went from the court room directly to the clerk's office and filed the very papers that the court in the court room had refused to let him file and had ordered him not to file."

We think the submission by counsel for the People that the paragraph quoted from the petition was not objectionable is mistaken. A consideration of the paragraph discloses that it merely alleged that the court had no jurisdiction of the habeas corpus matter and the order adjudging it was therefore void. This is a mere legal conclusion and we think in no way contemptuous, although it might in law be entirely without merit. Since it is obvious that the court, in considering the extent of the punishment, took this paragraph of the petition into consideration, we think the punishment inflicted was more than the offense warranted or than the court would have entered had this paragraph not entered into the matter.



In O'Brien v. International Ladies' Garment Workers' Union, 214 Ill. App. 46, where one was found guilty of contempt of court in violating an injunction and was committed to jail for a term of 75 days, this court held the punishment excessive and reversed the order of commitment for that reason. The case went to the Supreme Court and is entitled Ash Co. v. Garment Workers' Union, 290 Ill. 301, where the judgment of this court was reversed and the cause remanded to this court because there was no finding of fact made. The court there said, (306): "The reason for the reversal of the judgment of the lower court, as stated in the opinion, is that punishment by imprisonment should not have been imposed. Reversing for that supposed error would require the modification of the penalty imposed or remandment to the circuit court.

" \* \* \* Unless the expression in the Appellate Court's opinion that it did not think punishment by imprisonment should have been inflicted indicates that that court found the judgment to be an abuse of the lower court's discretion, it cannot be said that the reversal resulted from the Appellate Court determining that the punishment was excessive and unlawful. In any event, the Appellate Court should, if it concluded it had the power to do so, have modified the punishment or remanded the case to the lower court."

We think the imposition of a fine would subserve the ends of justice, but we are of the opinion that we have no power to modify the order. In these circumstances, the order of the Superior Court of Cook County will be reversed and the matter remanded to that court.

REVERSED AND REMANDED.

McSurely, J., concurs.

Matchett, P. J., dissenting: I think the order should be reversed without remanding.



*[Faint, illegible handwritten text]*

Union, 214 Ill. App. 40, where one was found guilty of conspiracy of sorts in violating an injunction and was committed to jail for a term of 15 days. This court held the punishment excessive and reversed the order of commitment for that reason. The case was so the Supreme Court and is entitled People v. [redacted] 214 Ill. App. 40, where the judgment of this court was reversed and the case remanded to this court because of an error of fact only. The court there said, (214): "The reason for the reversal of the judgment of the lower court, as stated in the opinion, is that the evidence in the case was insufficient to sustain the conviction."

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U.S. DEPARTMENT OF COMMERCE

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to modify the order. In some circumstances, the order of the

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34235

In the matter of the estate of  
MINNIE SCHMIDT, sometimes known  
as Minna Schmidt, and sometimes  
known as Wilhelmina Schmidt,  
deceased,

STATE BANK OF CHICAGO, a cor-  
poration, as executor under the  
last will and testament of said  
Minnie Schmidt, deceased,  
Appellant,

v.

WILHELMINA GROSS, Objector,  
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

259 I.A. 649<sup>5</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Wilhelmina Gross, a beneficiary under the last will and testament of Minnie Schmidt, deceased, filed an objection to the final account of the executor. The final account showed payment by the executor of \$25,000 mentioned in the will, to the trustee named in the will. The objection was that the \$25,000 should bear interest from April 9, 1925, the date of the death of Minnie Schmidt, to December 19, 1927, the date when the payment was made to the trustee. The objection was sustained and the executor appeals.

The facts are stipulated and the controlling question is the meaning of a part of paragraph six of the will. By that paragraph, the testatrix directed her executor to pay the sum of \$25,000 in cash or securities to the trustee. The trustee was directed to invest and reinvest the \$25,000 and the will then continued: "After paying all proper and necessary expenses incurred by said trustee in the care and management of said trust fund, I direct said trustee to pay the net income from said trust fund to my granddaughter, Wilhelmina Gross, in convenient installments to be determined by



In "Gibson v. United States," 191 U.S. 572, 1904,

where one was found guilty of contempt of court in violating an injunction and was committed to jail for a term of 15 days, this court said the punishment excessive and reversed the order of commitment for that reason. The case went to the Supreme Court and is entitled U.S. v. Gibson, 1904, 190 U.S. 572, 1904, where the judgment of this court was reversed and the same returned to this court because there was no finding of fact made. The court then said, (1904): "The reason for the reversal of the judgment of the lower court, as stated in the opinion, is that punishment by imprisonment would violate the prohibition of the Constitution. It is suggested that would violate the prohibition of the Constitution imposed by Amendment 10 of the United States."

"\* \* \* Unless the expression in the Appellate Court's opinion that it did not think punishment by imprisonment should have been inflicted indicates that that court found the judgment to be an abuse of the lower court's discretion, it cannot be said that the reversal resulted from the Appellate Court determining that the punishment was excessive and unlawful. In any event, the Appellate Court should, if it concluded it had the power to do so, have modified the punishment or remanded the case to the lower court."

"We think the imposition of a fine would preserve the ends of justice, and we say so in the opinion and we have no power to modify the order. In this circumstance, the order of the superior court of each county will be reversed and the matter remanded to that court."

"Reversed and remanded."  
No writs, 11. 1904.  
March 11, 1904. I think the order should be reversed without comment."



34235

In the matter of the estate of  
MINNIE SCHMIDT, sometimes known  
as Minna Schmidt, and sometimes  
known as Wilhelmina Schmidt,  
deceased,

STATE BANK OF CHICAGO, a cor-  
poration, as executor under the  
last will and testament of said  
Minnie Schmidt, deceased,  
Appellant,

v.

WILHELMINA GROSS, Objector,  
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The facts are stipulated and the controlling question is the meaning of a part of paragraph six of the will. By that paragraph, the testatrix directed her executor to pay the sum of \$25,000 in cash or securities to the trustee. The trustee was directed to invest and reinvest the \$25,000 and the will then continued: "After paying all proper and necessary expenses incurred by said trustee in the care and management of said trust fund, I direct said trustee to pay the net income from said trust fund to my granddaughter, Wilhelmina Gross, in convenient installments to be determined by

In the matter of the estate of  
Miss M. M. M., deceased, known as  
M. M. M., and sometimes  
known as M. M. M., deceased.

STATE OF MICHIGAN, a certain  
person, as executor under the  
last will and testament of said  
Miss M. M. M., deceased,  
appellee.

v.

WILLIAM M. M., executor,  
appellant.

THE COURT OF APPEALS OF THE STATE OF MICHIGAN.

William M. M., a resident of the State of Michigan,  
appellee, vs. William M. M., executor under the last will and  
testament of Miss M. M. M., deceased, appellant. This case arises from the  
final account of the executor. The final account shows payment  
by the executor of \$10,000.00 in cash, to the trustee  
named in the will. The executor was also the \$10,000.00 should have  
been paid to the trustee on the 1st day of January, 1918, the date of the death of Miss M. M. M.,  
as provided in the will. The date when the payment was made to the  
trustee. The executor was not paid the amount of \$10,000.00.  
The facts are stipulated and the controlling question is  
the meaning of a part of paragraph six of the will. By that paragraph  
the executor directed her executor to pay the sum of \$10,000.00 in  
cash or otherwise to the trustee. The trustee was directed to in-  
vest and reinvest the \$10,000.00 and the will then continued: "After  
paying all proper and necessary expenses incurred by said trustee  
in the care and management of said trust fund, I direct said trustee  
to pay the net income from said trust fund to my grandchildren,  
William M. M., in convenient installments to be determined by



said trustee, commencing at my death and continuing until January 2, 1935. \* \* \* On January 2, 1935, the trust created in this section 'SIXTH' shall cease and terminate and said trustee shall thereupon transfer, pay over, deliver and convey the entire corpus of said trust fund \* \* \* to Wilhelmina Gross."

The testatrix died April 9, 1925, and her will was admitted to probate in the Probate Court of Cook County on May 5, 1925. On April 9, 1926, Wilhelmina Gross filed her bill to contest the will, alleging that the testatrix was without testamentary capacity. That case was put at issue and went to trial, but before the conclusion of the trial, Wilhelmina Gross, on November 26, 1927, dismissed her bill, and on April 12, 1928, the executor filed its final account to which the objection was filed as stated. It also appears from the stipulation that at the time of the testatrix's death there was sufficient cash and securities in the hands of the executor to turn over the \$25,000 to the trustee.

The question for determination is whether the \$25,000 was payable by the executor to the trustee at the date of the death of the testatrix or one year from that date, or whether the action of Wilhelmina Gross, in filing the bill to contest the will, prevented the payment of the \$25,000 to the trustee, in either of which events the executor contends the \$25,000 should not bear interest.

Counsel for the executor points out that the rule of law as to when a legacy is payable is different in Massachusetts and New York from the law in Illinois on this subject and quote the rule in Illinois from the case of Fenton v. Hall, 235 Ill. 552, where it is said (p. 559): "A rule which is perhaps somewhat arbitrary but which has been generally adopted where no time has been fixed by the will for payment of a general legacy, is that it is payable at the expiration of one year from the testator's death and draws interest from that time." Counsel for both parties agree that the question



and further, commenting on my health and condition until January  
1, 1935. \* \* \* On January 2, 1935, the court ordered in said  
petition, "LAW" shall cease and terminate and said further shall  
thereupon terminate, pay over, deliver and convey the entire estate  
of said first wife \* \* \* to William Green."  
The court also said on July 7, 1935, and that will was admitted  
to probate in the Probate Court of Cook County on July 8, 1935. On  
April 2, 1935, William Green filed his bill in contest the will,  
alleging that the testatrix was at that time permanently incapable, that  
she was not at home and was in bed, but before the commission  
of the trial, William Green, on November 22, 1935, dissolved the  
bill, and on April 12, 1935, the court entered the final decree in  
which the petition was filed as stated. It also appears from the  
allegation that at the time of the testatrix's death there was  
sufficient cash and securities in the hands of the executor to pay  
over the \$12,000 to the first wife.  
The reason for the decision is stated in the bill, and was  
paid by the executor to the first wife as the wife of the first wife  
of the testatrix on one year term of one year, or whether the bill of  
William Green, in filing the bill in contest the will, prevented  
the payment of the \$12,000 to the first wife, in view of which events  
the executor contends the bill should not have been filed.  
Counsel for the executor points out that the wife of the  
first wife is now a widow and is living in Illinois and  
New York from the law in Illinois on this subject and notes the rule  
in Illinois from the case of Wright v. Wright, 211 Ill. 222, where it  
is said (p. 222): "A wife who is put in possession of the estate and  
will not voluntarily accept thereof as she has been told by the  
will the payment of a general legacy, is not to be paid as the  
executor of the first wife the testatrix's death and known interest  
from that time." Counsel for both parties agree that the question

is to be determined by a construction of the will. All of the authorities, from all jurisdictions, agree that if it can be ascertained from the will when the legacy is payable, then that date is controlling. The quotation from the Fenton case, supra, shows that if the time of payment is fixed in the will, then it is due and payable at the time mentioned and not one year after the death of the testator.

A consideration of that part of paragraph six, of the will above quoted, leads us to the conclusion that the \$25,000 was payable upon the death of the testatrix because it provides that the trustee should pay the income derived from the \$25,000 to Wilhelmina Gross "commencing at my death." Obviously if the \$25,000 were not payable at that time, there would be no income commencing on that date. And it is a general rule of law that a legacy draws interest from the time it is payable.

The question, however, remains whether interest should be payable on the \$25,000 in view of the contention made by the executor that the delay in making the payment to the trustee was occasioned by the fact that the legatee, Wilhelmina Gross, filed a bill and sought to have the will declared null and void.

The record fails to disclose that all of the delay was occasioned by the filing of the bill because it was not filed until April 9, 1926, just one year after the death of the deceased, a little less than a year after the will was probated. So there is nothing so far as the record shows, that would have prevented the executor from turning over the \$25,000 to the trustee prior to the time the bill was filed. Of course, if the \$25,000 which was evidenced, part in cash and part in securities, was drawing interest or dividends, whatever amount was thus obtained would belong to Wilhelmina Gross under the express terms of the will. There is nothing in the record on this point.



in so be determined by a comparison of the will. All of the  
 exceptions, from all jurisdictions, agree that it can be  
 ascertained from the will when the language is plain, then that  
 date is controlling. The question from the Trust case, Trust  
 above that in the case of Trust is filed in the will, then it is  
 the end payable at the time mentioned and not one year after the  
 death of the testator.

A comparison of the 2 parts of paragraph one of the  
 will above quoted, leads us to the conclusion that the \$10,000 was  
 payable upon the death of the testator because it provides that  
 the trustee should pay the income derived from the \$10,000 to  
 "William Green" commencing at my death. However, if the \$10,000  
 were not payable at that time, there would be no income commencing  
 on that date. And it is a general rule of law that a legacy becomes  
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The question, however, remains whether interest should be  
 payable on the \$10,000 in view of the construction made by the  
 executor that the delay in making the payment to the trustee was  
 occasioned by the fact that the trustee, William Green, filed a  
 bill and sought to have the will admitted to probate.

The record tells us that on the 1st of the delay was  
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 was filed a year after the will was admitted. It seems to me that  
 as far as the record shows, that would have prevented the trustee  
 from deriving from the \$10,000 in the trustee's hands at the time the  
 will was filed. Of course, if the \$10,000 interest was not paid,  
 in such case the trustee, was deriving interest or dividends,  
 whatever amount was then claimed would belong to William Green  
 under the express terms of the will. There is nothing in the



In Page on Wills, (2nd Ed.) it is said, sec. 1395: "Where at the time for paying the legacies, contest or other litigation is pending, and on that account the executor withholds payment of legacies, there seems to be a difference of judicial opinion whether the legatee can recover interest upon the legacies thus withheld. In some jurisdictions it is held that no interest can be recovered upon the legacies until the date at which the contest is decided. In other jurisdictions it is held to be the duty of executors to pay the legacies if proper security is given to him for the repayment of the same in case the contest is decided adversely to the will, and the running of interest is not postponed by the contest. This question depends largely upon the wording and construction of local statutes."

In Vol. 2, Schouler on Wills, Executors and Administrators, Fifth Edition, sec. 1481, the author, after stating that "Interest is recoverable, in general, from the time such a legacy becomes payable, and not sooner," the author continues: "There are cases which seem to lay stress upon the executor's opportunity to pay over and his delinquency in failing to do so at the proper time; as where the validity of the will was in litigation, or the grant of letters testamentary was justifiably delayed, or the legatee himself interposed obstacles or assets sufficient were not then available. Yet the usual rule, English and American, has been that pecuniary legacies bear interest from the time when they became vested in enjoyment and payable under legal rules or the express terms of the will, provided the estate be ever in a condition to satisfy them, and notwithstanding delay was occasioned on the legatee's part." In support of this latter statement, the author cites among other authorities, the case of Kent & Dunham v. Dunham, 106 Mass. 586. In that case the court, said (p. 590): "The defence that the legatees caused delay by unjustifiable proceedings embarrassing the executors in the settlement of the estate, was equally inadmissible for the purpose of defeating their claim to interest."

In *Page on Wills*, (2nd Ed.) it is said, sec. 1183: "Where  
at the time of paying the legatee, content or object is in question in  
pending, and on that account the executor withholds payment of  
legacies, there seems to be a difference of judicial opinion whether  
the legatee can recover interest upon the legacies thus withheld. In  
some jurisdictions it is held that no interest can be recovered upon  
the legacies until the date at which the content is decided. In  
other jurisdictions it is held so by the bulk of authorities as to pay the  
legacies if proper security is given to him for the payment of the  
same in case the content is decided adversely to the will, and the  
running of interest is not postponed by the content. This question  
depends largely upon the wording and construction of local statutes."  
In Vol. 8, *Commentaries on Wills*, *Legacies and Administration*,  
With Revision, sec. 1041, the author, after stating that "interest  
is recoverable, in general, from the time when a legacy becomes pay-  
able, and not merely," the author continues: "There are cases which  
seem to lay stress upon the executor's opportunity to pay over and  
his delinquency in failing to do so at the proper time; as where the  
validity of the will was in litigation, or the extent of legacies  
testamentary was judicially delayed, or the legatee himself inter-  
posed obstacles as where settlement was not soon available. But  
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payable under legal title or the express terms of the will, provided  
the estate be over in a condition to satisfy them, and notwithstanding  
delay or contention on the legatee's part." In support of this latter  
statement, the author cites many other authorities. The case of *Lord &*  
*Lord v. Lord*, 100 Mass. 500. In that case the court, said (p. 501):  
"The defence that the legatee cannot delay by unjustifiable proceedings  
embarrassing the executor in the settlement of the estate, was equally  
inadmissible for the purpose of defeating their claim to interest."



In 20 Cyc. p. 2104, it is said: "The fact that payment of the legacies is delayed by a contest of the will does not affect the right of the legatee to interest on the legacy from the time it is payable and it has been held that this rule applies although the legatees who claimed the interest opposed the will." In support of this, Woodward's Estate, 78 Vermont, p. 254, is cited. In that case it is said (p. 259): "This case cannot be made an exception on the ground that the contest which delayed the settlement of the estate was participated in by the legatees who are claiming the interest. Kent v. Dunham, 106 Mass. 590."

In the paragraph above quoted from Page on Wills to the effect that the interest is not allowable on legacies where there is litigation which prevents the payment of them for a time, the author cites Trustees of Church Home v. Morris, 99 Ky. 317; Goodman v. Palmer, 137 Tenn. 556; Vandergrift's Appeal, 80 Penn State 116.

In the instant case we hold that the court properly sustained the objection to the executor's account by the inclusion of interest as above stated. There is, however, a slight error in the amount ordered to be paid in that it appears that the executor paid taxes on that portion of the estate represented by the \$25,000 fund for the year 1926 - \$47.50, and for the year 1927 - \$60.15, or a total of \$107.65. The executor should be given credit for this amount and the judgment of the Circuit Court of Cook County will be affirmed with this modification.

JUDGMENT AFFIRMED AS MODIFIED.

Hatchett, P. J., and McSurely, J., concur.



In 20 Geo. 2, 1304, it is said: "The test of the will of the legatee is to be taken by a contract of law will have no effect the right of the legatee to interest on the legacy from the time it is payable and it has been held that this rule applies although the legatee who claimed the interest opposed the will." In support of this, Wright v. Wright, 10 Vermont, 4, 224, is cited. In that

case it is said (p. 228): "This case cannot be made an exception on the ground that the contract which delayed the settlement of the estate was participated in by the legatee who are claiming the interest." Wright v. Wright, 10 Vermont, 4, 224.

In the paragraph above quoted from page 1111 to the effect that the interest is not allowable on legacies where there is litigation which prevents the payment of them for a time, the author cites Trustees of Church Home v. Merrill, 22 Vt. 413; Wright v. Wright, 10 Vermont, 4, 224; Wright v. Wright, 10 Vermont, 4, 224.

In the latter case it is held that the court properly sustained the objection to the executor's account by the inclusion of interest as above stated. There is, however, a slight error in the amount ordered to be paid in that it appears that the executor paid some on that portion of the estate represented by the sum of \$100.00 for the year 1922 - \$7.50, and for the year 1923 - \$100.00, so a total of \$107.50. The executor should be given credit for this amount and the judgment of the Circuit Court of Cook County will be affirmed with this modification.

JUDGMENT AFFIRMED IN PART.

WATKINS, J. J., and KENNEDY, J., concur.

34313

GEORGE L. ELDRIDGE,  
Plaintiff in Error,

vs.

PHILIP H. KREUSCHER,  
Defendant in Error.

ERROR TO SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 650'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, George L. Eldridge, seeks to reverse a judgment entered on the verdict of a jury in favor of the defendant, which verdict and judgment were to the effect that the defendant, who was a physician and surgeon practicing his profession in Chicago, operated on plaintiff's left knee with plaintiff's consent.

The record discloses that plaintiff first became affected with the disease known as arthritis deformans in 1917 and that the disease grew steadily worse; that plaintiff had tried many cures and was treated by many physicians in many places, taking mineral baths in Idaho Springs, Colorado, and afterwards received chropractic and osteopathic treatments; that he was treated with steam and mud baths and electrical treatments and in 1919 went to Mayo Brothers at Rochester, Minnesota; that the disease affected both knees, his right elbow and ankle; that after he came from Rochester he was treated by a number of other doctors and on February 24, 1924, through a friend, he went to see defendant, who, the evidence shows, was a surgeon of high standing, had specialized in bone and joint surgery and had had much experience in cases of arthritis deformans. The evidence further shows that on February 24th defendant examined plaintiff and recommended that he go to the hospital for an operation, but advised that the plaintiff take the matter up with his family first, which was done and a few

2539 I.A. 650

2539 I.A. 650  
WILLIAM L. BARNETT  
Defendant in Error  
BY YOUR COUNSEL  
WILLIAM L. BARNETT  
Defendant in Error

THE COURT: O'CONNOR, JUDGE, THE COURT IN THE COURT.

By this signed Plaintiff, George L. Barnette, does  
he testify a witness on the verdict at a fact in favor of  
the defendant, which verdict and judgment were in the effect that  
the defendant, who was a physician and surgeon practicing his  
profession in Chicago, operated on Plaintiff's left knee with  
Plaintiff's consent.

The record reflects that Plaintiff's knee became  
affected with the disease known as arthritis in 1917  
and that the disease was steadily worse; that Plaintiff had  
been many times and was treated by many physicians in many  
places, taking almost \$2000 in such charges, medicines, and  
other things, but without any permanent improvement;  
that he was treated with x-rays and other methods of treatment,  
and in 1919 went to Mayo Brothers of Rochester,  
Minnesota; that the disease affected both knees, the right  
knee and ankle; that after he came from Rochester he was treated  
by a number of other doctors and on January 24, 1924, through a  
friend, he went to see defendant, who, the evidence shows, was a  
surgeon of high standing, and was called in to see and treat  
him, and had had much experience in cases of arthritis  
beforehand. The evidence further shows that on January 24th  
defendant examined Plaintiff and recommended that he go to the  
hospital for an operation, but advised that the operation was  
the matter as when his family first, which was done and a few



days thereafter plaintiff went to the hospital and defendant performed an operation on both of plaintiff's knees. Plaintiff remained in the hospital for a period of about four months and there is dispute in the evidence as to whether he was benefitted or injured by the operation.

As the case went to trial there were four counts in the amended declaration, two of which charged defendant with negligence in performing the operation, and the other two counts charged defendant with trespass vi et armis in that defendant operated on plaintiff's left knee without plaintiff's consent, while he was under the influence of the anaesthetic administered to him at the time of the operation. At the beginning of the trial the court, on motion of defendant's counsel, required plaintiff, over his objection, to elect on which counts of the declaration he would proceed, and thereupon plaintiff elected to proceed on the trespass counts. Plaintiff then offered some evidence under these counts, tending to show that the operation on the left knee was without his consent, while evidence offered on behalf of defendant tended to show that the operation on plaintiff's left knee was with plaintiff's consent. This was the issue in the case submitted to the jury, and, as stated, the jury found in favor of the defendant.

May 13, 1927, plaintiff, by leave of court, filed two additional counts in case, in which he sought to charge the defendant with falsely representing to plaintiff that he could cure the plaintiff. To these counts the defendant pleaded the two year Statute of Limitations, which the court held good. Plaintiff contends that this was error for the reason that the five year Statute of Limitations applied because the gist of the action set up in the two counts was fraud and deceit. We think plaintiff's contention cannot be sustained. By the two



counts plaintiff sought to recover damages for injury to his person, and cases of this character are barred after two years.

Sec. 14, chapter 83, Cahill's Statutes. That section provides, "Actions for damages for an injury to the person \*\*\* shall be commenced within two years/<sup>next</sup> after the cause of action accrued." The form of an action has nothing to do with the fixing of the limitation but the particular injury sued for is controlling. Handtoffski v. Chicago Traction Company, 274 Ill. 282. In the instant case recovery was sought under the two additional counts on account of injury to plaintiff's person and this was barred after two years.

Plaintiff contends that the court erred in requiring him to elect as to which counts he would proceed to trial; that under this ruling he was compelled to elect whether he would proceed under the two counts charging negligence or under the other two counts in trespass, and that in accordance with the ruling he elected to proceed under the latter two counts. And plaintiff argued that the charge of negligence in two of the counts, and the charge of trespass in the other two, were not inconsistent and that he should have been permitted to proceed under the four counts. On the other hand, defendant's position is that the order entered by the court did not require plaintiff to proceed on the negligence or the trespass counts, but that plaintiff could proceed on either or both theories.

It appears from the record that the court ordered that plaintiff be required to elect on which counts he intended to proceed without designating the character of such counts, but we think it obvious from an examination of the entire record that the ruling of the court was that plaintiff be required to elect whether he would proceed on the theory of negligence or on the theory of trespass.

We think the court should have permitted plaintiff to





proceed to trial under either or both of the theories set up in his declaration because under our practice it is proper for a declaration to contain counts in case and other counts in trespass. Sec. 36, chapter 110, Cahill's 1929 Statutes. But we are further of the opinion that plaintiff could have put in all of his evidence under the counts charging negligence, because, as argued by counsel for plaintiff, plaintiff "under the allegations of the first count which is for general negligence only, the operation on the left knee, when defendant had been employed to operate on the right, would be negligence." Citing Sullivan v. McGraw, 118 Mich. 39, and Heraney v. Peske, 115 Kansas, 552. In other words, we are of the opinion that under the charge of negligence contained in the first and fourth counts, plaintiff might show that he employed defendant to operate on his right knee, which defendant did, and that defendant also operated on plaintiff's left knee, which he was unauthorized to do. The two counts which charged negligence also charged unskillfulness on the part of defendant in performing the operation, so that under these counts it is clear that plaintiff might make proof of all the charges made in the four counts of the amended declaration. The two counts charging trespass, however, were much narrower in scope and no proof might be offered under those counts touching the question of the defendant's alleged unskillfulness in the performance of the operation, but the only evidence proper would be evidence tending to show that the operation on plaintiff's left knee was without his consent. When plaintiff was required by the court to elect on which theory he would proceed, it must be presumed that he was of the opinion that he would be in a better position to prove the alleged unauthorized operation on the left knee than he would in his attempt to prove any unskillfulness in the performance of the operation by defendant. And therefore, under the ruling of the court, he elected to proceed

[illegible]



under the narrower counts. He might, however, have elected to proceed under the other two counts which charged negligence and unskilfulness; but it must be presumed that he was of the opinion that he would not be able to substantiate the charge in these counts by proof. Plaintiff, having elected under the ruling of the court to proceed under the narrower theory of his case, ought not, after he has been defeated on that theory, say that the court erred in requiring him to elect, and to award him a new trial so that he might present it on the other theory.

Complaint is also made that the court erred in refusing to admit proper evidence offered by plaintiff and in admitting improper evidence in behalf of the defendant. The evidence shows that Dr. Malone was an interne at Mercy Hospital where plaintiff was operated on by defendant; that defendant told Dr. Malone to prepare plaintiff for the operation, and the next day, in accordance with this instruction, Dr. Malone prepared both of plaintiff's knees by shaving them above and below and by wrapping bandages below the knees. Plaintiff was asked as to what he said to Dr. Malone, at the time his knees were being prepared for operation, as to why the left knee was being prepared. What was said between plaintiff and Dr. Malone at that time was out of the presence of the defendant and counsel for defendant objected that anything said at that time by Dr. Malone to plaintiff would not be binding upon defendant. This objection was sustained. Plaintiff's position is that the ruling was error. The evidence on this question is further to the effect that the defendant had his patients go to Mercy hospital when they were to be operated on by him; that Dr. Malone, after graduating from medical school and after he was licensed in this state, spent eighteen months at Mercy hospital as an interne, and that just near the end of his service there, which was a few days after the operation, he gave

under the previous statute. He might, however, have elected to proceed under the old law which required a hearing and a finding of guilt; but it must be presumed that he was of the opinion that he would not be able to substantiate the charge in court. Evidently, having elected under the ruling of the court to proceed under the new law, he was not, after he had been indicted on that theory, and had not even been indicted on a new theory as that he might present it as the same theory.

Consequently it is also made that the court acted in relation to such proper evidence offered by plaintiff and in admitting proper evidence in behalf of the defendant. The evidence that Dr. Malone was an inmate of State Hospital before plaintiff was executed on by defendant and defendant told Dr. Malone to prepare himself for the operation, and the next day, in court, when this fact was introduced, Dr. Malone presented both of plaintiff's knees by moving them apart and below and by stretching defendant below the knees. Evidently was asked as to what he said to Dr. Malone, at the time the knees were being stretched for operation, as he was the first time the knees were moved. That was said between plaintiff and Dr. Malone at that time and out of the presence of the defendant and counsel for defendant objected that anything said at that time by Dr. Malone to plaintiff would not be binding upon defendant. This objection was sustained. Evidently's position is that the witness was correct. The evidence on this question is further to the effect that the defendant had his knees as to Harry Mangum when they were to be operated on by him; that Dr. Malone, after examining him without seeing him after he was licensed in this state, spent eighteen months at State Hospital as an inmate, and that just near the end of his service there, after a few days after the operation, he gave



attention to cases that were handled by the defendant, and that on the day previous to the operation, when defendant called professionally on plaintiff at the hospital, and in the presence of the three defendant instructed Dr. Malone to prepare both knees for operation, and that on the next morning plaintiff was prepared as requested by defendant. It further appears from the evidence that the internes at the hospital are from time to time assigned to the services of the different doctors. We think the evidence offered by plaintiff was hearsay; that Dr. Malone was not defendant's agent but an interne of the hospital, and that anything plaintiff said to Dr. Malone, out of the presence of defendant, would not be binding on the latter. But plaintiff further contends that Dr. Malone was permitted to testify as to this conversation between plaintiff and himself out of the presence of the defendant, when the defendant was putting in his evidence, and that when plaintiff was placed on the stand in rebuttal he was not permitted to go into this conversation and that this was clearly erroneous. We have read the testimony of Dr. Malone and we think it apparent that Dr. Malone's testimony was confined to the conversation that took place while plaintiff and defendant were present. And we are also clear that when plaintiff was on the stand in rebuttal and the question now under consideration was before the court, it was not contended by counsel for plaintiff that Dr. Malone had testified to anything concerning a conversation which took place out of the presence of plaintiff and defendant.

Further argument is made as to certain rulings of the court in the admission and exclusion of evidence which we think it unnecessary to notice because we are of the opinion that the rulings were substantially correct; but in any view of the case they were not of such a character as to warrant us in disturbing the judgment.



attention to cases have been handled by the defendant, and that on the day previous to the operation, when defendant called attention to the possibility of the defendant, and in the presence of the three defendants instructed Mr. Malone to prepare some more for operation, and that on the next morning defendant was prepared as requested by defendant. It further appears from the evidence that the interest of the defendant was then given to the assigned to the review of the defendant's report. We think the evidence offered by plaintiff was hearsay; that Mr. Malone was not defendant's agent but an interest of the defendant, and that anything plaintiff said to Mr. Malone, out of the presence of defendant, would not be binding on the latter. But plaintiff further contends that Mr. Malone was permitted to testify as to this conversation between plaintiff and himself out of the presence of the defendant, when the defendant was present in his absence, and that when plaintiff was present on the stand in respect to the not permitted to go into this conversation and that this was clearly erroneous. We have read the testimony of Mr. Malone and we think it apparent that Mr. Malone's testimony was restricted to the conversation that took place while plaintiff and defendant were present. And we are also of the view that when plaintiff was on the stand in respect to the question was under consideration was before the court, it was not permitted by counsel for plaintiff that Mr. Malone had testified to a conversation concerning a conversation which took place out of the presence of plaintiff and defendant. Further argument is made as to certain rulings of the court in the admission and rejection of evidence which we think it unnecessary to notice because we are of the opinion that the rulings were substantially correct; but in any view of the case they were not of such a character as to warrant an intervention on the part of the defendant.

Complaint is also made that the court erred in modifying an instruction requested by plaintiff and giving it to the jury as modified. The instruction was to the effect that if the jury believed that the plaintiff had sustained damages "in consequence of the injury," then in order to enable the jury to estimate the amount of such damages, it was not necessary that any witness should have expressed an opinion as to the amount of such damages, etc. The court inserted after the word "injury" above quoted, "to the plaintiff's left leg." In other words, the modification limited plaintiff's claim for damages to any injuries he had suffered by reason of the operation on plaintiff's left knee. We think the modification was correct in view of the fact that plaintiff was trying the case under the trespass counts. The only trespass claimed was that defendant had operated on the left leg without consent. Any other damages claimed to have been suffered by plaintiff under these counts would have been unwarranted.

Further complaint is made that the court erred in refusing to give other instructions requested by plaintiff. These instructions touched on the question of damages, and since the verdict was for the defendant the question of damages is now immaterial.

Three instructions were given by the defendant ending with the words that the jury should find the defendant not guilty, and it is claimed that the repetition of these words were unduly stressed to plaintiff's injury. We think there was no error in this respect, certainly none that would warrant a reversal of the judgment.

Complaint is also made that the court erred in giving, at defendant's request, instructions numbers 10, 11 and 18. By instruction number 10 the jury was told that there was no evidence tending to show that the operation on plaintiff's left knee caused

[illegible]



any injury to his right leg or left arm, and that plaintiff was not entitled to recover any damage on account of any injury to his right leg or left arm. Instruction number 11 was substantially to the same import. By instruction 18 the jury was told that as a matter of law, "when a patient places himself under the care of a surgeon for the purpose of being operated upon without instructions to the surgeon or limitation as to his authority, he thereby in law consents that the surgeon may perform such operation or operations as in his best judgment is necessary, proper and essential to the patient's welfare, and if you believe from the evidence in this case that the plaintiff placed himself in the care of Doctor Kreuscher for the purpose of being operated upon without instructions or limitations upon his authority, then Dr. Kreuscher was authorized to, and it was his duty to perform such operation or operations as in his best judgment was necessary, proper and essential to the plaintiff's welfare." Instructions 10 and 11 were on the question of damages, so that as stated the question of the correctness of them, in view of the verdict, is immaterial. We think there was no error in giving instruction number 18 because the evidence was to the effect that defendant was authorized to operate on both knees, and if there was evidence tending to show that no instructions were given to him, then we think the instructions stated a correct proposition of law.

Instruction 21 complained of told the jury that it was not claimed, nor was there any evidence tending to show that the defendant was guilty of any negligence or unskillfulness in performing the operation. We agree with counsel for plaintiff that if the evidence showed defendant operated on the wrong leg, this would be some evidence of negligence. but we are also of the opinion that it would be no evidence of unskillfulness, and we think the instruction was given to call attention of the jury to

any injury to his rights leg or left arm, and that plaintiff was not entitled to recover any damages on account of any injury to his right leg or left arm. Instruction number 11 was substantially to the same effect. My instruction is the jury was told that a master of law, "when a patient places himself under the care of a surgeon for the purpose of being operated upon without anesthesia there is no excuse or limitation as to his recovery, he thereby in law consents that the surgeon may perform such operation as is required as in his best judgment is necessary, proper and essential to the patient's welfare, and if you believe from the evidence in this case that the defendant acted reasonably in the use of proper means for the purpose of being operated upon without anesthesia or limitation upon his recovery, then it is your duty to find for the defendant and his wife to recover their damages as stated in the complaint of the plaintiff's wife." Instructions 12 and 13 were to the effect of damages, so that he could not recover if the correctness of them, in view of the verdict, is immaterial. It is true that no error in giving instruction number 12 because the evidence was to the effect that defendant was entitled to operate on both hands, and if there was evidence tending to show that no instructions were given to him, then we believe the defendant stated a correct proposition of law.



the fact that the operation itself was not performed in an unskillful manner. But in any view of the case, we think that the giving of the instruction did not prejudicially affect the plaintiff because by other instructions the jury was told, as a matter of law, that no matter how skillful or careful a surgeon might be, he had no right to perform an operation on an adult person without his consent even if the patient had consented to a different operation. The jury was also told that before the plaintiff could recover he must prove by a preponderance of the evidence that the operation by the defendant on plaintiff's left knee was performed without plaintiff's consent. Other instructions were given to the same import, so it is clear that the jury was told that plaintiff was entitled to recover if defendant had operated on plaintiff's left knee without the latter's consent. This was the sole issue presented and any slight error in other instructions did not prejudicially affect defendant in view of the entire record, as counsel for plaintiff in his brief says that the case as it actually went to the jury was whether the plaintiff had consented to the operation on his left knee. We think there was no such error in the instructions as would warrant us in disturbing the verdict and judgment.

The case has been tried twice. What the result was on the first trial does not appear. We have carefully considered all the evidence in the record, and while it appears that plaintiff has suffered greatly, that he was afflicted with the dread disease arthritis deformans for many years, took a great many treatments, consulted and was treated by many doctors before he met the defendant, we think the great weight of the evidence shows that both knees were to be operated upon, and the evidence to the contrary given by plaintiff was not believed by the jury. The further evidence is that plaintiff was at the hospital for about four



The fact that the operation itself was not performed in an unusual  
manner. But in any view of the case, we think that the giving  
of the instruction did not substantially affect the result. No  
cause by which investigation the jury was told, as a matter of law,  
that no matter how skillful or careful a surgeon might be, he had  
no right to perform an operation on an adult person without his  
consent even if the patient had consented to a different operation.  
The jury was also told that before the plaintiff could recover he  
must prove by a preponderance of the evidence that the operation  
of the defendant on plaintiff's left leg was performed at all.  
Plaintiff's statement. Other instructions were given to the jury  
imposed, so as to be clear that the jury was told that plaintiff was  
entitled to recover if defendant had consented to plaintiff's left  
knee without the latter's consent. This was the sole issue pre-  
sented and any slight error in these instructions did not work  
materially different substance in view of the entire record, as shown  
for plaintiff in his brief says that the case as it originally went  
to the jury was correct and plaintiff had consented to the opera-  
tion on his left knee. We think there was no such error in the in-  
structions as would warrant us in reversing the verdict and judg-  
ment.

The case has been tried twice. What the result was  
on the first trial has not been reported. We have carefully examined  
all the evidence in the record, and while it appears that plaintiff  
has suffered greatly, that he was afflicted with the dread disease,  
syphilis, for many years, took a great many treatments,  
consented and was treated by many doctors before he met the de-  
fendant, we think the great weight of the evidence shows that both  
men were to be operated upon, and the evidence in the country  
given by plaintiff was not believed by the jury. The finding  
evident is that plaintiff was at the hospital the short time

months after the operation and two doctors who saw plaintiff almost daily at the hospital during this period, testified that plaintiff made no complaint that the left knee had been operated upon; and Dr. Kresucher, the defendant, testified that during his visits to the plaintiff after the operation and during the latter part of plaintiff's stay in the hospital, when he was getting some motion in his knees and the pain was becoming less, plaintiff had expressed his gratitude for what had been done for him. This is not denied.

Upon a careful review of all the evidence in the record we are clearly of the opinion that the verdict of the jury in favor of the defendant is the only verdict that could stand. Under the evidence, a verdict for the plaintiff would have to be set aside as being manifestly against the weight of the evidence.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

months after the operation and the history was very similar almost  
 daily at the hospital during his convalescence, however they remained  
 made no complaint that was left alone and being operated upon; and  
 Dr. Grossman, the defendant, testified that during his visit to  
 the plaintiff after the operation was being the latter said he  
 plaintiff's stay in the hospital, when he was leaving some notice  
 in his house and the pain was becoming less, plaintiff was surprised  
 his physician for that had been told him, that is not denied.  
 When a medical review of all the evidence in the record  
 we are clearly of the opinion that the verdict of the jury in favor  
 of the defendant is not only correct but also sound. Under the  
 evidence, a verdict for the plaintiff would have to be set aside  
 as being manifestly against the weight of the evidence.  
 The judgment of the Superior Court of Cook County is

affirmed.

ATTEST,

March 27, 1911, and adjourned, 11:00 a.m.



34359

THE PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

MAURICE A. BARNETT and MAX KRAKOW,  
Plaintiffs in Error.

ERROR TO CRIMINAL COURT  
OF COOK COUNTY.

259 I.A. 650<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Maurice A. Barnett, Max Krakow, Laura B. Price, Joe Baum and Ben Levin were jointly indicted by the grand jury of Cook County. The indictment alleged that they fraudulently conspired to obtain about \$17,900 from the Royal Exchange Assurance of London, England, a corporation, by insuring Mrs. Price's jewelry against robbery and then pretending that she was held up and robbed of the jewelry. Baum and Levin testified for The People and the indictment at the time of the trial was still pending as to them and Mrs. Price. Barnett and Krakow obtained a severance and they were tried. Both were found guilty by the jury and Barnett's punishment was fixed at imprisonment in the penitentiary and Krakow was sentenced to a term of six months in the county jail and a fine of \$500. Judgment was entered on the verdict, and Barnett and Krakow prosecute this writ of error.

The evidence is to the effect that Baum originated the scheme which he testified he had carried in his mind for a few years. In the spring of 1928 he was introduced to the defendant Krakow, who was a manufacturing jeweler with an office in the Marshall Field Annex building, Chicago. Defendant Barnett had been in the jewelry business off and on for a number of years and at the time in question had desk room in Krakow's office. The matter of having some one insure his jewelry and who would submit to a pretended robbery was discussed a number of times. Barnett, who had been acquainted with Mrs. Price for a number of years, got in

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

MAURICE A. BARNETT and MAX KRAVOW,  
Plaintiffs in Error.

253 A. 650

W. J. BARNETT, Attorney for the Plaintiffs in Error.

Max Kravow, Maurice A. Barnett, and Max Kravow, Plaintiffs in Error, were jointly indicted by the grand jury of the District of Columbia on a charge of conspiracy to obtain about \$17,000 from the Royal Exchange Assurance of London, England, a corporation, by inducing Mrs. Fyke's jewelry dealer to rob her and then procuring that she be held up and robbed of the jewelry. Both and Kravow testified for the Government and the indictment was at the time of the trial was still pending as to them and Mrs. Fyke. Barnett and Kravow obtained a judgment and they were fined. Both were found guilty by the jury and Barnett's punishment was fixed at imprisonment in the penitentiary and Kravow was sentenced to a term of six months in the county jail and a fine of \$500. Judgment was entered on the verdict, and Kravow and Barnett were both this writ of error.

The evidence as to the effect that Barnett obtained the scheme which he testified he had carried in his mind for a few years. In the spring of 1930 he was introduced to the defendant Kravow, who was a well-known jewelry dealer with an office in the Royal Field Annex Building, Chicago. Defendant Barnett had been in the jewelry business off and on for a number of years and at the time in question had been room in Kravow's office. The matter of having some one induce his jewelry and who would submit to a pretended robbery was discussed a number of times. Barnett, who had been acquainted with Mrs. Fyke for a number of years, got in



communication with her and it was finally agreed that she would have her jewelry insured and go through with the fraudulent scheme. The parties then got in touch with an insurance broker, who met Mrs. Price at Barnett and Krakow's office. The necessary appraisal of the jewelry was made and it was finally placed with the corporation of the Royal Exchange Assurance of London, England, and the policy issued January 31, 1929. The premium paid was \$334, and the amount of the insurance was \$22,150. The jewelry covered was a platinum watch, a pearl chain, a pearl necklace, platinum and diamond rings, platinum and diamond bracelets, brooches, and also one mink and one mole coat.

The evidence was further to the effect that the pretended robbery of Mrs. Price was to be the work of Baum and Levin; that when the insurance money was collected one-third of it was to be given to Mrs. Price and she was to have most of her jewelry returned, and the other two-thirds were to be divided among Barnett, Krakow, Levin and Baum.

Baum testified that before the insurance policy was taken out it was necessary to make arrangements to pay the premium of \$334; that neither Mrs. Price, Barnett nor Krakow had the money and thereupon he obtained it from Levin, who was his brother-in-law, turned it over to Barnett and that Barnett gave it to Mrs. Price, who paid the premium to the Insurance company by her check; that the day prior to the robbery Mrs. Price had one of the rings mentioned in the policy in pawn, pledged to secure a loan of \$500, and it was agreed by defendants that the ring be redeemed and taken from the pawnbroker before the robbery; to accomplish this purpose it was necessary to raise part of the money; that thereupon Baum pawned one of his wife's rings, obtaining \$325, which was turned over to Barnett; that Mrs. Price was to advance the balance necessary, and the evidence further is that on the morning of the robbery,



communication with her and it was finally agreed that she would have her jewelry insured and so insured with the London and Lancashire Insurance Co. in London with an insurance broker, who was Mr. Miles at Barnett and Evers' office. The necessary agreement of the jewelry was made and it was finally placed with the protection of the Royal Exchange Assurance Co. of London, England, and the policy issued January 21, 1900. The premium paid was \$100, and the amount of the insurance was \$10,000. The jewelry consisted of a platinum watch, a pearl chain, a pearl necklace, platinum and diamond rings, platinum and diamond bracelets, brooches, and also one ring and one earring.

The evidence was further to the effect that the jewelry was insured by Mrs. Price and that the work of Mrs. Price and Mrs. Price was to be the work of Mrs. Price and Mrs. Price; that when the insurance money was collected one-third of it was to be given to Mrs. Price and she was to have most of her jewelry returned, and the other two-thirds were to be divided among Barnett, Kishew, Levin and Brown.

Barnett testified that before the insurance policy was taken out it was necessary to make arrangements to pay the premium of \$100; that neither Mrs. Price, Barnett nor Kishew had the money and therefore he obtained it from Levin, who was his brother-in-law, turned it over to Barnett and that Barnett gave it to Mrs. Price, who paid the premium to the insurance company by her check; that two days prior to the robbery Mrs. Price had one of the rings mentioned in the policy in pawn, pledged to secure a loan of \$100, and it was agreed by Kishew that the ring be redeemed and taken from the pawnbroker before the robbery; to accomplish this purpose it was necessary to raise part of the money; that Kishew had turned one of his wife's rings, obtaining \$100, which was turned over to Barnett; that Mrs. Price was to advance the balance necessary, and the evidence further is that on the evening of the robbery

bery, which occurred about seven o'clock on the evening of February 25th, Mrs. Price obtained her ring from the pawnbroker, paying him the amount of the loan.

It further appears that, in accordance with prior arrangements, Mrs. Price wore her jewelry and fur coat, which were covered by the policy, on February 25th, and on the afternoon of that day went in her automobile, which she drove herself, to call on some friends on the North side of Chicago; that, according to agreement, she stopped her car in front of her dressmaker's; her car having been described to Baum and Levin, they drove their car and stopped in the street near the dressmaking establishment, where it was agreed that Mrs. Price would be shortly after six o'clock. Between six and seven o'clock Mrs. Price came from the dressmaking establishment and Baum testified he got in Mrs. Price's car after her, when she handed him all of her jewels, which she had in a bag, and took off her coat and gave it to him; that he and Levin drove away and turned in most of the jewelry to Krakow at the latter's office. Baum kept the fur coat and pledged it to a pawnbroker who gave him \$400. Immediately after the jewels and coat were taken from Mrs. Price she returned from across the street, where she had parked her car, to the dressmaking establishment, where she appeared to be hysterical and stated she had been robbed of her jewelry and coat. The police were called and an investigation made, but as no tangible clues were received no arrests were made. Mrs. Price made proof of loss to the insurance company and on June 25th it gave her a check for \$2,000 and July 25th made her the final payment, as evidenced its check for \$15,945.75. The evidence is that about the latter part of August or first of September, Baum complained to Barnett that he and Levin had not been paid their part of the loot. Baum testified that Barnett suggested that Baum take the matter up with Mrs. Price;



berry, which occurred about seven o'clock on the evening of February 23rd, and which obtained her ring from the pawnshop, paying him the amount of the loan.

It further appears that, in accordance with other arrangements, the three were then jewelry and hat store, which were covered by the policy, on February 23rd, and on the afternoon of that day went to the pawnshop, where she showed herself, to call on some friends on the lower side of the street; that proceeding in agreement, she stopped her car in front of her friend's; her car having been described to them and leaving, they drove their car and stopped in the street near the pawnshop establishment.

When it was agreed that the three would be together after six o'clock, between six and seven o'clock Mrs. Price came from the pawnshop establishment and from her car he got in Mrs. Price's car after her, when she handed him all of her jewelry, which she had in a bag, and took off her coat and gave it to him; that he and Levin drove away and turned to west of the jewelry to travel at the latter's office. When they the two were and obtained it as a pawnshop and gave him \$200.

After the jewelry and coat were taken from Mrs. Price she returned to across the street, where she had parked her car, in the dress-making establishment, where she appeared to be hysterical and stating she had been robbed of her jewelry and coat. The police were called and an investigation made, but as no jewelry or coat were recovered, no further was made. Mrs. Price said that of late in the jewelry store company and on June 23rd it gave her a check for \$2,000 and July 19th she had the check returned, as evidenced the check for \$18,248.75. The evidence is that about the latter part of August or first of September, Hann complained to Barnett that he and Levin had been sold their car of the lot. Hann testified that Barnett suggested that Hann take the matter up with Mrs. Price;



that afterwards Baum and his wife called on Mrs. Price as arranged, and made complaint to her and after some discussion between them Mrs. Price agreed to pay \$663, being the amount Baum had given in payment of the insurance premium and the amount given by him to the pawnbroker to obtain Mrs. Price's ring. The next day, in accordance with the agreement then reached, Mrs. Price met Mrs. Baum downtown and paid the amount to Mrs. Baum in currency. At the time the payment was to be made, Barnett came in and objected to the payment being made by Mrs. Price.

Before the insurance company paid the loss covered by the policy, to Mrs. Price, their local attorney investigated the matter, and May 13, 1929, accompanied by a court reporter, called on Mrs. Price at her hotel and advised her that before the loss would be paid she must make a detailed statement as to how the robbery occurred, which she consented to do; thereupon the attorney asked her a number of questions, which she answered and which were taken down by the court reporter. The notes were afterwards transcribed, sent to Mrs. Price, who made certain corrections and after taking the matter up with her attorney, signed the statement and delivered it to the attorney for the insurance company; afterwards the loss was paid as above stated.

The evidence further is that in October, 1929, Baum and Levin not having been given their part of the insurance money, Baum went to see Binkley, the insurance company's local attorney, and told him the story of the conspiracy. Binkley made an investigation and later on went with Baum to the State Attorney's office where Baum and Levin then told their story to the State's attorney and after the investigation the indictment followed.

Barnett and Krakow both testified on the trial and each denied his guilt. From their testimony it appears that Baum met Krakow and afterwards called at Krakow's office and met

first witness, Mrs. and his wife called on Mrs. Price on Sunday, and made complaint to her and after some discussion between them Mrs. Price agreed to pay \$500, being the amount Mrs. Price had given in payment of the insurance premium and was received by Mrs. Price. The next day, in accordance with the agreement then reached, Mrs. Price met Mrs. Hann downtown and paid the amount to Mrs. Hann in cash. At the time the payment was to be made, Hann's name is not subject to the payment being made by Mrs. Price.

Before the insurance company paid the loss covered by the policy, to Mrs. Price, their local attorney investigated the matter, and May 12, 1935, accompanied by a local reporter, called on Mrs. Price at her hotel and advised her that before the loss would be paid she must make a detailed statement as to how the robbery occurred, which she consented to do; thereafter the attorney called her a number of questions, which she answered and which were taken down by the court reporter. The answers were afterwards transcribed, sent to Mrs. Price, who made certain corrections and after taking the matter up with her attorney, signed the statement and delivered it to the attorney at the insurance company; after which the loss was paid as above stated.

The evidence taken is that in March, 1935, Hann and Levin had having been given their part of the insurance money, Hann went to see Hinkley, the insurance company's local attorney, and told him the story of the robbery. Hinkley made an investigation and later on went with Hann to the State Attorney's office where Hann and Levin told their story to the State's attorney and after the investigation the loss was paid.

Hann and Levin later testified on the trial and each denied Mrs. Price's story. When their testimony is compared with Hann and Levin's story told at Hann's office and not



Barnett; that afterwards Baum called there a number of times covering a period of several weeks. It was in their office that the insurance broker who placed the insurance met Mrs. Price, who had been known to Barnett for a number of years. Mrs. Price did not testify, although the evidence shows she was seen around the court room during the time Barnett and Krakow were being tried. A number of witnesses testified as to the good reputation for honesty and integrity of Krakow. The People called no witnesses who gave testimony on this question to the contrary. A number of witnesses also testified that Barnett's reputation for honesty and integrity was good; the People in rebuttal called some witnesses who testified that his reputation for honesty and integrity was bad. The foregoing is briefly the testimony except as to some documents and other evidence which will be hereinafter referred to.

The defendants contend that the evidence fails to prove that the Insurance company alleged to have been defrauded was a corporation, as alleged in the indictment, and that under the law in this State the averment in an indictment that money has been fraudulently obtained by means of a conspiracy from a corporation is a material averment and must be proven as alleged. In support of this contention the cases of People v. Pernalaky, 334 Ill. 38; People v. Krittenbrink, 269 Ill. 244; Aldrich v. People, 225 Ill. 610; People v. Stern, No. 33968, Appellate Court, First District, and other cases are cited. The law is as stated by counsel for the defendants.

The Act of June 3, 1889 provides "that in all criminal prosecutions involving proof of the legal existence of a corporation, user shall be prima facie evidence of such existence." Cahill's 1929 Statutes, p. 999. The charter of the Insurance company was not introduced in evidence and the only question is



Robert; that afterwards he called there a number of times  
 covering a period of several weeks. It was in their office that  
 the insurance broker who issued the insurance met Mrs. Wilson, who  
 had been known to Robert for a number of years. Mrs. Wilson did  
 not testify, although the evidence shows she was seen around the  
 court room during the time Robert and Krumm were being tried.  
 A number of witnesses testified as to the good reputation for  
 honesty and integrity of Krumm. The people called no witnesses  
 who gave testimony on this question in the contrary. A number  
 of witnesses also testified that Krumm's reputation for honesty  
 and integrity was good; the people in rebuttal called some wit-  
 nesses who testified that his reputation for honesty and integrity  
 was bad. The foregoing is briefly the testimony given as to some  
 documents and other evidence which will be mentioned referred to.  
 The following counsel filed the evidence which he  
 prove that the insurance company alleged to have been defrauded  
 was a non-existence, as alleged in the indictment, and that under  
 the law in this State the payment in an indictment does money  
 has been fraudulently obtained by means of a conspiracy there a  
 conspiracy is a material element and must be proven as alleged.  
 In support of this contention the counsel presented  
the following authorities:  
225 Ill. 511; People v. Krumm, 225 Ill. 511; People v. Krumm,  
First District, and other cases are cited. The law in an State  
by counsel for the defendant.  
 The act of June 2, 1889 provides "that in all crim-  
 inal proceedings involving proof of the legal existence of a cor-  
 poration, there shall be given prima facie evidence of such existence  
 until a 1889 Statutes, p. 699. The character of the insurance  
 company was not introduced in evidence and the only question is

whether the State made proof by user as provided by the statute quoted.

Counsel for the defendants contend that the proof is entirely insufficient and say that "The only evidence offered by the State to prove the corporate existence of the company was the oral testimony of the witness, J. Austin Eckstein." They then discuss the testimony of this witness and contend that the proof is insufficient under the authorities above cited. But we think the testimony of this witness is not the only evidence in the record that tended to prove that the Insurance company was shown by the exercise of its corporate functions to be a corporation. The substance of Eckstein's testimony was that he was assistant manager of the Chicago branch of Appleton & Cox, Inc., marine underwriters and attorneys in fact for several insurance companies, including the Corporation of the Royal Exchange Assurance of London, England; that Appleton & Cox had been connected with the Royal Exchange for about twelve years and during that time had issued on behalf of the Royal Exchange over fifty thousand insurance policies; that they collected premiums, issued drafts and did a general insurance business in this State. In addition to this testimony the policy issued to Mrs. Price is in evidence and it in terms states that "The Corporation of the Royal Exchange Assurance" insured the jewelry and furs of Mrs. Price. It was signed by "Appleton & Cox, Inc., Attorney," and states on its face that it is "not valid unless countersigned by a duly authorized agent of the company" at Chicago and is signed "Fred S. James & Co., by H. M. Ririe, Agent."

Oscar Berlin, the insurance broker through whom the policy in question was issued, testified that after Mrs. Price filled out an application for insurance he submitted it to Fred S. James & Co., and that they represented the Royal Exchange Assurance



whether the State made proof by way as provided by the statute

proved.

Learned for the defendant content that the proof is

entirely insufficient and say that "The only evidence offered by the

State to prove the corporate existence of the company was the oral

testimony of the witness, J. Austin Kestel." They then discuss

the testimony of this witness and contend that the proof is insuffi-

cient under the authorities above cited. But we reject the testi-

mony of this witness is not the only evidence in the record that

tended to prove that the insurance company was known by the know-

edge of its corporate existence to be a corporation. The evidence

of Kestel's testimony was that he was assistant manager of the

Chicago branch of American & New, Inc., marine underwriters and at-

torney in fact for several insurance companies, including the

Corporation of the Royal Exchange Assurance of London, England; that

applied a Cor had been connected with the Royal Exchange for about

twelve years and during that time had issued on behalf of the Royal

Exchange over fifty thousand insurance policies; that they collected

premiums, issued drafts and did a general insurance business in

this State. In addition to this testimony the policy issued to Mrs.

Price is in evidence and it is found that the policy issued to Mrs.

the Royal Exchange Assurance" issued the policy and that of Mrs.

Price. It was signed by "American & New, Inc., Attorney," and

states on its face that it is "not valid unless countersigned by a

duly authorized agent of the company" at Chicago and is signed "Fred

J. James & Co., by E. M. Kivie, agent."

Learned for the defendant, the testimony of Mrs. Price when the

policy in question was issued, testified that after Mrs. Price

filled out an application for insurance he submitted it to Fred J.

James & Co., and that they represented the Royal Exchange Assurance



Corporation.

Ririe testified that he was in the insurance business, being employed by Fred S. James & Co.; that Fred S. James & Co. are agents "for the Corporation of the Royal Exchange Assurance. They are agents for the Royal Exchange Corporation of the Royal Exchange;" that he signed the policy in behalf of the "corporation of the Royal Exchange."

H. M. Angell, manager of Appleton & Cox who wrote the policy in question, testified that Appleton & Cox write various forms of insurance and have an office in Chicago. He also testified that he signed the two checks with which payment was made to Mrs. Price for the loss claimed under the policy; that he had been representing "the Corporation of the Royal Exchange Assurance of London five and one-half years."

Sinkley testified that he was attorney for the "Royal Exchange Assurance of London" and had been such attorney for four or five years.

The two checks given to Mrs. Price in payment of the alleged loss, which are in the record, are dated at Chicago and state on their face that "The Royal Exchange Assurance," through Appleton & Cox, Inc., their attorney, orders payment to be made to Mrs. Price. The application made by Mrs. Price, a copy of which is in the record, shows on the back of it that she is applying to the "Corporation of the Royal Exchange Assurance," of London, for insurance. The proof of loss made by Mrs. Price states among other things that the name of the company issuing the policy is the Corporation of the Royal Exchange Assurance. We think this evidence was sufficient, in the absence of any countervailing evidence, to show that the insurance company issuing the policy in question was exercising corporate functions in Illinois. The documents referred to designate the insurance

Corporation.

This testified that he was in the insurance business, being employed by Wm. S. James & Co.; that Wm. S. James & Co. are agents for the Corporation of the Royal Exchange Assurance. They are agents for the Royal Exchange Corporation of the Royal Exchange; that he signed the policy in behalf of the Corporation of the Royal Exchange.

M. M. Angell, manager of Angell & Co. who wrote the policy in question, testified that Angell & Co. write various forms of insurance and have an office in Chicago. He also testified that he signed the two checks with which payment was made to Mrs. Price for the loss claimed under the policy; that he had been represented "the Corporation of the Royal Exchange Assurance of London five and one-half years."

Edw. J. Angell testified that he was attorney for the "Royal Exchange Assurance of London" and that both were attorney for Mrs. Price for five years.

The two checks given to Mrs. Price in payment of the alleged loss, which are in the record, are dated at Chicago and state on their face that "The Royal Exchange Assurance, Chicago, Angell & Co., Inc., their attorney, attests payment to be made to Mrs. Price. The application made by Mrs. Price, a copy of which is in the record, shows on the back of it that she is applying to the "Corporation of the Royal Exchange Assurance," of London, for insurance. The proof of loss made by Mrs. Price states among other things that the name of the company issuing the policy is the Corporation of the Royal Exchange Assurance. We think this evidence was sufficient, in the absence of any conflicting evidence, to show that the insurance company issuing the policy in question was exercising corporate functions in Illinois. The documents referred to designate the insurance



company as a corporation, and we think we would be going farther than the law warrants should we hold that this evidence was not prima facie sufficient to make out a case as required by the statute of this State. We think there is no case that goes so far.

In the Pernalsky case (334 Ill. 38) the indictment charged that the defendants broke and entered the store of F. W. Woolworth Company, a corporation, with intent to steal and carry away the goods in the store. The court there held that the averment of corporate ownership of the property was a material one and that the existence of the corporation must be proved. But that such fact need not be shown by the charter or by the articles of incorporation. The court then refers to the statute which we have quoted above <sup>and</sup> said (p. 40): "The record in this case contains no evidence of any character that the F. W. Woolworth Company is a corporation."

In the Krittenbrink case (269 Ill. 244) it was contended that (p.245): "There was no legal evidence that Parke, Davis & Co. was a corporation, as alleged in the indictment.\*\*\* The only evidence in regard to the incorporation of Parke, Davis & Co. was the testimony of a witness who was permitted, over the objection of plaintiff in error, to answer the question whether in the years 1914, 1913 and 1912, and at any prior time, Parke, Davis & Co. did business as an individual, co-partnership or a corporation. He answered, 'As a corporation.' This evidence was incompetent. It afforded no proof of user of corporate franchises. It was merely the opinion of the witness."

In the Aldrich case (225 Ill. 610) it was charged in the indictment that "the stolen property was the goods of 'Albert A. Newman, a corporation.' The proof showed it was the property of Albert A. Newman, an individual."

In the Stern case, 33968, Appellate Court, First



company as a corporation, and we think we would be going further than the law warrants should we hold that this evidence was not prima facie sufficient to make out a case as required by the statute of this State. We think there is no case that goes so far. In the Woolworth case (134 Ill. 384) the indictment charged that the defendants drove and entered the store of E. W. Woolworth Company, a corporation, with intent to steal and carry away the goods in the store. The court there held that the statement of corporate ownership of the property was a material, and that the existence of the corporation must be proved. But that again need not be shown by the charter or by the articles of incorporation. The court then refers to the evidence which we have quoted above (p. 40): "The record in this case contains no evidence of any character that the E. W. Woolworth Company is a corporation."

In the Livingston case (220 Ill. 144) it was concluded that (p. 242): "There was no legal evidence that Davis & Co. was a corporation, as alleged in the indictment. The only evidence in regard to the incorporation of Davis & Co. was the testimony of a witness who was permitted, over the objection of plaintiff in error, to answer the question whether in the years 1914, 1915 and 1916, and at any other time, Davis & Co. did business as an individual, co-partnership or a corporation. He answered, 'As a corporation.' This evidence was incompetent. It afforded no proof of corporate existence. It was merely the opinion of the witness."

In the Alford case (225 Ill. 210) it was charged in the indictment that "the stolen property was the goods of Albert A. Newman, a corporation." The grand jury showed it was the property of Albert A. Newman, an individual."

In the Starn case, 33308, Appellate Court, Third

District, Ill., it was charged that the defendant fraudulently obtained "the property of 'Hayden, Van Atter and Shimberg, incorporated, a corporation.'" The only evidence that this concern was a corporation was that a witness testified: "'I was employed by Hayden, Van Atter and Shimberg, incorporated, as sales manager.'" And two exhibits, one a check \*\*\* to the order of 'Hayden, Van Atter and Shimberg,' which bore a rubber stamp on the back endorsing the check to the bank for deposit, in which the name showed "Hayden, Van Atter and Shimberg, incorporated."

The evidence in the cases cited is far less than the evidence in the instant case. In view of the evidence in the record tending to show that the Insurance company was exercising corporate functions in Illinois, and there being no evidence to the contrary, we are of the opinion that the proof was sufficient.

People v. Burger, 259 Ill. 284-287; Graff v. People, 208 Ill. 312-319; and Kossakowski v. People, 177 Ill. 563-567.

As stated above, on May 13, 1929, Binkley, the attorney for the Insurance company, and a court reporter, called on Mrs. Price and asked her for a detailed statement as to how the robbery occurred. The Insurance company insisted that this be done before the loss would be paid, and Mrs. Price stated that this was all right, whereupon counsel propounded to her questions which she answered, which the reporter took down in shorthand. Afterwards the questions and answers were transcribed, mailed to Mrs. Price, who went over them, made some corrections, and after consulting her counsel she signed them and they were delivered to the attorney for the Insurance company. The substance of the statement was that she had been actually robbed of her jewelry and coat. The statement covered a number of typewritten pages and was offered in evidence by the People, after Binkley had identified it and testified as to how it was prepared, and was received over defendants'



District, Ill., it was charged that the defendant fraudulently ob-  
 tained "the property of" Raydon, Van Allen and Company, in the  
 State of Illinois." The only evidence that this company was a  
 corporation was that a witness testified: "I was employed by  
 Raydon, Van Allen and Company, Incorporated, as sales manager,"  
 and two exhibits, one a check for the order of "Raydon, Van  
 Allen and Company," which bore a return stamp on the back refer-  
 ing the check to the bank for deposit, in which was also entered  
 "Raydon, Van Allen and Company, Incorporated."  
 The evidence in the case filed in the case was the  
 evidence in the instant case. In view of the evidence in the in-  
 stant case tending to show that the insurance company was organized and  
 began business in Illinois, and there being no evidence to the  
 contrary, we are of the opinion that the grant was sufficient.  
People v. People, 220 Ill. 224-227; People v. People, 220 Ill. 224-227.  
219; and People v. People, 217 Ill. 224-227.  
 As stated above, on May 12, 1920, Shirley, the attorney  
 for the insurance company, and a court reporter, called on Mrs.  
 Tice and asked her for a detailed statement as to how the robbery  
 occurred. The insurance company believed that this is how before  
 the loss would be paid, and Mrs. Tice stated that this was all  
 right, whereupon counsel proposed to her questions which she  
 answered, which the reporter took down in shorthand. Afterwards  
 the questions and answers were transcribed, called to Mrs. Tice,  
 who went over them, made some corrections, and after consulting  
 her counsel she signed them and they were delivered to the attorney  
 for the insurance company. The substance of the evidence was that  
 she had been actually robbed of her jewelry and cash. The state-  
 ment covered a number of typewritten pages and was offered in evi-  
 dence by the People, after Shirley had identified it and testified  
 as to how it was prepared, and was received over defendant's



objection. It is strenuously insisted by counsel for the defendants that this was erroneous and highly prejudicial; that it could only have been properly admitted to impeach Mrs. Price if she took the stand on behalf of the defendants and testified contrary to the statement; or if the People were taken by surprise, to call her attention to the written answers she had made to the questions put to her in order to refresh her memory and awaken her conscience if she testified contrary to the answers there made. We think it clear that none of these contentions is apt here. The People were showing that the Insurance company had been duped out of more than \$17,000 through the fraudulent conspiracy of Mrs. Price and the other defendants. This was what was charged in the indictment and the People had a right to prove and must prove the allegations.

A further contention is made that this evidence was in direct contravention of sec. 9, art. 2 of the Bill of Rights, of our Constitution, which provides that in all criminal prosecution the accused shall have the right to meet the witnesses face to face, and that what Mrs. Price said, as shown by the statement, could not be shown unless she were put on the stand. Obviously what Mrs. Price said to Binkley could be testified to by him because it tended to further the common design - the criminal conspiracy; and the fact that what she said was in the form of a typewritten statement, giving exactly what was said, ought not to render it inadmissible. Furthermore, Mrs. Price, after the alleged robbery, made written proof of loss in an endeavor to obtain payment from the Insurance company. This document was offered and received in evidence. Obviously it was properly received, and we see no difference in the receiving of that document than in receiving the document in question. The defendants

objection. It is strenuously insisted by counsel for the defendant that this was erroneous and highly prejudicial: that it could only have been properly admitted to impeach Mrs. Tice if she took the stand on behalf of the defendant and testified contrary to the statement; or if the Tices were taken by surprise, in such a way as to draw attention to the written answers she had made to the questions but to not in any way to reflect her memory and wisdom for her answer. It was testified contrary to the answers there made. He thinks it clear that none of these considerations is of any avail. The Tices were aware that the insurance company had been duped out of more than \$15,000 through the fraudulent conspiracy of Mrs. Tice and the other defendants. This was what was charged in the indictment and the Tices had a right to pray and want prove the allegations.

A further contention is made that this witness was in direct contradiction of sec. 9, art. 3 of the Bill of Rights of our Constitution, which provides that in all criminal prosecutions the accused shall have the right to meet the witnesses face to face, and that what Mrs. Tice said, as shown by the statement, could not be shown unless she were put on the stand. Obviously what Mrs. Tice said to Harkney could be testified to by his statement it tended to further the same action - the original conspiracy; and the fact that what she said was in the form of a question is immaterial. Giving merely what was said, ought not to render it inadmissible. Furthermore, Mrs. Tice, after the alleged robbery, made written proof of loss in an endeavor to obtain payment from the insurance company. This document was also read and received in evidence. Obviously it was properly received, and we see no objection to its receiving at that time. It is in receiving the document in question. The defendant



on trial did not have the right, under the constitutional provision mentioned, to be confronted by Mrs. Price on the stand before the written proof of loss could be received. Counsel could and did cross examine the witness Binkley. Counsel for defendants in their brief say that "It is obvious that the statement was not introduced in evidence by the State's attorney as corroborative evidence; and moreover, under the well settled rule it could not have been introduced for such purpose."

The statement taken down in shorthand as it was, showed precisely what Mrs. Price had said. She was insisting that she had been robbed and should be paid by the Insurance company. This was a part of the conspiracy charged and we think the document was properly received in evidence.

The argument of the State's attorney made to the jury is also complained of in a number of particulars. One is that in making his closing argument, in his endeavor to show the jury what Mrs. Price said about her string of pearls having been forcibly jerked from her neck in the hold-up, as testified to by witnesses, was false; that the State's attorney, in a demonstration before the jury, tore apart a cheap string of beads which he had with such violence that the beads scattered, several of them striking the jurors. While there was no evidence showing that the string of beads used by the State's attorney was the same as that worn by Mrs. Price, yet we are clearly of the opinion that the jury would in no way be prejudicially affected. They are supposed to have the qualifications mentioned by the statute and not to be swayed by every little incident that takes place during the trial.

Of a like nature is the further argument that the State's attorney said during the argument that Baum and Krakow were the kind of men that "go around to your widows, after you are gone and fleece them out of the insurance money." The argument being





that there was no evidence to warrant such statement. It is also contended that the court erroneously overruled objection to the argument of counsel for the People in reference to his statement that the conspirators Baum and Levin were to receive immunity. The argument was: "Men of this jury, I told you before, when I made an objection in open court here, I said if they have an immunity bath, then the Judge on the bench must be co-conspirators with those that give them the immunity bath." This argument ought not to have been made, but it is obvious that Baum and Levin expected entire immunity; they both testified to this fact. The jury clearly understood it.

A further complaint is made to the argument of the State's attorney in that he stated that Mrs. Price had been "collaborating" with the attorneys for the defendants every day "to fool the jury;" that Mrs. Price was in the back of the room during the trial, and in his argument said, "Why didn't they bring her and her lawyer, who was in the court room here a few minutes ago?" A further complaint is that the State's attorney in his argument insinuated that the defendant "Barnett had had illicit relations with Mrs. Price," and further charging that Barnett had induced other women "to put up a fake robbery hold-up." And again the State's attorney, in his argument, said, "Barnett is gone. He does not want to sit in here;" that in attacking Mrs. Price, who was not on trial, nor a witness in the case, the State's attorney stated that if the jury did not find Baum and Krakow guilty, it would weaken the case against Mrs. Price. We think this argument ought not to have been made in view of the evidence in the record, but as stated, it is not everything said by the State's attorney not warranted by the evidence, that will warrant a reversal of the judgment. The statute provides that jurors shall be from twenty-one to sixty-five years old, in possession of their



that there was no evidence to warrant such statement. It is also contended that the court erroneously overruled objection to the argument of counsel for the People in reference to his statement that the conspirators Baum and Levin were to receive immunity. The argument was: "Now of this jury, I told you before, when I made an objection in open court here, I said if they have an immunity badge, then the Judge on the bench must be co-conspirators with them that give them the immunity badge." This argument ought not to have been made, but it is evident that Baum and Levin expected entire immunity; they were entitled to this fact. The jury clearly understood it.

A further complaint is made to the argument of the State's attorney in that he stated that Mrs. Price had been "collaborating" with the attorneys for the defendants every day "to fool the jury"; that Mrs. Price was in the back of the room during the trial, and in his argument said, "Why didn't they bring her and her lawyer, who was in the court room have a few minutes ago?" A further complaint is that the State's attorney in his argument insinuated that the defendant "Baum" had had illicit relations with Mrs. Price, and further claiming that "Baum" had induced other women "to put up a fake robbery half-up." And again the State's attorney, in his argument, said, "Baum is gone. He does not want to sit in here;" that in attacking Mrs. Price, who was not on trial, nor a witness in the case, the State's attorney stated that if the jury did not find Baum and Arthur Kelly, it would weaken the case against Mrs. Price. We think this argument ought not to have been made in view of the evidence in the record, but as stated, it is not everything said by the State's attorney not warranted by the evidence, that will warrant a reversal of the judgment. The statute provides that jurors shall be from twenty-one to sixty-five years old, in possession of their



natural faculties and not infirm or decrepit and of fair character, "approved integrity, of sound judgment and well informed and who understand the English language." Sec. 2, chap. 78 Revised Stats. It must be presumed that the men making up the jury in the instant case had the qualifications mentioned in the statute, and we think it clear that jurors having such qualifications would not be affected prejudicially towards the defendants on account of the argument made by the Assistant State's attorney. The issue was clear and it was that the defendants had conspired to defraud an insurance company out of more than \$17,000, and we are of the opinion that the jury understood this was the question before them and were not swayed by the argument made by the State's attorney of which complaint is made.

Mrs. Joseph Baum, wife of one of the conspirators, testified - and her testimony shows that she was an accomplice - that she and her husband called on Mrs. Price at her hotel apartment about the beginning of September, 1929, and that Baum demanded \$5,000 from Mrs. Price as his share of the proceeds of the conspiracy and the \$663 which he told Mrs. Price he had paid towards the insurance premium and to the pawnbroker as above stated. Mrs. Baum was not indicted and it is contended that her testimony was improper for two reasons: (1) that Mrs. Baum, being the wife of the alleged accomplice Joseph Baum, was incompetent to testify under sec. 5, chap. 21 of our Statutes; and (2) that the alleged conversations were had long after the termination of the conspiracy. Neither of these objections was made on the trial. The only objection was a general objection.

The record discloses that when Mrs. Baum was asked whether she had ever had a talk with her husband with regard to a fake hold-up in which he participated, counsel for the defendants





said, "I object to that." The objection was overruled. She was then asked when the conversation took place, and replied it was the beginning of September, 1939. "I called somebody after my conversation with my husband. After I called somebody I went to the Seneca hotel, and when I got to the Seneca hotel I went to Mrs. Price's room." Counsel for defendants: "I object to that same line of testimony and I want to renew my objection." The Court: "Overruled."

An examination of the record will show that at no time during the testimony of Mrs. Baum was any objection made that she was incompetent under the statute or that the alleged conversation was after the termination of the conspiracy. Mrs. Baum testified as to the meeting with Mrs. Price the next day downtown and receiving the \$663. Neither of the objections now made was in any way suggested to the trial Judge. Under our procedure, where a witness is testifying and defendant's counsel thinks the testimony is improper, he should point out the objection made, especially such objections as are now here urged. This is done so that the trial judge can rule intelligently.

But in any event we are of opinion that the first objection made in the brief, namely, that Mrs. Baum being the wife of Joe Baum, was incompetent under sec. 5, chap. 21, of our statutes, is not apt here. That section provides that no husband or wife shall be competent to testify for or against the other as to any transaction or conversation occurring during the marriage, and the argument is that Mrs. Baum was permitted to testify concerning conversations with Mrs. Price, and that the facts testified to by Mrs. Baum were obtained by reason of her marital relations with Joe Baum. Mrs. Baum was not giving testimony for or against her husband, and the statute does not apply. She was testifying on behalf of the People. Her husband, Joe Baum, was not on trial.



said, "I object to that." The objection was overruled. When was then asked when the conversation took place, and replied it was the beginning of September, 1929. "I called somebody after my conversation with my husband. After I called somebody I went to the Boston Hotel, and when I got to the Boston Hotel I went to Mrs. Price's room." Counsel for defendant: "I object to that same line of testimony and I want to know my objection." The Court: "Overruled."

An examination of the record will show that at no time during the testimony of Mrs. Baum was any objection made that the was incompetent under the statute or that the alleged conversation was after the termination of the conspiracy. Mrs. Baum testified as to the meeting with Mrs. Price the next day downtown and receiving the \$500. Neither of the objections now made was in any way suggested in the trial judge. Under our procedure, where a witness is testifying and defendant's counsel thinks the testimony is improper, he should point out the objection made, specifically and objections as are now made. This is done in fact the trial judge can rule intelligently.

And in any event we are of opinion that the first objection made in the trial, namely, that Mrs. Baum being the wife of Joe Baum, was incompetent under sec. 2, chap. 21, of our statute, is not apt here. That section provides that no husband or wife shall be competent to testify for or against the other as to any transaction or conversation occurring during the marriage, and the argument is that Mrs. Baum was permitted to testify concerning conversations with Mrs. Price, and that the facts testified to by Mrs. Baum were obtained by means of her marital relations with Joe Baum. Mrs. Baum was not giving testimony for or against her husband, and the statute does not apply. She was testifying as to facts of the People. Her husband, Joe Baum, was not on trial.

The objection cannot be maintained. Graff v. People, 208 Ill. 312. The second objection urged to this testimony of Mrs. Baum was that the conversations between her husband and Mrs. Price in her presence were inadmissible because they took place after the termination of the conspiracy, and it is argued that the alleged conspiracy terminated when the Insurance company made the final payment on July 25, 1929. And the case of The People v. Halpin, 276 Ill. 363, and other cases are cited to sustain the proposition that acts and declarations of conspirators, in the absence of other comconspirators, are inadmissible against the co-conspirators who are not present, which acts and declarations are after the termination of the conspiracy. The same contention is made that the court erred in permitting Joe Baum to testify to the same conversation with Mrs. Price in the Seneca hotel, and for the same reasons stated in counsel's objection to the testimony of Mrs. Baum. The record shows, however, that when Joe Baum was about to testify concerning this conversation with Mrs. Price, counsel for the defendants objected "that this was subsequent to July 25th." The court overruled the objection and although it was not then pointed out that the objection was that the conversation was after the termination of the conspiracy, yet we think the objection was sufficient to save the point and the ruling of the court was erroneous as held in the Halpin and other cases, although the evidence which was held to be improper in the Halpin case was not so closely related to the conspiracy there charged as is the evidence in the instant case to the conspiracy of the defendants. The evidence here is to the effect that it was a part of the conspiracy that the proceeds of the insurance money received should be divided, one-third to Mrs. Price and two-thirds among the other conspirators. So that what was done towards the division of the loot was a part of the original conspiracy. And in California it has been held that:



The objection cannot be sustained. People v. Williams, 208 Ill. 112. The second objection urged is also contrary to the law and that the conversation between her husband and Mrs. Trice in her presence were inadmissible because they took place after the termination of the conspiracy, and it is argued that the alleged conspiracy terminated when the insurance company made the final payment on July 25, 1921. In the case of The People v. Williams, 208 Ill. 112, and other cases are cited to sustain the proposition that acts and declarations of conspirators, in the absence of other conspirators, are inadmissible against the co-conspirators who are not present, which acts and declarations are after the termination of the conspiracy. The same contention is made that the court acted in permitting Joe Mann to testify to the same conversation with Mrs. Trice in the James Hotel, and for the same reasons stated in counsel's objection to the testimony of Joe Mann. The record shows, however, that when Joe Mann was absent in Seattle concerning this conversation with Mrs. Trice, counsel for the defendant objected "that this was subsequent to July 25th." The court overruled the objection and although it was not then pointed out that the objection was that the conversation was after the termination of the conspiracy, yet we think the objection was sufficient to save the point and the ruling of the court was erroneous in holding in the Ralph and other cases, although the evidence which was held to be improper in the Williams case was not so closely related to the conspiracy there charged as is the evidence in the instant case to the conspiracy of the defendants. The evidence here is to the effect that it was a part of the conspiracy that the proceeds of the insurance money received should be divided, one-third to Mrs. Trice and two-thirds among the other conspirators. It thus appears that the division of the proceeds of the insurance was a part of the original conspiracy, and in California it has been held that:



"The common design of a criminal enterprise may extend, however, as appellant concedes, beyond the point of the commission of an act constituting the crime for which the alleged conspirator is on trial. People v. Opie, 123 Cal. 294; \*\*\* People v. Holmes, 118 Cal. 444; \*\*\* People v. Rodley, 131 Cal. 240; \*\*\* 'The question as to when the design is accomplished and abandoned is one depending on the facts and circumstances in each case, and the nature and purposes of the conspiracy, and such question is one for the jury, as is also the question as to whether the acts proven were not a part of the design of the conspiracy.'" People v. Lorraine, 90 Cal. App. 317-327.

But we are also of the opinion, as held in the Halpin case, where the evidence was received over objection and where the court held it was erroneously received, yet it was further held that upon a consideration of all the evidence in the record, that the court would not be warranted in reversing the judgment of conviction if the jury, acting reasonably on the competent evidence and under proper instructions, could have reached no other conclusion. In the instant case, upon a careful consideration of all the evidence in the record, we think that considering only the competent evidence the jury could have reached no other verdict than they did, and in these circumstances the judgment ought not to be reversed, as held in the Halpin case.

Further complaint is made that the court erred in permitting Joe Baum to testify over objection that after he went to Binkley, attorney for the Insurance company, and told him of the conspiracy, and while he was at Binkley's office in an endeavor to convince Binkley of the truth of the story, he called up Mrs. Price on the telephone and a man in Binkley's office listened in to the conversation on an extension telephone. The conversation as testified to by Baum was: "'Hello, Mrs. Price, this is Joe.' She





said, 'What do you want?' I said, 'I could get a thousand dollars for the coat.' She said, 'All right' and hung up." When Baum was being interrogated concerning this matter the objection of counsel for the defendants was, "I object. We are not bound by what Scaffa told this man." Scaffa was the man who listened in on the telephone. The point now made, that the evidence was inadmissible because the conversation took place long after the termination of the conspiracy, was not the contention made on the trial. But in any event, we think the testimony was not of such a character as to warrant us in disturbing the verdict of the jury.

It is also contended that the court erred in admitting the testimony of the witness, Schaeffer, who was the auditor of the Boulevard Bridge Bank. He testified that a Mrs. Laura B. Price who lived at the Seneca hotel, had drawn a check against her account at the bank September 6, 1929. The evidence shows that Mrs. Laura B. Price lived at the Seneca hotel and that a Mrs. Laura B. Price had an account in the bank, and The People sought to show that the \$663 which was given to Mrs. Baum by Mrs. Price the day after the conversation was alleged to have been had between Mrs. Price and Baum and his wife at the Seneca hotel, was the money drawn out by Mrs. Price the day before the payment was made. Objection to this testimony is that it merely corroborated the testimony of Baum and his wife in regard to the conversation had at the Seneca hotel with Mrs. Price, and since the testimony of Baum and his wife was inadmissible for the reasons urged by counsel for the defendants, the evidence tending to corroborate it was also inadmissible. No such objection was made on the trial of the case. We think the evidence was properly admissible as tending to show that Mrs. Price drew \$600 from the bank almost immediately before Mrs. Baum testified she was handed the \$663 by Mrs. Price.



asked, 'What do you want?' I said, 'I would get a thousand dollars for the coat.' She said, 'All right, and hang up.' When I came back being interrogated concerning this matter the situation of course for the defendant was, 'I object. We are not bound by what she told this man.' That was the man who listened in on the telephone. The coat was gone, and the witness was in a position to cause the conversation took place after the termination of the conversation, was not the contention made on the trial. But in any event, we think the testimony was not of such a character as to warrant an instruction to the jury.

It is also contended that the coat was in the possession of the witness, the witness, the witness, who was the mother of the defendant. He testified that a man, known as E. Price who lived at the house, had taken a check against the account of the bank September 8, 1935. The witness never saw Mrs. E. Price lived at the house, and the witness sought to show that the \$400 which was given to Mrs. Price the day after the conversation was alleged to have been paid between Mrs. Price and E. Price, and his wife at the house, and the money drawn out by Mrs. Price the day before the payment was made. It is also contended that it merely corroborated the testimony of E. Price and his wife in regard to the conversation had at the house with Mrs. Price, and since the testimony of E. Price and his wife was corroborated by the testimony of the defendant, the evidence tending to corroborate it was also inadmissible. It was also contended that the evidence was not of such a character as to warrant an instruction to the jury. We think the evidence was properly admitted as tending to show that Mrs. Price drew \$400 from the bank shortly before Mrs. Price testified she was paid for the coat by Mrs. Price.

Lloyd J. Butler testified that he was an official of the Illinois State Pawnbrokers' Association, and that Mrs. Price had pawned her ring there and he identified the pawn ticket bearing the signature of Mrs. Price, which showed that she had received her ring from the broker. There was evidence tending to show that the signature on the ticket was Mrs. Price's signature. We think this evidence was entirely proper, as this was long before the termination of the conspiracy, and whether there was a variance in the amount of money alleged to have been paid to the witness by Mrs. Price, as defendants' counsel contend, and the amount the latter paid to the pawnbroker, only went to the weight of this evidence.

Defendants complain of the giving of instructions numbers 4, 7, 8 and 10. By instruction No. 4 the jury were told that the defendant might testify in his own behalf and how they should look at this testimony. Instruction No. 7 told the jury that the testimony of an accomplice was competent evidence; that the credibility of the accomplice was for the jury to pass upon as they would pass upon the credibility of any other witness; that such testimony must be received with great caution, but if such testimony carried conviction and the jury were convinced of its truth, they should give it the same weight as would be given to the testimony of a witness who was in no respect implicated in the offense. Instruction No. 8 was to the effect that under the law a defendant might be convicted by the uncorroborated testimony of an accomplice; and if the jury found from the evidence that the testimony given by Barnett and Levin was true, then they could act upon such testimony; that the testimony of an accomplice, like all other evidence, was for the jury to pass upon. Instruction No. 10 was in reference to circumstantial evidence.

We think there was no prejudicial error in the giving of the instructions complained of, in view of the evidence in



Lloyd T. Miller testified that he was an attorney at the Illinois State Bar Association, and that the witness had passed her ring there and he identified the ring as being the signature of Mrs. Price, which showed that she had received the ring from the father. There was evidence tending to show that the signature on the check was Mrs. Price's signature. We think this evidence was entirely proper, as this was found before the testimony of the conspiracy, and whether there was a variance in the amount of money alleged to have been paid to the witness by Mrs. Price, as defendant's counsel contended, was the subject of the evidence. It is the purpose of this evidence, only, to show the weight of this evidence. Defendant's counsel at the time of instructions numbers 4, 7, 8 and 10. By instruction No. 8 the jury were told that the defendant might testify in his own behalf and how they should look at his testimony. Instruction No. 7 told the jury that the testimony of an accomplice was competent evidence; that the credibility of the accomplice was for the jury to pass upon as they would pass upon the credibility of any other witness; that such testimony must be received with great caution, but if such testimony entitled conviction and the jury were convinced of its truth, they should give it the same weight as would be given to the testimony of a witness who was in no respect implicated in the offense. Instruction No. 8 was to the effect that under the law a defendant might be convicted by the uncorroborated testimony of an accomplice; and if the jury found from the evidence that the testimony given by Barnett and Davis was true, then they could act upon such testimony; that the testimony of an accomplice, like all other evidence, was for the jury to pass upon. Instruction No. 10 was in reference to circumstantial evidence. We think there was no prejudicial error in the giving of the instructions complained of, in view of the evidence in



the case. While there are some inaccuracies in the instructions, we think they are not of such a character as to warrant us in disturbing the verdict of the jury.

The judgment of the Criminal court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

the case. While there are some instances in the literature, we think they are not of such a character as to warrant us in elevating the verdict of the jury. The judgment of the criminal court of this county is affirmed.

ATTEST.

Witness my hand and seal of office at the County of Los Angeles, California, this 1st day of January, 1901.

34804

LOUIS J. SCHERR,  
Appellee,

vs.

EDWARD J. PAULER et al.,  
Appellants.

INTERLOCUTORY APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

259 I.A. 650<sup>3</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendants seek to reverse an order entered by the Circuit court of Cook county enjoining the defendants from foreclosing a chattel mortgage on certain personal property and from removing the property from certain premises located in the City of Chicago. The injunctional order was issued October 9, 1930, upon complainant's verified bill of complaint and accompanying affidavits. The order provided that the writ of injunction issue upon the complainant giving bond in the sum of \$3,000. The bond was filed and approved on October 9th, 1930. On November 8th the defendants took their appeal under the statute by filing their bond and having it approved by the clerk of the court.

The defendants first contend that the order is wrong and should be reversed because the bill was improperly verified. The affidavit to the bill of complaint is made by the complainant in which he swears "that he has read the above and foregoing bill of complaint by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be on his information and belief, and as to those matters, he believes it to be true." This affidavit is in proper form. Farrall v. Heiberg, 262 Ill. 407; Peterson Co. v. Asphalt Sales Corp., 235 Ill. App. 592; National Supply Co. v. Ill. Preserving Co., 239 Ill. App. 69. No contention is made that the affidavit was not in proper form, but the



1348

EDWARD J. KAHN, JR.  
Associate  
LOUIS J. KAHN, JR.  
Associate  
1000  
1000

INVESTIGATION REPORT  
REPORT OF THE BOARD

2531 A. 680

RE. TRUSTEES OF COMMON TRUST AND SAVINGS ASSOCIATION OF THE DISTRICT OF COLUMBIA

By this report the following facts are stated as to the-  
her entered by the District Court of the District of Columbia in the  
Tombstone from foreclosing a chattel mortgage on certain personal  
property and from removing the property from certain premises in-  
cated in the City of Chicago. The information was received in-  
October 2, 1930, upon complainant's verified bill of complaint  
and accompanying affidavits. The order provided that the writ of  
injunction issue upon the complainant giving bond in the sum of  
\$5,000. The bond was filed and returned on October 10, 1930.  
On November 20, 1930, the defendant filed a bill of complaint and  
by filing this bill and moving it removed to the District of  
Court.

The defendant first contends that the bill is wrong  
and should be reversed because the bill was improperly verified.  
The affidavit to the bill of complaint is made by the complainant  
in which he swears "that he has read the above and foregoing bill  
of complaint by him subscribed and knows the contents thereof,  
and that the same is true of his own knowledge, except as to those  
matters which are therein stated to be on his information and be-  
lief, and as to those matters, he believes it to be true." This  
affidavit is in proper form. Hartley v. Heiberg, 202 Ill. 427;  
Robinson Co. v. Samuel's Sales Corp., 258 Ill. App. 522; National  
Banking Co. v. Ill. Trusting Co., 250 Ill. App. 57. No conten-  
tion is made that the affidavit was not in proper form, but the

point made is as stated by counsel for the defendants, that "The bill of complaint did not charge anything on information and belief. Every statement therein made was positive." This is a strange argument to advance. The averments of the bill are stated positively and the verification is that the averments are true. The fact that complainant added in his affidavit that he believed the matters in the bill which are said to be stated upon information and belief, to be true, is surplusage.

A further point is made that it was error to issue the injunction without notice. Section 3 of chapter 69 of our statute provides that no court shall issue an order awarding a writ of injunction without previous notice of the time and place of the application having been given to the defendants unless it shall appear from the bill of accompanying affidavits that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately and without notice.

From the allegations of the bill which must be taken as true on the record before us, it appears that the complainant is the owner of a building and furniture in the building which is being used as and for rooming house purposes; that one of the defendants, although not having any interest in the furniture, fraudulently purported to execute a chattel mortgage conveying the furniture to the other defendant; that both of the defendants knew that the furniture belonged to complainant but that they had entered into the alleged chattel mortgage to defraud the complainant; that the alleged mortgagee was proceeding with an alleged foreclosure of the chattel mortgage and had advertised that the furniture would be sold under the alleged chattel mortgage a day or two after the bill was filed. It is further alleged in the bill that one of the defendants had stated that he intended to remove the furniture from



point made in the report of the defendant, that "The bill of complaint did not charge anything on information and de- list. Every statement therein made was positive." This is a strange statement to make. The defendant of the bill and stated positively and the verification is that the defendant was true. The fact that complaint added in his affidavit that he believed the matters in the bill which was said to be stated upon information and belief, to be true, is unnecessary.

A further point is made that it was never so stated the information without notice. Section 1 of chapter 33 of the statute provides that no court shall issue an order requiring a writ of information without previous notice of the time and place of the application having been given to the defendant unless it shall appear from the bill of accompanying affidavit that the rights of the defendant will be unduly prejudiced if the in- junction is not issued immediately and without notice.

From the allegations of the bill which must be taken as true on the recent balance, it appears that the complaint is the owner of a building and premises in the building which is being used as and for rooming house purposes; that one of the defendants, although not having any interest in the building, fraudulently purposed to execute a chattel mortgage conveying the premises to the other defendant; and both of the defendants knew that the premises belonged to complaint but that they had con- sidered into the alleged chattel mortgage to defraud the complainant; that the alleged mortgage was recorded after an alleged introduction of the chattel mortgage and had advised that the premises were to be sold under the alleged chattel mortgage a day or two after the bill was filed. It is further alleged in the bill that one of the defendants had stated that he intended to remove the premises from



the building where it was located to places unknown to the complainant, and that if this were done the complainant would be unable to find his furniture. On preliminary motion of this kind, under the allegations of the bill, we cannot say that the court was in error in issuing the injunction without notice. Nor can we say that the injunction of the defendants that a court of equity was without jurisdiction because complainant had an adequate remedy at law by an action of replevin, is sound. We think complainant's remedy by an action of replevin was not complete and adequate. In the instant case, if complainant is able to prove that the chattel mortgage was fraudulent as he alleges, then it can be ordered delivered up and cancelled and all of the rights of the parties can equitably be adjusted.

Obviously, we are not passing on the merits of the contentions made by the complainant because that matter is not before us.

The order of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

the building where it was located to places unknown to the complainant, and that if this were done the complainant would be unable to find his furniture. On preliminary motion of this kind, under the allegations of the bill, we cannot say that the court was in error in issuing the injunction without notice. Nor can we say that the

injunction of the defendant that a court of equity was warranted in issuing because complainant had an adequate remedy at law by an action of trespass, is sound. We take complainant's remedy by an action of trespass was not complete and adequate. In the instant case, if complainant is able to prove that the chattels wrongs was fraudulent as he alleges, then it can be ordered delivered up and cancelled and all of the rights of the parties can equally be adjusted.

Obviously, we are not passing on the merits of the contention made by the complainant because that matter is not before us.

The order of the Circuit Court of Cook County is

affirmed.

ATTEST.

Witness my hand and seal, this 11th day of November, 1900.

33789

ETHEL C. RUSSELL,  
(Plaintiff) Appellee.

v.

WILLIAM J. RUSSELL,  
(Defendant) Appellant.

APPEAL FROM  
CIRCUIT COURT

COOK COUNTY.

259 I.A. 650<sup>4</sup>

Opinion filed Dec. 10, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an action in replevin brought by Ethel C. Russell, plaintiff, against William J. Russell, the defendant, who is also the father of the plaintiff. The action was to recover an Ampico piano and certain music rolls, one green lacquered desk, one bookcase and certain bedroom furniture. Plaintiff alleges that the piano, together with the bedroom furniture, was given to her by her father. She testified that he told her that he would furnish her bedroom as a birthday present and did so furnish it. It was agreed by counsel during the course of the proceeding that the piano was paid for by the defendant.

It is insisted on behalf of the defendant that he was unable to procure a fair trial because of the conduct of the court and counsel for the plaintiff. The replevin action was started March 15, 1929. Over objection of counsel, the plaintiff was asked numerous questions by her counsel in regard to the terms of the will of her mother for the purpose of showing that the mother, who died December 16, 1928, left her personal property to the plaintiff. The record seems to be full of this line of examination, which was interjected by counsel for plaintiff, although the action was not brought



Opinion filed Dec. 10, 1930

[illegible]

by the plaintiff as executrix of the estate, nor is there evidence showing what, if any, property belonged to the mother prior to her death. The court permitted this line of examination, which we believe was immaterial in view of the fact that the property in question was claimed to have been a gift from the father.

During the course of the proceedings, the following discussion took place while plaintiff was being cross-examined:

"Mr. Grossberg: We want to show, if the Court please -

The Court: I think you are wasting time; the father is obliged to support her and everything else until she is -

Mr. Grossberg: Until she is eighteen years old.

The Court: It don't make any difference if she was forty years old if he wanted to keep it up.

Mr. Grossberg: I want to show he did support her.

Mr. Reniff: Just a minute I will show who had the money in this family when he was married.

Mr. Grossman: If the Court please, this young lady is claiming certain things as belonging to her.

The Court: Claiming the piano and bedroom furniture.

Mr. Grossberg: All right.

The Court: Never ought to have come into court at all.

Mr. Grossberg: No it never had. No daughter should have brought this kind of a suit.

The Court: No father should have deprived a daughter of them, the only daughter he had -

Mr. Reniff: Especially when the mother furnished the money for them.

Mr. Grossberg: I submit, if the Court please, we cannot go on with this case.

The Court: Yes, we will go on with, finish it and get a verdict on it.

Mr. Grossberg: In view of the last remark -

The Court: In view of all the remarks made, we will finish it, won't carry it any further.

Mr. Grossberg: I move the Court be permitted to withdraw a juror.

The Court: Overruled, proceed. Proceed I say."

At the end of plaintiff's evidence, counsel for defendant attempted to present to the court a motion, which the court refused to hear. We presume it was an attempt to present a motion to direct a verdict at the end of plaintiff's case.

by the plaintiff as contrary to the public, not in their  
evidence showing that, if any, property belonged to the mother  
prior to her death. The court rejected this line of argu-  
ment, since we believe the plaintiff in view of the fact  
that the property in question was claimed to have been a gift  
from the father.

During the course of the proceedings, the following  
discussion took place while plaintiff was being cross-examined:

Q. Now, Mr. Plaintiff, you want to show, in the Court

please -  
A. Yes, I think you are wasting time; the  
father is obliged to support her and everything else  
until she is -

Q. Now, Mr. Plaintiff, until she is sixteen years old.  
The Court: It doesn't make any difference if she  
was forty years old it is wrong to say it is.

Q. Now, Mr. Plaintiff, I want to know in the Court's  
opinion, that a child I will claim who has  
the name in this family when he was married.

Q. Now, Mr. Plaintiff, if the Court please, this young  
lady is claiming certain things as belonging to her.  
The Court: Claiming the name and nothing

else.  
Q. Now, Mr. Plaintiff, all right.  
The Court: Never mind, I have asked you many  
times.

Q. Now, Mr. Plaintiff, he is your son, he is married  
and he has a wife and a child.

Q. Now, Mr. Plaintiff, he is married and has a child.  
The Court: He is married and has a child.  
Q. Now, Mr. Plaintiff, the only thing he has -

Q. Now, Mr. Plaintiff, the only thing he has is the  
name of his father, the name of his father.

Q. Now, Mr. Plaintiff, I want to know, if the Court please,  
he cannot be an heir of his father.

Q. Now, Mr. Plaintiff, I want to know, if the Court please,  
he cannot be an heir of his father.

Q. Now, Mr. Plaintiff, I want to know, if the Court please,  
he cannot be an heir of his father.

Q. Now, Mr. Plaintiff, I want to know, if the Court please,  
he cannot be an heir of his father.

Q. Now, Mr. Plaintiff, I want to know, if the Court please,  
he cannot be an heir of his father.

Q. Now, Mr. Plaintiff, I want to know, if the Court please,  
he cannot be an heir of his father.



On direct examination the defendant was asked certain questions for the purpose of eliciting the fact that he was living with his family, and that the articles in question, at the time of the replevin suit, were in his home. The court undertook to cross examine. The questions and answers follow:

"Q. You didn't occupy the bedroom? A. Not always.

Q. No; you didn't use the furniture in there?

A. When it was in there, the same as we did any other furniture in the house.  
\*\*\*\*\*

The Court. It was her bedroom.

The Witness: It was her room, yes, but it wasn't her furniture.

Q. Did you play the piano? A. Yes.  
\*\*\*\*\*

The Court: Does the girl?

The Witness: Anyone could play it, it was an electric piano.

Q. Is that the reason you play it? A. No."

During the course of the proceeding, the plaintiff testified that she was thrown out of her home and sustained a black eye. This was denied by the defendant. Plaintiff was examined in rebuttal, by her counsel, and at the end of counsel's examination the court, over objection continued the examination as follows:

"The Court: You made some statement about a black eye, why don't you make good on it?

Mr. Reniff: Oh, I forgot; I thank the Court for the suggestion.

Q. Did you have any discoloration of the eye after this time?

The Witness: Yes, sir, \* \* \*

The Court: From what, what caused that? \* \* \*

A. My brothers hit me, too.

The Court: Did they actually strike you?

The Witness: Yes, sir \* \* \*"

There also appears to have been an effort to interject into the proceeding a cloud of suspicion around the conduct of the defendant and by innuendo he was charged with having forged certain documents pertaining to the estate of his wife. The court ruled this out, but it was repeatedly brought before

On direct examination the defendant was asked certain questions for the purpose of eliciting the fact that he was living with his family, and that the evidence in question, at the time of the transaction, was in his home. The court understood to cross examine. The questions and answers follow:

Q. Now didn't occupy the bedroom? A. Not always.  
Q. And you didn't see the defendant in there?  
A. That is not in there, the way as to him and other persons in the house.  
Q. The Court: It was not necessary.  
A. The witness: It was not necessary, yes, but it wasn't necessary.  
Q. All you say the witness? A. Yes.  
Q. The Court: Does the jury?  
A. The witness: I don't know, I don't know, I don't know.  
Q. Is that the reason you say it? A. No.

During the course of the examination, the witness testified that she was shown out of her home and was shown a place. This was done by the defendant. The witness was examined in detail, by her counsel, and at the end of counsel's examination the court, upon objection, sustained the examination as follows:

Q. The Court: The witness testified about a black eye, didn't you? A. Yes, I did.  
Q. Now, didn't you say you saw it?  
A. Yes, I did. I didn't see the Court for the witness.  
Q. And you were not dissatisfied of the eye after this time?  
A. The witness: Yes, sir.  
Q. The Court: Now, didn't you say you saw it?  
A. Yes, I did. I didn't see the Court for the witness.  
Q. The Court: All right, all right, all right.

There also appears to have been an effort to introduce into the proceeding a claim of confusion around the conduct of the defendant and of himself, as was charged with having fought certain persons, resulting in the injury to his wife. The court ruled this out, but it was repeatedly brought before

the attention of the jury for no good purpose. The issue involved was a simple question of fact as to the ownership of the property in question. The estate of the mother was not involved.

In any action a court should be careful of its conduct so as not to create an impression in the minds of the jurors that the court leans toward one side or the other. The conduct of the court in this case in participating in the examination of witnesses necessarily indicated to the jury that the court had an opinion unfavorable to the defendant. His remark in the presence of the jury, "No father should deprive a daughter of them," meaning the property in question, was in itself enough to indicate, not only that the court was favorable to the plaintiff, but that he considered the conduct of the defendant reprehensible and unnatural. It is unfortunate that cases have to be reversed because of the conduct of the court thereby incurring added expense and loss of time in the retrial of such actions. The jurors were instructed by the court to the effect that anything said or done by the court should not be considered by them in arriving at a verdict, but this instruction did not cure the harm already done.

We are of the opinion that the conduct of the court and the remarks made by it in the course of the proceeding, were sufficient to justify a reversal and for that reason the judgment is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL AND FRIEND, JJ. CONCUR.



the attention of the jury for no good purpose. The issue  
involved was a simple question of fact as to the ownership of  
the property in question. The nature of the matter was not  
involved.

In any action a court would be entitled to the  
content as to not to create an impression in the minds of  
the jury that the court is not taking sides on the other.  
The content of the story in this case is contained in  
the examination of witnesses necessarily included in the  
jury that the court had an opinion relative to the testimony.  
His remark to the jury, "the matter should  
be left to the jury," was not intended to create an impression  
that the court was in itself enough to influence the jury in reaching  
its verdict in the matter, but that he considered the evidence  
of the defendant respectable and satisfactory. It is not  
to be made that such a remark to be repeated because of the fact  
at the time shortly following which evidence was taken by the  
in the verdict of each witness. The jury was instructed  
by the court to the effect that each witness was to be taken by the  
court should not be considered as being in conflict with a witness,  
but that instruction was not given the jury already done.  
The aim of the opinion that the verdict of the court  
and the verdict made by it in the matter of the proceeding,  
was sufficient to justify a reversal and that was the reason the  
judgment is reversed and the same remanded for a new trial.

REVEREND JUDGE, U. S. DISTRICT COURT.

33810

ELMER G. HASSMAN,

Appellee,

v.

THE GREAT ATLANTIC & PACIFIC  
TEA CO., a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 651'

Opinion filed Dec. 10, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion  
of the court.

Plaintiff Hassman brought his action to recover for injuries to his automobile by reason of a collision at the intersection of Lincoln avenue, North Park avenue and Wisconsin street, three intersecting streets in the City of Chicago. Plaintiff testified that he was driving northwest on Lincoln avenue and that at the intersection of that street with Wisconsin street, his car was struck on the right side by a truck of The Great Atlantic & Pacific Tea Co., which was proceeding along Wisconsin street in a westerly direction. Plaintiff testified further that, as a result of said collision, his car was pushed over against a car operated by the defendant Smith, which was going southeast on Lincoln avenue in the opposite direction from that in which plaintiff's car was proceeding.

At the end of plaintiff's testimony, both defendants made motions for a directed verdict which were overruled. Thereupon neither defendant offered any proof as a matter of defense, but both renewed their motion for a directed verdict at the end of all of the evidence. The cause was tried by the court without a jury and a finding was had in favor of the defendant, Smith, and against the Great Atlantic & Pacific Tea Co., and judgment entered on the finding in the sum of \$57.18.

33810

THE COURT ATTEMPTED TO  
RE-STATE THE CASE  
IN A MORE  
SIMPLE MANNER

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SIMPLE MANNER

259 I.A. 651

Opinion filed Dec. 10, 1930

THE COURT ATTEMPTED TO RE-STATE THE CASE IN A MORE SIMPLE MANNER

of the case.

THE COURT ATTEMPTED TO RE-STATE THE CASE IN A MORE SIMPLE MANNER

injuries to his automobile by reason of a collision at the

intersection of Lincoln Avenue, South First Avenue and

Wisconsin Street, three intersecting streets in the city of

Chicago. Plaintiff testified that he was driving westward on

Lincoln Avenue and that at the intersection of that street

with Wisconsin Street, his car was struck on the right side

by a truck of the Great Atlantic & Pacific Tea Co., which was

proceeding along Wisconsin Street in a westerly direction.

Plaintiff testified further that, as a result of said collision,

his car was pushed over against a car operated by the defendant

which was being collected on Lincoln Avenue in the

opposite direction from that in which plaintiff's car was

proceeding.

At the end of plaintiff's testimony, both defendants

made motions for a directed verdict which were overruled. There-

upon neither defendant offered any proof as a matter of defense,

but both renewed their motion for a directed verdict at the end

of all of the evidence. The court was tried by the court with-

out a jury and a finding was had in favor of the defendant, which

and against the Great Atlantic & Pacific Tea Co., and judgment

entered on the finding in the sum of \$27.18.



It is urged on behalf of the defendant, Great Atlantic & Pacific Tea Co., that the court erred in finding in favor of the defendant, Smith, and against the defendant here, because of the fact that at the close of the plaintiff's case the court denied a motion for a directed verdict as to both of them and, subsequently, under the same evidence, found in favor of the defendant, Smith, and against the defendant here.

We are referred to the case of Genslinger v. New Illinois Athletic Club of Chicago, 353 Ill. App. 298, which, however, is not in point. In that case the Appellate court held that it was bound by a previous decision and that the matter had been before it on a previous appeal. In the case at bar the court retained jurisdiction of the cause and had the power to change its ruling during the course of the proceeding.

It is also insisted that under the proof offered by the plaintiff, it was impossible for the accident to have occurred. It is pointed out that, from plaintiff's proof, the accident could not have happened because of the fact that at the rate at which his car was proceeding, it would have been beyond the street intersection before the truck of the defendant had reached it. The answer is that the accident did occur at the street intersection, and the testimony of the plaintiff is that his car was struck on the side by the truck. From the facts in evidence it is apparent that the truck ran into the automobile and not the automobile into the truck.

The court heard the evidence without a jury, and this court cannot say that its finding is so manifestly against the weight of the evidence that it should disturb that finding and judgment.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

It is urged on behalf of the defendant, Great Atlantic & Pacific Tea Co., that the court erred in finding in favor of the defendant, Smith, and against the defendant here, because of the fact that at the close of the plaintiff's case the court denied a motion for a directed verdict as to both of them and, subsequently, under the same evidence, found in favor of the defendant, Smith, and against the defendant here.

We are referred to the case of REYNOLDS V. RAY, 111 Ill. App. 2d 411, 1944, which, however, is not in point. In that case the appellate court held that it was bound by a previous decision and that the matter had been before it on a previous appeal. In the case at bar the court retained jurisdiction of the case and had the power to change its ruling during the course of the proceedings. It is also insisted that under the facts offered by the plaintiff, it was impossible for the witness to have observed. It is pointed out that, from plaintiff's point of view, accident could not have happened because of the fact that at the time at which his car was damaged, it could have been beyond the street intersection before the front of the defendant had reached it. The answer is that the witness did come to the street intersection, and the testimony of the plaintiff is that his car was struck on the side by the truck. From the facts in evidence it is apparent that the truck ran into the automobile and not the automobile into the truck.

The court heard the witness almost a year, and this court cannot say that the finding is so manifestly against the weight of the evidence that it should disturb that finding and judgment.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

REINHOLD AND FLETCHER, JJ. CONCUR.

33829

NATHAN RUSHAKOFF,

(Plaintiff) Appellee,

v.

CITY OF CHICAGO, a Municipal  
Corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 651<sup>2</sup>

Opinion filed Dec. 10, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion  
of the court.

Plaintiff sued to recover \$200 paid by him to the  
defendant City of Chicago for a license as a junk dealer for  
the year 1925.

It appears from the record that the ordinance re-  
quiring the payment of \$200 to the city for such license had  
been repealed by a subsequent ordinance passed November 12,  
1924, and so held in the case of Feisner v. The City of  
Chicago, 318 Ill. 131.

Plaintiff testified that at the time he made his  
application and paid his money to defendant for his license  
he was told that the license would be mailed to him. He  
never received it.

Gross, a witness for the city, testified that the  
license was never issued, but that it was held because of a  
notation on the back, "Holding to collect for 1924 license."  
There is no evidence that the plaintiff owed for a 1924  
license. The payment was made by the plaintiff and received  
by the defendant for a specific purpose, namely, issuance of  
a 1925 license.



33800

ATLANTA UNIVERSITY

(Institution) Atlanta, Ga.

W.

CITY OF ATLANTA, a Municipal Corporation,

(Defendant) Respondent.

ATLANTA UNIVERSITY

(Plaintiff) Petitioner

IN CHARGE

250 E.A. 681

Opinion filed Dec. 10, 1930

1. Petitioner's motion for summary judgment is denied.

2. The court.

3. Petitioner's motion for summary judgment is denied. The City of Atlanta has a license for a hotel for the year 1931.

4. It appears from the record that the defendant has been operating the business of the City of Atlanta for the year 1931. The defendant has been operating the business of the City of Atlanta for the year 1931.

5. The court.

6. Petitioner's motion for summary judgment is denied.

7. Application and petition for summary judgment are denied.

8. It is so ordered that the license be granted to the City of Atlanta for the year 1931.

9. The court.

10. A license for the year 1931, granted to the City of Atlanta.

11. License was granted to the City of Atlanta for the year 1931.

12. License was granted to the City of Atlanta for the year 1931.

13. There is no evidence that the license was granted for a year.

14. The license was granted by the City of Atlanta for the year 1931.

15. The license was granted for a specific purpose, namely, to operate a hotel.

16. The license.

Under the circumstances in this case, there being no ordinance authorizing the collection of the money, it should have been returned.

The cause was tried by the court without a jury and the issues were found in favor of the plaintiff and judgment entered for \$200, and we believe properly so.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

Under the circumstances in this case, there being no evidence supporting the collection of the money, it should have been refused.

The court was aided by the court without a jury and the issues were found in favor of the plaintiff and judgment entered for him, and so believe properly so.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

WOMANLY AFFIRMED.

WOMANLY AFFIRMED, J. J. J.



33836

MRS. JOSEPHINE HAUSNER,  
(Plaintiff) Appellant,

v.

JOSEPH HAUSNER,  
(Defendant) Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

259 I.A. 651<sup>3</sup>

Opinion filed Dec. 10, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

This is an appeal by Josephine Hausner to review a judgment entered by the Superior Court of Cook County finding the issues against her and in favor of Joseph Hausner, the defendant. Suit was started July 3, 1928. From the record it appears that this was the second trial, the first one resulting in a disagreement of the jury. The errors relied upon for reversal are based entirely upon the weight of the evidence.

Plaintiff's claim was for \$1500 loaned to the defendant in April 1921. At the trial, in support of her claim, plaintiff produced two certified checks dated November 1, 1927, one for \$1500 and one for \$911.65, signed by John O. Bastear, drawn on the Avenue State Bank of Oak Park, Illinois, and payable to the order of Joseph Hausner, the defendant. Neither of these checks bore the endorsement of the payee. Plaintiff claimed the check for \$1500 was in payment of the loan. Defendant denied that he owed plaintiff any money, but insisted that the checks were made out to him for the purpose of making a loan to the plaintiff in 1927, at her request, as she intended to use the money in the purchase of a bungalow. Defendant further insisted that the loan was to be completed and the check endorsed when he received a note as security from the plaintiff.

651 A. 651  
 Opinion filed Dec. 10, 1930  
 (Plaintiff) (Defendant)  
 (Plaintiff) (Defendant)  
 (Plaintiff) (Defendant)  
 (Plaintiff) (Defendant)

Opinion filed Dec. 10, 1930

of the court.  
 This is an appeal by Joseph Hanner to review

a judgment entered by the Superior Court of Cook County  
 finding the record against her and in favor of Joseph Hanner.  
 The record was entered July 2, 1927. From the  
 record it appears that this was the second trial, the first  
 one resulting in a disagreement of the jury. The second  
 relied upon for reversal are based entirely upon the weight  
 of the evidence.

Plaintiff's claim was for \$1500 loaned to the  
 defendant in April 1927. At the trial, in support of her claim,  
 plaintiff produced two certified checks dated November 1, 1927,  
 one for \$1500 and one for \$211.85, signed by John G. Hanner,  
 drawn on the Avenue State Bank of Oak Park, Illinois, and  
 payable to the order of Joseph Hanner, the defendant. Neither  
 of these checks bore the endorsement of the payee. Plaintiff  
 claimed the check for \$1500 was in payment of the loan.  
 Defendant denied that he used plaintiff any money, but insisted  
 that the checks were made out to him for the purpose of making  
 a loan to the plaintiff in 1927, at her request, as she  
 intended to use the money in the purchase of a bungalow. De-  
 fendant further insisted that the loan was to be completed  
 and the check endorsed when he received a note as security  
 from the plaintiff.

Plaintiff testified that she was the mother of the defendant and that in April, 1921, the defendant told her he wanted to buy a house but he did not have sufficient money, so she loaned him \$1500 which she had saved out of money given to her by her three children who lived with her, one of whom was the defendant. She testified that she had received \$1,000 as life insurance upon the death of her husband, which had occurred about 30 years prior to the starting of this action; that she kept all her money in a cupboard and other places around the house and never put it in a bank; that when she loaned the \$1500 to the defendant she took the money out of these various receptacles and paid him in \$5, \$10 and \$20 bills; that when the defendant gave her the checks he said, "Here Ma, they are yours." That "she kept the check for \$911.65, because the defendant did not want to sign the other check which was for \$1500."

Josephine Kanak testified on behalf of the plaintiff that she was a sister of the defendant and was living with her mother in 1921, and was present at the transaction between the parties; that the defendant was trying to get \$1500 because he had to put a \$2,000 deposit on a house; that she saw her mother give him \$1500 in currency which she got from the pantry; that she saw her mother count it and also counted it herself; that she was present at a conversation in September, 1927, and that Mr. Bastear was present at the time and the defendant told him that he would like to make a loan on his house in order to pay the old lady and that Mr. Bastear brought in the checks and asked the defendant how he wanted them made out; that the defendant had handed her the checks and said, referring to the \$1500 check, "Give this one to the old lady and hold this one for me"; that she thereupon handed the checks to her mother.



Witness testified that she was the mother of the defendant and that in April, 1931, the defendant told her he wanted to buy a house but he did not have sufficient money, so she loaned him \$1000 which she had saved out of money given to her by her father. She testified that she had received \$1,000 as a life insurance upon the death of her husband, which had occurred about 10 years prior to the taking of this statement. That she kept all her money in a vault and other places around the house and never put it in a bank; that when she loaned the \$1000 to the defendant she took the money out of these various possessions and said him in \$50, \$10 and \$20 bills; that when the defendant gave her the check he said, "Here is, they are yours." That she kept the check for \$1000.00, because the defendant did not want to give the other check which was for \$1000.00. Witness again testified on behalf of the defendant that she was a sister of the defendant and was living with her mother in 1931, and was present at the transaction between the parties; that the defendant was trying to get \$1000 because he had to get a \$1000 deposit on a house; that she saw her mother give him the \$1000 in various ways and saw him the money; that she saw her mother count it and also changed it herself; that she was present at a conversation in September, 1931, and that Mr. Hester was present at the time and the defendant told him that he would like to make a loan on his house in order to pay the old lady and that Mr. Hester brought in the check and asked the defendant how he wanted them made out; that the defendant had handed her the check and said, referring to the \$1000 check, "Give this one to the old lady and hold this one for me"; that she thereupon handed the check to her mother.

John O. Bastear testified on behalf of the plaintiff that he was in the real estate business; that the defendant talked with him about placing a mortgage on his property and that he went to the defendant's home with two blank checks and was told by the defendant to make one out for \$1500 and one for \$911.65; that he gave the checks to the defendant who thereupon handed them to his sister saying, "This is for the old lady". On cross-examination he stated that he did not so testify on the previous trial because he must have misunderstood the question.

Ella Frana testified that she was a sister of the defendant and was present at the conversation at the defendant's home in November, 1927, when his mother asked the defendant to endorse the check and he said he would not.

The defendant in his own behalf testified that he worked for the Burlington railroad as an engineer continuously for 24 years; that he earned approximately \$2,000 a year in 1917, 1918 and 1919 and that he had \$2,000 in 1921; that he bought his house and paid \$2,000 in cash and placed a mortgage on it for the balance; that he did not borrow any money from the plaintiff; that he bought the house from a brother of Mr. Bastear who testified in the case; that after he purchased the house his mother lived down stairs and paid him at first \$15 a month and later \$20 a month; that prior to the time that Bastear brought over the checks, defendant had had a talk with his mother and Mrs. Kanak, in which he told them that he would place a loan on his property, so that they could purchase a bungalow; that Mrs. Ella Frana stated that she was going to put a mortgage on her place and that he, the defendant, should loan them the other \$1500 to make up a loan of \$3,000; that he said he would if they would give him security; that he had been working all night and was pretty



John E. Hunter testified on behalf of the defendant that he was in the room where defendant was being held with him about placing a cigarette on the table and that he was in the defendant's room with two other men and was told by the defendant to make one out for him and one for himself; that he gave the order to the defendant who thereupon handed them to his sister saying, "This is for the old lady". On cross-examination he testified that he did not testify on the previous trial because he was not allowed to testify.

The above described person was a resident of the  
District and was present at the investigation of the District  
House in November, 1917, when his name was asked the following  
to indicate the check and he said he would not.  
The statement in his own behalf furnished that he  
worked for the investigation referred to as engineer occasionally  
for 24 years; that he earned approximately \$1,000 a year in  
1917, 1918 and 1919 and was paid in 1917; that he  
bought his house and paid \$1,000 in cash and placed a  
mortgage on it for the balance; that he did not borrow any  
money from the District; that he bought the house from a  
brother of Mr. Nathan who testified in the case; that after  
he purchased the house his mother lived there until and until  
his at first was a month and later two months; that after the  
the time that mother passed over the house, Nathan and  
had a talk with his mother and Mrs. Nathan, in which he told  
them that he would place a loan on his property, so that they  
could purchase a company; that Mrs. Nathan stated that  
she was going to get a mortgage on her place and that he,  
Nathan, would loan her the money to make up the loan  
at \$1,000; that he said he would if they would give him  
security; that he had been working all night and was pretty



well tired out and that Bastear did not arrive with the checks until about 11 o'clock and he was sleepy and gave these checks to Mrs. Kanak and asked her to take care of them because he was afraid he might fall asleep on the car on his way to work and was afraid somebody might take the checks from him; that he wanted a note for the money, so that he would have something to show for the \$1500.

It is urged as ground for reversal that the verdict is contrary to the weight of the evidence; that the testimony of the plaintiff is supported by that of her daughters and the witness Bastear and that the testimony of the defendant is uncorroborated. On the other hand it is insisted by counsel for defendant that the burden of proof was upon the plaintiff; that the truth of the defendant's story is supported by the facts; that it is unbelievable that the plaintiff had \$1500 in cash in her house or that she waited from 1921 to 1927 before bringing suit on the claim or that she would have paid rent to the defendant for six years if she had a claim against him for the amount of \$1500. It is further insisted that the evidence shows that there was bad feeling between the defendant and his brothers and sisters who testified at the hearing, and that the plaintiff's story did not hold together; that she testified in answer to the questions of the court that she was holding the checks for the defendant so that they should not be lost.

There is considerable force in the defendant's position, particularly in view of the fact that there was no need to make out two checks, one for \$1500 and one for \$911.65, if the sole purpose of making out the checks was in order to pay the plaintiff the \$1500 which she claimed to have loaned to the defendant.

well first and that plaintiff did not arrive with the checks until about 11 o'clock and he was sitting and gave these checks to Mrs. Rank and asked her to take care of them because he was afraid he might fall asleep on the way on his way to work and was afraid somebody might take the checks from him; that he wanted a note for the money, so that he would have something to show for the \$1500.

It is stated as grounds for recovery that the plaintiff is entitled to the money at the time; that the testimony of the plaintiff is supported by that of her daughter and the witness Houtson and that the testimony of the defendant is contradicted. In the other hand it is testified by witness for defendant that the money of \$1500 was given to plaintiff; that the truth of the defendant's story is supported by the fact that it is uncontradicted that the plaintiff and Rank lost; that it is uncontradicted that the plaintiff and Rank in cash in New York on that date called from 1921 to 1927 before paying out on the basis of that she would have paid out to the defendant for his part it was paid a check against him for the amount of \$1500. It is further testified that the evidence shows that there was no dealing between the defendant and his brother and sister who testified at the hearing, and that the plaintiff's story did not hold together; that the testimony is contrary to the testimony of the court that she was holding the checks for the defendant so that they should not be lost.

There is contradictory force in the defendant's testimony, particularly in view of the fact that there was no need to make any two checks, one for \$1500 and one for \$11.50. If the wife wanted to collect the checks and in order to pay the plaintiff the \$1500 which she claimed to have loaned to the defendant.

The first trial resulted in a disagreement of the jury. The second trial resulted in a verdict in favor of the defendant, on which judgment was entered. The burden of proof was upon the plaintiff to establish her case by a preponderance of the evidence. The trial court had an opportunity of seeing and hearing the witnesses and of observing their conduct while upon the stand and was in a much better position to weigh the evidence than is a court of review. The weight of the evidence does not necessarily rest upon the number of witnesses testifying upon one side or the other and, while that fact may be taken into consideration in weighing the evidence, nevertheless, the trial court also has the right to take into consideration the demeanor and appearance of witnesses when testifying, together with the probability or improbability of their story and all the facts and circumstances surrounding the transaction.

We cannot say as a matter of law that the verdict and judgment thereon is manifestly against the weight of the evidence, and, therefore, the judgment is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.



The first trial resulted in a dismissal of the jury. The second trial resulted in a verdict in favor of the defendant, as with judgment was entered. The burden of proof was upon the plaintiff to establish her case by a preponderance of the evidence. The jury found that on opportunity of seeing and hearing the witnesses and of observing their conduct while upon the stand was in a good position to judge the evidence was in a state of truth. The weight of the evidence was not necessarily true when the number of witnesses testifying was not in its favor and, while that may be taken into consideration in weighing the evidence, nevertheless, the fact that there has been a large number of witnesses testifying, together with the probability of improbability of their story and all the facts and circumstances surrounding the transaction.

It cannot be as a matter of fact that the verdict and judgment should be set aside on the ground of the evidence, but, nevertheless, the judgment is affirmed.

THE COURT THEREUPON.

RECORDED AND INDEXED, 11, 1910.

34132

CHARLES M. FAIRALL and  
BEULAH H. FAIRALL,

Appellees,

v.

DANIEL A. COFFEY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 651<sup>4</sup>

Opinion filed Dec. 10, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion  
of the court.

Plaintiffs, Charles M. Fairall and Beulah H. Fairall,  
his wife, recovered a judgment in the Municipal Court of Chicago  
for \$1200 against the defendant Daniel A. Coffey for a breach  
of contract. The cause was tried before a jury, resulting in  
a verdict in favor of the plaintiffs and judgment was entered  
on the verdict, from which judgment this appeal is perfected.

The facts show that the defendant Daniel A. Coffey,  
together with a Mr. Livingston and a Mr. Friedman, constituted  
a syndicate which was promoting the sale of lots in a sub-  
division to which the Union Bank of Chicago held title as  
trustee. On October 19, 1925, plaintiffs entered into a written  
contract with the Union Bank of Chicago, as trustees, for the  
purchase of lots 68 and 70 at a price of \$2,000, which was pay-  
able \$800 in cash and the balance in monthly payments of \$20  
each on the first day of each and every month thereafter. The  
proof shows that plaintiffs paid \$1500 and that their last pay-  
ment was made January 3, 1928.

Beulah Fairall testified that she received a telephone  
message from Coffey in July, 1928, in which he said he would  
like to buy the lots and that she went to see him and that he

14125

CHARLES V. HARRIS and  
ETHEL M. HARRIS,

Plaintiffs,

vs.

HARRIS A. HARRIS,

Defendant.

Case No. 10,130

FILED

1930

Opinion filed Dec. 10, 1930

THE COURT, after reading the petition and answer,

of the court.

Plaintiffs, Charles V. Harris and Ethel M. Harris, his wife, recovered a judgment in the Circuit Court of Chicago for \$100 against the defendant Ethel M. Harris and a decree of divorce. The same was then set aside and a new trial was ordered in favor of the plaintiff and judgment was entered on the verdict, from which judgment this appeal is taken.

The facts show that the defendant Ethel M. Harris, together with a Mr. Livingston and a Mr. Johnson, constituted a syndicate which was operating the sale of lots in a subdivision in which the main body of Chicago held title to lots. In October 1928, plaintiffs entered into a written contract with the main body of Chicago, as trustees, for the purchase of lots 66 and 67 at a price of \$2,000, which was paid \$500 in cash and the balance in monthly payments of \$100 each on the first day of each and every month thereafter. The proof shows that plaintiffs paid \$100 and that their last payment was made January 1, 1929.

Being fully satisfied that she received a telephone message from Victor in July, 1928, in which he said he would like to buy the lots and that she went to see him and that he



said he would pay what had been already paid by the Fairalls under the contract; that it was agreed between them that he was to pay \$1500 and that he paid \$300 and had her sign a note, plaintiff's exhibit #1, which reads as follows:

"\$300.00

Chicago, August 1st, 1928.

At date of re-purchase of lots after date I  
promise to pay to the order of DANIEL P. COFFEY Three  
Hundred and no/100 Dollars at his office in Chicago,  
Illinois Value received with interest at the rate of  
per cent per annum.

BEULAH H. FAIRALL

No. -1- Due ....."

She testified further that he told her not to keep up the payments on the contract and that she went to see Coffey in September and tendered him the purchase contract, which is in evidence as plaintiff's exhibit 2, which bore the signatures of herself and her husband, Charles M. Fairall, as assignors of the agreement. She testified that at the same time she tendered a quit claim deed signed by herself and husband conveying any and all title they might have to the premises.

Coffey testified that the plaintiff, Beulah Fairall, called on him and tried to sell the lots to him and stated that they had already tried to sell them and had a "For Sale" sign on the premises; that he told her he would try to get the syndicate to do something and did so try, but was unsuccessful; that he never agreed to buy the premises and that the \$300 which he gave her was a loan and not part of the purchase price as claimed by her.

It is insisted that the cause should be reversed because the alleged agreement amounted to an executory contract for the purchase of real estate; that the purchase contract provided against assignment unless consent of the first parties was obtained; that plaintiffs' evidence did not preponderate in their favor; that the court erred in admitting evidence of a declara-

[illegible]

The testified further that he did not discuss on the payments on the contract and that she went on her trip to England and looked for the money contract, which is in evidence as Plaintiff's exhibit 7, which shows the agreement of herself and her husband, Charles E. Smith, as witnesses of the agreement. She testified that at the time she testified a wife claim based on her husband's contract was voided and that all the money must be for the contract.

[illegible]

one of the things we had to do was to make sure that we had the right people in the right places.

100-443887-100

Small, dark, and very common.

... ..

tion of forfeiture by the trustee after the suit at bar was started.

The note signed by Beulah Fairall, plaintiffs' exhibit 1, would indicate an agreement in writing to re-purchase the lots in question, and the jury could easily have construed it as a substantiation of her testimony. The agreement was not to purchase real estate, but to take an assignment of the purchase contract. Coffey was a member of the syndicate which was jointly engaged in the enterprise. Such joint agreements have been held to constitute a partnership. Such being the case, he had a right to waive the condition that the contract should not be assigned without the consent of the syndicate. Charles H. Fairall, the husband, joined in the assignment of the purchase contract which was tendered to the defendant. This would dispose of the point that the agreement between Coffey and Beulah Fairall was not enforceable because the husband was not a party to the agreement. By his joining in the assignment, he ratified the action of his wife in making the agreement.

It is insisted that the court erred in admitting testimony for the purpose of showing that a notice of forfeiture of the contract had been sent to the plaintiffs by the Union Bank of Chicago. There is considerable force in defendant's position. It frequently happens that counsel, in their anxiety to obtain a verdict, will attempt to put in evidence matters which have no purpose, other than to create a prejudice. While such conduct is not to be commended, never-the-less, in the case at bar we do not consider it reversible error. The purchase contract was in evidence and, by its terms, showed that payments were overdue and that a forfeiture could be declared if the Union Bank, as trustee, so desired.



tion of testimony by the trustee after the suit at law was  
started.

The note signed by Daniel Feltwell, plaintiff:

Exhibit 1, would indicate an agreement in writing to reimburse  
the late in question, and the jury could easily have concluded  
it was a substitution of the testimony. The agreement was  
not to reimburse until after, but to have an agreement of the  
business contract. But the witness of the plaintiff which  
was jointly engaged in the contract. The joint agreement  
have been held to constitute a partnership. That being the case,  
he had a right to make the condition that the contract should  
not be assigned without the consent of the plaintiff. Hence  
M. Feltwell, the husband, joined in the agreement at the time  
these contract which was entered in the defendant. This would  
dispose of the point that the agreement between Feltwell and  
Daniel Feltwell was not enforceable because the husband was not  
a party to the agreement. By his joining in the agreement,  
he ratified the action of his wife in making the agreement.  
It is insisted that the court erred in admitting  
testimony for the purpose of showing that a notice of testimony  
of the contract had been sent to the plaintiff by the husband  
and of course. There is considerable doubt in defendant's  
position. It is frequently known that counsel, in their  
endeavor to make a verdict, will attempt to put in evidence  
evidence which has no purpose, other than to create a prejudice.  
While such conduct is not to be commended, nevertheless, in  
the case at bar it is not considered it reversible error. The  
evidence submitted was in evidence and, by the terms, showed  
that Feltwell was a partner and that a partnership could be  
created at the time such an agreement was made.

We are unable to say that the verdict is manifestly against the weight of the evidence. The jury and the trial court had an opportunity of seeing and observing the witnesses and were in a better position to weigh their testimony than would be a court of review. We see no reason for disturbing the judgment.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.

It is not possible to say that the verdict is necessarily

against the weight of the evidence. The jury and the trial

court had an opportunity of seeing and assessing the witnesses

and were in a better position to weigh their testimony than

would be a court of review. No one can reason for determining

the judgment.

For the reasons stated in this opinion the judgment

of the appellate court is affirmed.

THE COURT OF APPEALS IN THE SECOND DEPARTMENT.

SENTENCE AFFIRMED. 12. 1907.



34144

RUFUS CLARK, for use of  
Thomas McCarthy,

Appellee,

v.

METROPOLITAN LIFE INSURANCE  
COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 652

Opinion filed Dec. 10, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion  
of the court.

This was a garnishment suit brought in the name of  
Rufus Clark, for use of Thomas McCarthy, against the Metropol-  
itan Life Insurance Company to recover \$400 claimed to be due  
Rufus Clark out of the moneys in the hands of the garnishee  
Metropolitan Life Insurance Company.

Defendant filed its sworn answer denying that it had  
any goods, moneys or property in its possession due and owing  
to the defendant Clark at the time of the service of the writ.  
Defendant's position appears to be that the testimony on be-  
half of the plaintiff was insufficient to overcome the sworn  
answer. A subpoena duces tecum was served on the defendant,  
evidently for the purpose of producing papers which would show  
the garnishee had issued a policy of insurance on the life of  
the deceased wife of Clark and had paid by check the amount due  
under the policy after the service of the writ of garnishment.  
No documents nor papers were produced, but testimony was  
introduced by the defendant for the purpose of showing that  
all such documents and papers, if any, were out of the state.

25914. 622  
 ALVIN KARPIS  
 EDWARD BREMER  
 J. EDGAR HOOVER

EDWARD BREMER  
 ALVIN KARPIS  
 J. EDGAR HOOVER  
 EDWARD BREMER  
 ALVIN KARPIS  
 J. EDGAR HOOVER

Opinion filed Dec. 10, 1930

MR. JUSTICE HOLMES delivered the opinion

of the court.

This was a partnership suit brought in the name of  
 Karpis Trust, for use of Thomas Karpis, against the Karpis-  
 Bremer Trust Company as receiver (KTC) claimed to be due  
 before Karpis was of the money in the hands of the receiver  
 Karpis Trust Company.

Defendant filed its motion seeking judgment that it had  
 no right, money or property in the partnership and was not  
 to the defendant claim at the time of the seizure of the ship.  
 Defendant's position appears to be that the testimony on be-  
 half of the plaintiff was insufficient to establish the facts  
 stated. A witness James H. Hume was called on the defendant.  
 evidently for the purpose of producing papers which would show  
 the partnership had received a salary of insurance on the life of  
 the deceased wife of Karpis and had paid by check the amount due  
 under the policy after the seizure of the ship at Baltimore.  
 He testified that papers were produced, but testimony was  
 introduced by the defendant for the purpose of showing that  
 all such documents and papers, if any, were out of the state.

Plaintiff produced as a witness, one Sims, a funeral director, who testified that he had charge of the funeral arrangements at the time of the death of Mattie Clark, wife of the defendant Clark, who lived at 3134 Giles avenue, Chicago; that on or about May 25, 1929, he was with the husband of the deceased when a check was handed to Clark at the office of the Metropolitan Life Insurance Company, 45 East 47th street; that he then went with Clark to the Roosevelt State Bank, where the check was cashed; that he received his money out of the sum paid by the bank and that Clark retained the balance amounting to about \$325 or \$330; that the check was for approximately \$700. Sims testified further that about 15 days prior to this he had been at the same office of the Metropolitan Life Insurance Company and that the same man who filled out the checks filled out the claim papers for Clark.

Rufus Clark, the judgment debtor, was placed on the stand by plaintiff and testified that he did receive money from the garnishee and that Sims was with him at the time; that it was three or four weeks after his wife's death; that at the time his wife died she had some insurance in the Metropolitan Life Insurance Company.

The evidence adduced was competent for the purpose of showing that money had been paid to the judgment debtor after the service of the writ. The writ was served May 17, 1929. The testimony was to the effect that after that date, somewhere about May 25, 1929, a check was given by the Metropolitan Life Insurance Company, garnishee, to Rufus Clark, which was cashed at the Roosevelt State Bank and that it was for more than the amount of the judgment. The evidence of those who witnessed the transaction and saw the check given by the garnishee, and



plaintiff produced as a witness, and since, a witness  
testified that he had seen the plaintiff  
at the time of the death of Willie Clark, 1930;  
of the defendant Clark, who lived at 1133 Allen Avenue, Chicago;  
that on or about May 20, 1930, he was with the husband of the  
defendant when a check was cashed at the office of the  
Metropolitan Life Insurance Company, 40 East 47th Street; and  
he then went with Clark to the Roosevelt Hotel, where the  
check was cashed; that he received his money out of the sum  
paid by the bank and that Clark retained the balance amounting  
to about \$200 on \$250; that the check was for approximately  
\$700. Sims testified further that about 15 days prior to  
this he had been at the same office of the Metropolitan Life  
Insurance Company and that the same was the office of the  
check which was the claim payable to Clark.  
Karl Clark, the judgment debtor, was placed on  
the stand by plaintiff and testified that he did receive money  
from the plaintiff and that this was the money at the time  
that it was given to him from the plaintiff's estate; that  
at the time this was given to him he had no intention of the  
Metropolitan Life Insurance Company.  
The evidence submitted was sufficient for the purpose of  
showing that money had been paid to the judgment debtor after  
the service of the writ. The writ was served May 14, 1930. The  
testimony was to the effect that after that date, somewhere  
about May 15, 1930, a check was given by the Metropolitan Life  
Insurance Company, defendant, to Willie Clark, which was cashed  
at the Roosevelt Hotel and that it was for more than the  
amount of the judgment. The evidence of these witnesses  
the transaction and how the check given by the plaintiff, and

afterwards honored by the bank, was competent. It was not essential that the original policy of insurance be produced. The law required only sufficient evidence to overcome the sworn answer. No witness on behalf of the garnishee testified that the company had never issued a policy on the life of Clark's wife nor that there was none in effect at the time of her death. The evidence in our opinion was sufficient to overcome the sworn answer. Wilcox, et al v. Kling, 87 Ill. 107; Young v. First National Bank of Cairo, 51 Ill. 73.

The trial court found the issues in favor of the plaintiff and entered judgment on its finding. We see no reason for disturbing the judgment.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HIBEL AND FRIEND, JJ. CONCUR.

attestations furnished by the State, and the evidence. It was not  
essential that the original policy of insurance be produced.  
The law required only sufficient evidence to overcome the  
evidence offered. No witness on behalf of the defendant testified  
that the company had never issued a policy on the life of  
Graham's wife nor that there was some in effect at the time of  
her death. The evidence in this respect was sufficient to  
overcome the other evidence. WILLIAM A. G. WILSON, JR.  
197; Young v. First National Bank of Chicago, 111 Ill. 291.

The trial court found the issue in favor of the  
defendant and entered judgment on its finding. It was an  
error for granting the judgment.  
For the reasons stated in this opinion the judgment  
of the appellate court is affirmed.

REVEREND JUDGE, 11. 1900.



34281

WILLIAM J. GAGNEPAIN,

Plaintiff in Error,

v.

MINERVA GAGNEPAIN,

Defendant in Error.

126  
A  
ERROR TO

SUPERIOR COURT,

COOK COUNTY.

259 I.A. 652<sup>2</sup>

Opinion filed Dec. 10, 1930

MR. PRESIDING JUSTICE WILSON delivered the opinion  
of the court.

Error to the Superior Court of Cook County to  
reverse an order finding defendant guilty of contempt for  
failure to pay alimony. The complete abstract of record  
follows:

"ABSTRACT OF RECORD.

Rec.  
Page

1 Placita.  
3 Order of Commitment:

Order of the Superior Court of Cook  
County and entered by the Honorable Harry A.  
Lewis, Judge of said court, finding the plain-  
tiff in error guilty of contempt of Court for  
failure to pay alimony."

Rule 18 of this court provides that in all cases,  
a party bringing a cause in this court shall furnish a complete  
abstract or abridgment of the record. Among other things the  
rule requires that, "The abstract must be sufficient to  
present fully every error and exception relied upon."

IN RE

WILLIAM J. BARTON

PLAINTIFF IN ERROR

v.

UNITED STATES

DEFENDANT IN ERROR

253 I.A. 652

Opinion filed Dec. 10, 1930

THE COURT, upon the petition of the plaintiff,

of the court.

After to the Superior Court of Cook County to  
reverse an order of said court setting aside the  
verdict in favor of the plaintiff. The plaintiff  
alleges that the verdict is contrary to law and  
equity, and that the same is void.

VERDICT OF JURY

Dec.  
1930

Order of Court  
United States

ORDER OF THE SUPERIOR COURT OF COOK  
COUNTY, entered on the minutes of said court,  
dated June 10, 1930, setting aside the  
verdict in favor of the plaintiff, and  
entering a new verdict in favor of the  
plaintiff.

It is the order of this court that in all cases  
a party bringing a motion in this court shall  
submit an affidavit of the facts upon which the  
motion is based. The affidavit must be sworn to  
before a notary public or other officer duly  
qualified to administer oaths.

There is nothing in the abstract of record other than the allegation that an order was entered finding the defendant guilty of contempt of court. The order itself is not abstracted and this court will not go to the record to reverse.

For failure to comply with the rules of this court in presenting a sufficient abstract, the order of the Superior Court of Cook County is affirmed.

ORDER AFFIRMED.

HEBEL AND FRIEND, JJ. CONCUR.



There is nothing in the abstract of record  
after that the allegation that an order was entered finding  
the defendant guilty of contempt of court. The order itself  
is not abstracted and this court will not go to the record  
to review.

It is said to comply with the rules of this  
court in presenting a sufficient abstract, the order of  
the Superior Court of Cook County is allowed.

RECEIVED  
JAN 12 1934

33775

127A  
UNITED LITHUANIAN LOAN & BUILDING  
ASSOCIATION, a Corporation,

Defendant in Error,

v.

JUSTIN K. WOICICK and FELIX STASEWICZ,

Plaintiffs in Error.

SUIT OF ERROR

TO SUPERIOR COURT

COOK COUNTY.

259 I.A. 652<sup>3</sup>  
Opinion filed Dec. 10, 1930

MR. JUSTICE FRIEND delivered the opinion of the court.

This suit is an action of debt filed in the Superior Court of Cook County against Charles Klimowicz, as principal, and Justin K. Woicick and Felix Stasewicz, as sureties, on a bond of \$7,000, given by Charles Klimowicz as treasurer of the United Lithuanian Loan & Building Association, a corporation.

By its amended declaration filed on May 24, 1928, the plaintiff alleges, in substance, that Charles Klimowicz was elected treasurer of the Association for the term ending September 1, 1921; that he executed his bond as such treasurer in the sum of \$7,000, together with Justin K. Woicick and Felix Stasewicz, as sureties, conditioned upon the faithful performance of his duties, and at the expiration of his term in office to deliver to his successor all balances and property belonging to the Association; that by reason of losses sustained through investments made in violation of the by-laws of the Association, the defendant failed at the expiration of his term of office to turn over to the Board of Directors more than \$3,000 of the property of the plaintiff.

Verified pleas of non est factum were filed to the amended declaration by the defendants Woicick and Stasewicz,

UNITED STATES COURT

WESTERN DISTRICT OF KENTUCKY

IN RE: JAMES H. HARRIS

Defendant in Error,

vs.

JAMES H. HARRIS and WILLIAM HARRIS,

Plaintiffs in Error.

959-1-1-552

Opinion filed Dec. 10, 1930

Mr. Justice HARRIS delivered the opinion of the court.

This case is an action at debt filed in the Superior Court of West Kentucky against Charles HARRIS, as executor, and James H. HARRIS and Willis HARRIS, as co-defendants, on a bond of \$7,500, given by Charles HARRIS as Treasurer of the United HARRIS Loan & Building Association, a corporation.

By its amended declaration filed on May 26, 1929, the

plaintiff alleges, in substance, that Charles HARRIS was

elected Treasurer of the Association for the term ending

September 1, 1929; that he executed his bond as such Treasurer

in the sum of \$7,500, together with James H. HARRIS and

Willis HARRIS, as co-defendants, who were the principal

performances of his duties, and at the expiration of his term

in office to deliver to his successors all moneys and property

belonging to the Association; that by reason of losses sustained

through investments made in violation of the by-laws of the

Association, the defendant failed at the expiration of his

term of office to turn over to the Board of Directors more than

\$1,000 of the property of the plaintiff.

Verdict given by the jury in favor of the

amended declaration by the Association against and possession.



on July 16, 1928, and on October 19, 1928, when the cause was regularly reached for trial, the defendant Charles Klimowicz, who had theretofore filed no appearance, entered a like plea by leave of court. Upon the hearing on the pleas the treasurer's bond was produced before the court and evidence was introduced showing that the treasurer and his sureties acknowledged their respective signatures before a notary public. The court then ordered the pleas stricken and suggested to counsel that they adjourn to the jury room to compute the liability of the bond. This was done and the amount found to be due, \$4426.85, was compromised at \$4,000. The court thereupon entered default against all defendants for want of plea, a jury was waived, and the cause submitted to the court, who made a finding and entered judgment in favor of plaintiff and against defendants for \$7,000, debt, to be satisfied on payment of \$4,000 damages.

On November 3, 1928, the defendant, Charles Klimowicz, filed a petition asking that the judgment be set aside and that he and the other defendants be given leave to plead to the amended declaration instanter. The hearing on the petition as subsequently amended, together with the pleas filed by the defendants, Woicick and Stasewicz, and the replication of the plaintiff, came on for hearing before the court May 2, 1929. The petition and the pleas of the sureties, as amended, alleged in substance, that the treasurer faithfully discharged his duties and paid over to his successor in office all money and property of the plaintiff, and that he purchased the securities in question upon the order of the Board of Directors, who subsequently ratified the purchase. Additional evidence was adduced upon the hearing of the petition and pleas, and on motion of the court the original judgment was set aside, the

on July 16, 1938, and on August 12, 1937, when the same was  
repeatedly received for several, the defendant Charles Almonster,  
who had theretofore filed no answer, entered a late plea  
by leave of court. Upon the hearing on the plea the treasurer's  
book was produced before the court and evidence was introduced  
showing that the treasurer and his secretary communicated with  
respective signatures before a notary public. The court then  
ordered the same evidence and suggested to counsel that they  
adjourn to the jury room to prepare the liability on the same.  
This was done and the amount found to be due, \$1,000.00, was  
compromised at \$750. The court thereupon entered judgment  
against all defendants for want of plea, a jury was waived,  
and the case submitted to the court, who made a finding and  
entered judgment in favor of plaintiff and against defendants  
for \$7,000.00, less, as he stipulated on payment of \$1,000.00 damages.  
On November 8, 1938, the defendant, Charles Almonster,  
filed a petition asking that the judgment be set aside and  
that he and the other defendants be given leave to plead to  
the several declarations introduced. The hearing on the petition  
was adjourned until the next day, when the case was taken up by the  
defendant, Charles Almonster, and the petition of the  
plaintiff, then on the hearing before the court on July 4, 1938.  
The petition and the plea in the answer, as amended, alleged  
in substance, that the treasurer lawfully discharged his  
duties and paid over to his successors as officers all money and  
property of the plaintiff, and that he performed the duties  
in question with the intent of the laws of Missouri, and  
subsequently received the money. Additional evidence was  
adduced upon the hearing of the petition and plea, and on  
motion of the court the original judgment was set aside, the

cause abated as to Charles Klimowicz, who had died prior thereto, and the following order was then entered:

"And the court having now heard all the evidence adduced and being fully advised in the premises, finds the debt to be \$7,000 and assesses the plaintiff's damages at the sum of \$4,426.98. Motion for new trial overruled and judgment same day."

It is first urged that plaintiff failed to introduce the bond in evidence and to make proof of its execution, and thereby failed to make out a prima facie case.

The order entered upon the final hearing on May 2, 1929, was, in part, as follows: "And the court having now heard all the evidence adduced and being fully advised". Evidently the proof made at the first hearing on October 19, 1928, upon the plea of non est factum was considered by the court as part of the evidence in the case, together with all the testimony subsequently heard on May 2, 1929. The judgment then entered was not vacated until the day of the final hearing upon the petition and pleas, and after the trial court had heard all the evidence in the case.

It is further contended that plaintiff failed to prove the conditions of the bond. The amended declaration sets out the conditions of the bond, and alleges that the treasurer failed to perform his duties and account, as stipulated in the bond. The pleas of the defendants deny these allegations and join issue on that question of fact, thus admitting by their pleadings what the conditions of the bond were. Upon this state of the record we see no force to the contention that the plaintiff failed to make proof of the bond, its execution and contents.

All other contentions of defendants are directed (1) to the question of the liability of the treasurer for



was stated as to Charles Williams, who had died prior  
thereto, and the following order was then entered:

"And the court having now heard all the evidence  
adduced and being fully advised in the premises,  
it is the duty of the court to say that the plain-  
tiff's damages are the sum of \$5,000.00. Motion for  
new trial overruled and judgment affirmed."

It is likewise urged that Williams failed to inter-  
duce the bond in evidence and so waive proof of its execution,  
and thereby failed to make out a prima facie case.

The order entered upon the final verdict on May 1,

1906, was, in part, as follows: "And the court having now  
heard all the evidence adduced and being fully advised."

Evidently the proof made at the first hearing on January 15,  
1905, upon the plea of non est was considered by the

court as part of the evidence in the case, together with all  
the testimony subsequently heard on May 1, 1906. The judgment  
then entered was not vacated until the day of the final hearing  
upon the petition and issue, and after the final verdict had  
been all the evidence in the case.

It is further contended that Williams failed to prove

the conditions of the bond. The amended declaration sets  
out the conditions of the bond, and alleges that the treasurer  
failed to pay the same and account, as stipulated in the  
bond. The plea of the defendants deny these allegations and  
join issue on that question of fact, thus admitting by their  
plea that the conditions of the bond were. Upon this state  
of the record we see no force in the contention that the plain-  
tiff failed to make proof of the bond, its execution and contents.

All other contentions of defendants are disposed

(1) as to the question of the liability of the treasurer for

investing surplus funds of the Association in securities not sanctioned under its by-laws, and his failure to account for losses sustained by reason of purchases made; and (2) whether the Board of Directors ratified the purchase of these securities by their subsequent acts.

The evidence upon which these contentions rest shows that on October 19, 1920, the plaintiff had in its treasury about \$9,000 in surplus funds; that the directors authorized the temporary investment of these funds in short term notes to be purchased from a bank if the same could be secured; that \$4,000 of this sum was used to purchase bonds of the Hool Realty Company, secured by a mortgage on a leasehold of real estate encumbered by two prior mortgages; that the character of the security was printed across the face of each bond in letters one-half inch high; that these bonds were purchased during Charles Kilmowicz' term of office as treasurer and within the period of time covered by his bond, and were paid for with plaintiff's funds; that subsequently a receiver appointed for the Hool Realty Company paid dividends amounting to \$1,133.23 on account of plaintiff's claim, which were accepted by the plaintiff's Board of Directors, and reduced the loss of the Association to that extent; and that at the end of the treasurer's term of office he failed to turn over to his successor and the Board of Directors all balances that had come into his hands. The shortage is represented by the amount of the judgment. Plaintiff also introduced in evidence the by-laws of the Association containing a provision requiring the treasurer to give a bond and authorizing "funds in excess of the demand of the shareholders may, by a two-thirds vote of all the directors, be temporarily invested in other securities, such investments to be limited to first mortgages on real estate,

[illegible]



or government, state and municipal bonds."

Plaintiff as part of its case proved that Charles Klimowicz was elected treasurer of the Association, his acceptance of office, the giving of the bond, his investment of \$4,000 of the Association's money in third lien securities and the loss sustained. This constituted a prima facie case and raised a strong presumption of failure to comply with the conditions of the bond. Under the pleadings herein, it then became the burden of defendants to establish compliance. (9 Corpus Juris, 121, Sec. 232; Wood, eto. v. Friendship Lodge, 106 Ky. 434; Douglas v. Mennessy, 15 R. I. 272.) They attempted to do this by admitting substantially all the essential facts heretofore related, but sought to disclaim liability on the ground that the treasurer did not know the bonds were secured by a leasehold; that they were purchased by his son, president of the Association, who they contended must be presumed to have acted with the authority of the Board of Directors, and that the acceptance of dividends from the receiver constituted a ratification of the purchase. As bearing upon the question whether the treasurer purchased the bonds the evidence shows that his son, George Klimowicz, president of the Association, was engaged in business with his father under the name of Charles Klimowicz & Son, in whose offices the Association also had its office; that the bonds, when purchased by George Klimowicz the president, were paid for partly in cash and partly by a Liberty Bond belonging to plaintiff; that the check for \$3,000 issued in payment of three of the bonds was drawn to the order of Charles Klimowicz & Son; that interim certificates issued before the bonds were delivered and later the bonds were placed in the safe of the Association in the office of Charles

on government, state and municipal bonds.

It is also a part of the same record that

Klimov was elected treasurer of the association, his

name of office, the giving of the bond, the investment of

\$4,000 of the association's money in United States securities and

the loss sustained. This constituted a prima facie case

and raised a strong presumption of liability to recover the

contents of the bond. Under the circumstances, it is

because the burden of proof is on the defendant.

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to be held by the association, and the association

therefore related, and sought to establish liability on the

ground that the treasurer did not know the bonds were secured by

a mortgage; that they were purchased by his son, president of

the association, and they contained no reference to the

secured with the authority of the board of directors, and that

the acceptance of dividends from the receiver constituted a

ratification of the purchase. In answer to the question

whether the receiver purchased the bonds the evidence shows

that the son, George Klimov, president of the association,

was engaged in business with his father under the name of

George Klimov & Son, in whose office the association also

had its office; that the bonds, when purchased by George Klimov

the president, were paid for partly in cash and partly by a

check for \$4,000; that the check for \$4,000

issued in payment of three of the bonds was drawn to the order

of George Klimov & Son; that certain certificates issued

before the bonds were delivered and later the bonds were

placed in the care of the association in the office of George



Klimowicz & Son by the treasurer himself, and that the president, George Klimowicz, son and business associate of the treasurer, received five per cent. commission on the sale of the bonds. The only fair inference that can be drawn from the association and relationship disclosed by the evidence between father and son, treasurer and president, respectively, is that the bonds were purchased with the full knowledge and understanding of the defendant, Charles Klimowicz.

To further justify the purchase of these bonds defendants sought to prove that George Klimowicz showed the Board of Directors a circular issued by the Hool Realty Company advertising the securities in question as first mortgage bonds. The court properly excluded this evidence as not tending to prove authority for the purchase of securities that were a first mortgage on a leasehold and a third lien upon real estate, in violation of the plaintiff's by-laws.

The evidence shows that the receiver for the Hool Realty Company paid dividends on the \$4,000 claim of plaintiff and the acceptance of the dividends is relied upon by defendants as evidencing a ratification of the purchase by the Board of Directors.

Cases are cited in defendant's brief on the proposition that where a corporation rescinds an ultra vires contract, it must restore the benefits thereunder, and before bringing suit must tender back the amount received. These cases are not applicable because there was no authority for the purchase of securities of this character. It was the duty of the Board of Directors to accept dividend payments to minimize the loss sustained by the Association. The judgment of the trial court was properly entered and will be affirmed.

AFFIRMED.

WILSON, F.J. AND NEBEL, J. CONCUR.



1. The purpose of the investigation was to determine the extent of the problem of the lack of adequate housing for the poor in the city of New York.

[illegible]

that where a corporation remains an alien under contract, it must respect the public's prerogatives, and before bringing suit must locate first the money involved. This suit was not an alienable business suit as is usually the case in suits of this character. It was the duty of the court to determine the source of the money involved in the suit and to award it to the plaintiff. The payment of the suit could not be refused. The payment of the suit could not be refused.

33897

INTERNATIONAL INDEMNITY COMPANY,  
a corporation,

Appellant,

v.

JOEL F. ROSENTHAL and EMIL  
ROSENTHAL,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

259 I.A. 652<sup>4</sup>

Opinion filed Dec. 10, 1930

MR. JUSTICE FRIEND delivered the opinion of the court.

This is an action in assumpsit based upon a contract of insurance between plaintiff and defendants for premiums claimed to be due under an insurance policy dated February 5, 1921. Prior thereto the defendants were engaged in the automobile finance business. In order to protect their mortgage interests against losses by fire or theft defendants carried a policy of insurance in London Llyods. In December 1930, the defendant Joel F. Rosenthal requested one Lazarus, an insurance broker, to secure a policy of similar character from another company and delivered the Llyods' policy to him. Lazarus secured the policy in question under which approximately 2,000 certificates were issued between February 10, 1921 and September 28, 1921. Cancellations from time to time because of bad moral risks reduced the number of certificates in effect on the last mentioned date to about 1,300. These remained in full force until the expiration of the last certificate on September 29, 1922.

Paragraph 5 of the policy in question reads as follows:

"This policy may be cancelled by either J. F. Rosenthal, doing business as Automobile Bonding





Co., not Inc., or E. Rosenthal, or the International Indemnity on giving the other forty-five (45) days written notice, at the expiration of which forty-five (45) days all liability of International Indemnity Company shall cease absolutely; except that the insurance issued on motor vehicles covered under certificates to and including the expiration of said forty-five (45) day period shall remain in full force and effect; except that if at any time during the first twelve months of this policy the losses reported exceed thirty-five (35%) per cent of the premium written under this policy for the same period, or if during any period of twelve full consecutive months during the term of this policy or extending beyond its expiration the losses reported under certificates and policies issued exceed seventy (70%) per cent of the premium written for the term of this policy, the International Indemnity Company shall have the right to increase the rate for the unexpired term of said certificates and policies to not exceeding the so-called conference rates applying in the respective localities of insured automobile, but on the failure of the assured herein to pay the additional premium due on said certificates and policies of insurance, the International Indemnity Company shall have the right to cancel existing insurance on motor vehicles covered under certificates and policies at that time, upon giving J. F. Rosenthal, doing business as the Automobile Bonding Co., not Inc., or E. Rosenthal, forty-five (45) days written notice of its intention so to do, the International Indemnity Company, however, reserves the right to cancel individual certificates if specific issue should warrant same. It is further understood and agreed that in the event of cancellation of any certificates or policies issued under this policy, either by J. F. Rosenthal, doing business as Automobile Bonding Co., not Inc., or E. Rosenthal, or the purchaser of automobile (in which event cancellation will be figured at established short rates) J. F. Rosenthal, doing business as Automobile Bonding Co., not Inc., or E. Rosenthal, agrees to refund to the purchaser for said insurance."

On June 8, 1931, four months after the policy became effective, defendants received a letter from plaintiff stating:

"We would like to be relieved of the above entitled policy as we are striking all finance companies' business from our books. Please be advised that the above policy will be cancelled forty-five days from the date hereof.

"Hoping you appreciate our position in this matter, I beg to remain.

Yours very truly,  
J. Edward Saff,  
Manager."





Following this notice plaintiff continued to accept certificates under the master policy beyond the expiration of the forty-five days stipulated therein and until September 28, 1921.

On September 30, 1921, another notice was mailed by plaintiff to defendants as follows:

"You are hereby notified that the policy of insurance No. 157515 issued to you by the International Indemnity Company of California will be and the same is hereby cancelled, which cancellation shall be and become effective at noon standard time on November 14, 1921, in accordance with the provisions of said policy, and you are hereby further notified that the International Indemnity Company of California will not be liable for any loss or damage of any nature under said policy after the date and hour above specified.

"Demand is hereby made for the return of said policy to said Company."

On March 24, 1922, which was more than a month after the policy would have expired by its terms and about six months after plaintiff had ceased issuing any certificates of insurance thereunder, Lazarus, the broker who procured the policy for defendants, received the following communication from the agents of plaintiff:

"Confirming our conversation of this morning, beg to advise that we are preparing and will furnish just as quickly as the same is completed an endorsement to be attached to the above open policy pursuant to the provisions of Paragraph 5, of special endorsement attached thereto, listing the additional premium charge due the International Indemnity Company by reason of the fact that losses reported have exceeded the maximum limits fixed by said special endorsement.

"In accordance with our understanding, the endorsement will be effective as of December 13, 1921, and will affix an additional premium charge to each certificate in force on that date on a pro-rata basis to dates of expiration, computed on the basis of the difference in the premium actually charged at the inception of the certificate and the conference tariff rate applicable to the car described in each certificate, the method of computation having been discussed with Mr. Schwartz, and representative certificates and the additional rate computed in accordance with the above.



by the fact that the same person is not always the same person.

NOTES: 1. The above information was obtained from the file of the FBI, dated 10/10/61, and dated 10/10/61.

1. The first step in the process of the investigation is the selection of the subject. This is done by the investigator who is assigned to the case. The subject is then interviewed and the information obtained is used to develop a plan of action. This plan is then carried out and the results are reported to the investigator. The process is then repeated until the case is closed.

"As stated above, it is our desire to complete the preparation of the additional premium endorsement immediately, and we would thank you, therefore, to confirm our understanding as to the method in which the transaction is to be handled.

Yours very truly,

(Signed) Walters & Durfee,  
Agents."

Sometime in April or May, 1932, the time not being definitely fixed, the following endorsement was delivered to Lazarus by Durfee, manager of the plaintiff company:

"It is mutually understood and agreed that losses reported under Certificates issued under open Policy #157515 to which this endorsement is attached, have exceeded the maximum limits prescribed by paragraph 5 of special endorsement attached to said policy.

"Therefore, by mutual agreement, the following additional premium charges are declared due and payable under various certificates of coverage issued under said open policy, in amounts hereinafter set forth, viz."

This endorsement contained a tabulation of the names of certificate holders, the expiration dates of the certificates, and the additional premium figured on the basis of the difference in the premium actually charged at the inception of the policy and the conference tariff rate applicable. The total additional premiums shown amounted to \$10,917.11. When this memorandum was presented to Joel F. Rosenthal, defendant, he questioned the correctness of the total amount claimed to be due; and later had his own employees recheck the various items and compile figures showing a total of only \$4,800. This information was conveyed to Durfee. There followed several telephone conversations, and finally on July 5, Rosenthal advised Durfee that defendants declined to pay the additional premiums.

Two principal questions are raised by this appeal. One arises out of the legal construction of paragraph 5 of the policy; the other rests upon plaintiff's contention that the defendants by accepting the benefits of the insurance after





cancellation notices were served upon them placed a practical construction on paragraph 5, under which they recognized and conceded their liability, disputing only the amount thereof.

Under the first clause of paragraph five either party might cancel the policy upon giving the other 45 days notice in writing, whereupon all liability of the plaintiff would cease, except that insurance issued under certificates to and including the expiration of the 45 days would remain in full force and effect. The second clause provides for excess premiums in the event that losses exceeded a certain percentage of the premium, and permits cancellation by the plaintiff only upon failure of the assured to pay the additional premiums due.

The first notice of cancellation stated that plaintiff desired to strike all finance business from its books, and the second assigned no reason whatsoever. No demand was made for additional premiums in either of these notices, and it is not contended that plaintiff ever made a demand prior to March 24, 1922, which was after the policy would have expired under its terms and many months after the cancellation notices were sent. It therefore appears that plaintiff terminated the policy under the first clause of paragraph 5, and that the failure of defendants to pay the excess premiums could not then have been the controlling cause for cancellation. Consequently defendants' liability, if any, must rest upon the legal construction of the policy.

It is conceded that the contract of insurance contains no promise on the part of defendants to pay the additional premiums. The plaintiff contends that a necessary implication to pay arises as a matter of law. The cases cited in support of this contention, however, are not applicable. The terms of this policy were perfectly plain and no ambiguity appeared therein.

cancelation notices were served upon them placed a prejudicial  
construction on paragraph 2, under which they recognized and  
conceded their liability, admitting only the amount of the  
Under the first clause of paragraph five either  
party might cancel the policy upon giving the other 45 days  
notice in writing, without any liability of the plaintiff  
would arise, except that insurance issued under conditions  
to and including the expiration of the 45 days would remain in  
full force and effect. The second clause provides for a  
premium in the event that losses exceeded a certain percentage of  
the premium, and further cancellation by the plaintiff only upon  
failure of the insured to pay the additional premium due.  
The first notice of cancellation stated that plaintiff  
desired to settle all business from its books, and the  
second stated no reason whatever. It stated that the  
additional premium in effect at that notice, and it is not  
contended that plaintiff ever made a demand upon the policy.  
It is also stated that the policy would have expired under the  
terms and many months after the expiration notice was sent.  
It therefore appears that plaintiff terminated the policy under  
the first clause of paragraph 2, and that the failure of the  
insured to pay the excess premium could not then have been the  
canceling cause for cancellation. Consequently defendant's  
liability, if any, must rest upon the legal construction of the  
policy.  
It is contended that the contract of insurance contains  
no provision on the part of defendant to pay the additional  
premium. The plaintiff contends that a necessary condition  
to pay arises as a matter of law. The cases cited in support of  
this contention, however, are not applicable. The issue of this  
policy was definitely fixed and no liability attached thereon.



Under its provisions plaintiff had the right to increase the rate for the unexpired terms of the certificates issued, if losses exceeded a certain percentage of the premiums, and upon defendants' failure to pay the excess to cancel the policy. Where the language of a contract is not specific and is susceptible of more than one construction, it is proper to ascertain the circumstances surrounding the parties and the object they had in view, and effect will be given to their intention where it can be done without doing violence to the plain and obvious meaning of the language implied. Wolf v. Schwill, 289 Ill. 190. But this rule of law cannot here be invoked to interpolate into the contract an implication to pay, where by its specific terms none exists. Robinson v. Stow, 39 Ill. 528. Moreover, it is conceded that contracts of insurance are to be construed more strongly against the insurer and in favor of the insured, and the mere fact that defendants' former policy in London Lloyds was used as the basis for drawing the contract here in question and was similar in its provisions, does not in any way alter the rule.

Plaintiff further contends that the parties placed a practical construction on the policy and that by dealing with plaintiff after the endorsement with a tabulation of excess premiums was delivered to them in April or May, 1922, defendants recognized their liability. At the time of these transactions the contract of insurance had ceased to exist. It had not only expired by its terms, but by prior cancellation.

Defendants had the right to recheck figures presented to them after the contractual relationship of the parties had terminated, to consider the amount claimed to be due, and to be advised with reference thereto. If during this period certain



Under the provisions of the policy, the right to recover the  
policy for the amount of the certificate issued, if  
losses exceeded a certain percentage of the premium, and upon  
defendants' failure to pay the amount to cancel the policy.  
Where the language of a contract is not specific and is un-  
clear, it is to be construed, if it is proper to ascertain  
the circumstances surrounding the parties and the object they  
had in view, and effect will be given to their intention where  
it can be done without doing violence to the plain and obvious  
meaning of the language used. Ball v. Ball, 200 Ill. 170.  
But this rule of law cannot be applied to interpret the  
contract as implied to pay, where by the specific terms  
none exists. Robinson v. Bank, 20 Ill. 500. Moreover, it is  
essential that interests of insurance are to be construed  
strongly against the insurer and in favor of the insured, and  
the principle that defendants' intent policy is hereby stated  
was used as the basis for finding the contract here in question and  
was stated in the provisions, does not in any way alter the rule.  
Plaintiff further contends that the contract was  
a practical operation on the policy and was by dealing with  
plaintiff after the endorsement with a violation of express  
provisions was delivered to them in April or May, 1932, defendants  
recognized their liability. At the time of these transactions  
the contract of insurance had ceased to exist. It had not only  
expired by its terms, but by legal cancellation.  
Defendants had the right to check figures presented  
to them after the contractual relationship of the parties had  
terminated, to ascertain the amount claimed to be due, and to be  
advised with reference thereto. It during this period certain

unexpired certificates issued under the policy were allowed to continue in force, that fact alone cannot be considered as controlling. Plaintiff might at any time have cancelled these unexpired certificates. It is reasonable to suppose that as a matter of business policy it may have preferred to allow them to continue in effect to the date of their expiration, which in no case extended beyond September, 1933. The course of action pursued by defendants cannot be considered as indicative of any intention one way or another as to the construction placed upon the policy by the parties or as an admission of liability by the defendants.

We perceive no error in the record and the judgment will accordingly be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

• 2000 •



34099

BOVEE TRANSMISSION CORPORATION,  
a corporation, for the use of  
HARRY T. CARROLL,

Appellee,

v.

CHICAGO TRUST COMPANY, a cor-  
poration,  
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 652<sup>5</sup>

Opinion filed Dec. 10, 1930

MR. JUSTICE FRIEND delivered the opinion of the court.

This is a first class action brought by Bovee Transmission Corporation for the use of Harry T. Carroll, plaintiff, against Chicago Trust Company. The trial court found the issues in favor of the plaintiff, assessed his damages at \$5,000 and rendered judgment on the finding.

The essential facts disclose that in June, 1924, Bovee Transmission Corporation obtained authority from the Secretary of State to sell \$1,000,000 worth of its preferred stock as a Class "B" security in the manner provided by the Illinois Securities Act. A penal bond in the sum of \$300,000 was given by the seller conditioned to hold intact the proceeds of the sale of said stock until the sum of \$300,000 should have been obtained and for the faithful safeguarding of said funds and the repayment thereof as contemplated by Section 11 of the Securities Act.

Contemporaneous with the execution of the bond Bovee Transmission Corporation entered into a written contract with defendant, Chicago Trust Company, providing that the corporation should deposit with the Trust Company 80% of the par value of the stock as sold, and furnish a list of the

CONFIDENTIAL

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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with reference to the Trust Company, providing that the corporation shall operate as the Trust Company of the United States, and furnish a list of the names of the stockholders and the names of the directors of the corporation.

purchasers of the said stock, containing the particulars of each purchase; that if the full amount of \$300,000 should not have been deposited with the Trust Company within eighteen months, the latter should then pay back to each purchaser of stock whose money had been deposited by the corporation the full amount deposited upon surrender of the certificate of stock; and that the corporation should deposit with the Trust Company 80% of the amount of each sale which was to be returned to the corporation in the event it made deposits aggregating \$300,000 within eighteen months from the date of said contract, subject however, to the approval of the Secretary of State. For the purpose of identifying purchasers whose money had been deposited with the Trust Company, the contract provided that certified lists be furnished from time to time as sales were made. This provision of the agreement was not strictly complied with by the vendor corporation nor insisted upon by the Trust Company. The parties agree, however, that the certified lists that were delivered to defendant do not designate plaintiff as the purchaser of the stock in question.

The evidence further discloses that considerably less than the full amount of \$300,000 was deposited with the defendant within the time limit specified in the contract, and the Trust Company, according to its agreement, returned to purchasers appearing on its certified lists all the money in its fund, except the \$5,000 claimed by the beneficial plaintiff.

Plaintiff was not the original purchaser of the certificates in question, having acquired the same in June and July, 1929. Whether he purchased these certificates or acquired them as collateral or by gift is not disclosed by the evidence. Some of the certificates held by him were



purchase of the said stock, containing the particulars of  
each account; that if the full amount of \$700,000 should not  
have been deposited with the Trust Company within eighteen  
months, the latter should then pay back to each depositor of  
stock whose money had been deposited by the corporation the  
full amount so-called upon certificate of the certificate of  
stock; and that the corporation should account with the Trust  
Company 50% of the amount of each sale which was to be  
returned to the corporation in the event of its liquidation  
amounting to \$1,000,000 within eighteen months from the date of  
said contract, subject however, to the approval of the majority  
of stock. For the purpose of identifying purchasers whose  
money had been deposited with the Trust Company, the contract  
provided that certified lists be furnished from time to time  
as sales were made. This provision of the agreement was not  
strictly complied with by the Trust Company, not insofar  
upon by the Trust Company. The parties agree, however, that  
the certified lists that were delivered to defendant do not  
designate himself as the purchaser in the stock in question.  
The witness further testifies that approximately  
less than the full amount of \$700,000 was deposited with the  
defendant within the time limit specified in the contract, and  
the Trust Company, according to its agreement, returned to  
purchasers appearing on the certified lists all the money in  
the fund, amounting to \$700,000 claimed by the beneficial holders.  
Witness was not the original purchaser of the  
certificates in question, having acquired the same in late 1929  
July, 1932. Whether he purchased these certificates or  
acquired them as collateral on a gift is not disclosed by  
the witness. Some of the certificates sold by him were

endorsed in blank and others assigned by separate instrument.

The sole question raised by this appeal is whether plaintiff is entitled to receive back from defendant the sum of \$5,000 still remaining on deposit under the aforesaid agreement.

Paragraph second of the agreement provides as follows:

" 2nd. In the event that the full amount of Three Hundred Thousand Dollars (\$300,000.00) shall not have been deposited with the party of the second part within eighteen months from the date hereof, then in such event the said party of the second part shall without further notice or instructions pay back to each and every purchaser of stock whose money shall have been deposited and placed in trust by the said party of the first part, the full amount deposited from the said purchaser upon the surrender of the certificate of stock issued to him or her."

Defendant relies on the strict construction of this paragraph, and contends that plaintiff not being a "purchaser of stock whose money has been deposited" has failed to bring himself within the terms of the agreement and is therefore not entitled to receive back the sum in question.

This provision of the contract should, however, be considered together with paragraph eight of the same agreement which provides that "said funds shall be held for disposition subject to the instructions and authority of the Securities Department of the State of Illinois." There is also in evidence a letter from the Secretary of State to the Chicago Trust Company, stating that "inasmuch as the capital required was not obtained within the time limit in the impounding bond, you are authorized and directed to pay unto the subscribers or to the holders of the shares 80% of the amount paid therefor, as required by law, and as provided in and by the terms of the impounding bond."

Inasmuch as the authority to sell the Bovee Trans-

undue in plain and obvious language by separate instrument.  
The sole question raised by this appeal is whether  
plaintiff is entitled to receive back from defendant the sum  
of \$3,000 still remaining on deposit under the aforesaid agree-  
ment.

This case comes to the court for review as follows:

"And, in the event that the full amount of Three  
thousand Dollars (\$3,000.00) shall not  
have been deposited with the court at the second  
and third sittings of the court, then in such event the said party of the second part  
shall without further notice or intimation pay back  
to said and every person at once and every  
shall have been deposited and placed in trust by the  
said party of the first part, the full amount hereon-  
able from the said party of the first part, to wit:  
of the certificate of stock issued to him or her."

Defendant relies on the first paragraph of this  
contract, and contends that plaintiff has failed to bring  
of such money has been deposited" has failed to bring  
himself within the terms of the contract and is therefore  
not entitled to receive back the sum in question.  
This provision of the contract should, however, be  
considered together with paragraph eight of the same agreement  
which provides that "said funds shall be held for disposition  
subject to the instructions and authority of the trustees  
Department of the State of Illinois." It is also in  
evidence a letter from the Secretary of State to the Chicago  
Trust Company, stating that "inasmuch as the capital received  
was not retained within the State in the intended bond,  
you are authorized and directed to pay unto the undersigned  
on or to the order of the State of Illinois the amount said to be  
as required by law, and as provided in and by the terms of  
the foregoing bond."

Inasmuch as the authority to sell the bonds from-



mission Corporation stock, the taking of an impounding bond by the Secretary of State, and the agreement between the parties were all based on the provisions and requirements of the Illinois Securities Act, we see no reason why the provision of Paragraph eight of the agreement should not be as fully controlling as the portion of the contract relied on by defendant. Paragraph eight directs the funds to be held for disposition subject to the instructions and authority of the Securities Department, and that Department by its letter and pursuant to the authority of the contract directed the Trust Company "to pay unto the subscribers or to the holders of shares 80% of the amount paid therefor, as required by law". Plaintiff had evidently acquired ownership of these certificates. They were produced by him, properly endorsed, and his ownership is not denied by the pleadings nor challenged by the evidence. Moreover, there is proof that the stock represented by plaintiff's certificates had been sold and paid for, and the right of the original purchasers to sell, assign or transfer them to plaintiff is not questioned.

We are therefore of the opinion that plaintiff being the owner and "holder" of the certificates in question, even though he fails to qualify as the "purchaser whose money has been deposited", is, under the terms of the contract and pursuant to the direction of the Secretary of State, entitled to be paid the amount on deposit represented by his certificates. The judgment of the trial court will therefore be affirmed.

AFFIRMED.

WILSON, P.J., AND HERBEL, J. CONCUR.

[illegible][illegible]

34108

TRADERS INVESTMENT COMPANY,  
a Corporation,

Appellee,

v.

HARRY ROSEN, et al,  
(Edmund A. Hastings, Trustee,  
Appellant).

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

259 I.A. 653

Opinion filed Dec. 10, 1930

MR. JUSTICE FRIEND delivered the opinion of the court.

By this appeal Edmund A. Hastings, Trustee, seeks to reverse a decree foreclosing a mechanic's lien in favor of complainant, who was the assignee of the contractors furnishing the material and labor. The sole question involved is whether the bill of complaint was prematurely filed.

The facts essential to the determination of this question are as follows: On November 4, 1926, P.J. Organ & Company agreed in writing to furnish the material and labor necessary to erect two brick garages on the property of Harry and Besse Rosen for the sum of \$7,000. Upon completion of the work on January 5, 1927, the contractors assigned to complainant Traders Investment Company, a corporation, all of their right in and to the amount due or to become due under the contract. \$500 having been previously paid, there was owing at the time of the assignment the sum of \$6,500. This amount was further reduced to \$4,745, prior to the filing of the bill of complaint.

The contract upon which the suit is founded contained, among others, the following provisions

"The undersigned agrees to pay for said labor and materials the sum of \$7,000.00, payable in 25 installments \* \* \* provided, however, that in the event of default in the payment of any said installments when due, or of the sale or incumbrance of



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259 I.A. 653

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Opinion filed Dec. 10, 1930

1. THE COURT hereby certifies the copies of the record.

2. This appeal is from a judgment of the District Court of the United States for the District of Columbia, entered on the 11th day of November, 1929, in favor of the appellant, who was the assignee of the bankrupt estate of the bankrupt and labor. The said judgment involved the validity of a certain contract between the parties, and the court held that the same was validly made.

3. The facts presented by the record are as follows:

On November 4, 1929, the appellant, who was the assignee of the bankrupt estate of the bankrupt and labor, entered into a contract with the appellee, who was the assignee of the bankrupt estate of the bankrupt and labor, for the purpose of selling the property of the bankrupt estate of the bankrupt and labor. The contract provided that the appellant should sell the property of the bankrupt estate of the bankrupt and labor to the appellee, and that the proceeds of the sale should be paid to the appellee.

4. The contract provided that the appellant should sell the property of the bankrupt estate of the bankrupt and labor to the appellee, and that the proceeds of the sale should be paid to the appellee.

5. The contract provided that the appellant should sell the property of the bankrupt estate of the bankrupt and labor to the appellee, and that the proceeds of the sale should be paid to the appellee. The contract also provided that the appellant should pay to the appellee a certain sum of money, and that the appellee should pay to the appellant a certain sum of money.

6. The contract provided that the appellant should sell the property of the bankrupt estate of the bankrupt and labor to the appellee, and that the proceeds of the sale should be paid to the appellee.

7. The contract provided that the appellant should sell the property of the bankrupt estate of the bankrupt and labor to the appellee, and that the proceeds of the sale should be paid to the appellee.

\*The undersigned agrees to pay for said labor and materials the sum of \$7,000.00, payable in 12 installments of \$583.33, the first installment to be paid on or before the 1st day of January, 1930, and the balance of the sum of \$7,000.00 to be paid in 11 equal installments of \$583.33 each, on the 1st day of each month thereafter.

any part of the premises in question without the written consent of the contractor or his assigns \* \* \* the contractor or his assigns may, without notice, declare the whole of said sum or so much thereof as remains unpaid \* \* \* immediately due and payable."

In accordance with the provisions of the contract the defendants Rosen executed a note dated January 5, 1927, agreeing to pay the contract price in installments on the 5th day of each month after date. The note contained the following provision:

"In case of default in the payment of any installment or any interest or any sum of money which may be due hereon, the aggregate amount of this note remaining unpaid and every installment thereof shall, without notice or demand, at once become due any payable, together with interest after default at the highest legal contract rate, exchange and all collection charges, including attorney's fees."

It is conceded that when the bill was filed on February 8, 1928, an installment of \$135, which matured on February 5, 1928, was past due. This sum was received by complainant and credited to defendants' account on February 15, 1928. Lis pendens was registered on February 8, 1928. On August 20, 1927, more than nine months after the contract was entered into, the Rosens executed a trust deed on the property in question to Edmund A. Hastings, as trustee, which was registered in the Torrens Office of the Registrar of Deeds of Cook County on August 21, 1927.

The execution of the trust deed on August 20, 1927, and default in the payment of the installment maturing on February 5, 1928, are relied upon by complainant as the basis of its suit. Both the original and amended bills of complaint allege that after payment of \$1,620 on account of the contract "There is still due \* \* \* \$4,880 with interest from February 5, 1928, when same became due and payable under the terms of said contract." According to the agreement of the parties, default

any part of the business in connection with the  
business of the company or its agents, or  
the business of the company, without written  
consent of the board of directors, and the  
company shall be liable for the same.

In accordance with the provisions of the contract  
the defendant herein executed a note dated January 2, 1937,  
agreeing to pay the principal and interest on the 1st  
day of each month after date. This note was made in full  
and contains the following provisions:

"In case of default in the payment of any in-  
stallment or any interest on the note of which this  
note is a part, the company shall have the right  
to demand immediately and without limitation of time  
the entire amount of the note, with interest thereon  
at the rate of six per cent per annum, and the  
company shall have the right to demand immediately  
the entire amount of the note, with interest thereon  
at the rate of six per cent per annum, and the  
company shall have the right to demand immediately  
the entire amount of the note, with interest thereon  
at the rate of six per cent per annum."

It is conceded that when the bill was filed on  
February 2, 1937, on installment of bill, which related to  
February 2, 1937, was paid in full. This was not reflected by  
complaint and resulted in defendant's account on January  
1, 1937. The amount was reflected on February 2, 1937. On  
August 20, 1937, when the bill was filed on the account was  
entered into, the account executed a note dated on the account  
in question to Edward A. Hastings, as trustee, which was  
reflected in the account of the defendant of which  
of Cook County on August 21, 1937.

The execution of the note dated on August 21, 1937,  
and which is the subject of the complaint, resulted on  
February 2, 1937, and which was paid by complaint on the basis  
of its value. Both the principal and interest bills of complaint  
allege that after payment of \$1,000 on account of the contract  
"There is still due to the company \$4,500 with interest from February 2,  
1937, when same became due and payable under the terms of said  
contract." According to the agreement of the parties, which



in the payment of one installment accelerated the maturity of the entire sum remaining unpaid "without notice or demand" and the filing of the bill of complaint containing the foregoing allegation amounted to a declaration that the entire sum then became due. No further notice, declaration or act was necessary to accelerate the maturity of the entire indebtedness; the filing of the bill of complaint was sufficient. Having thus declared the entire indebtedness due by the filing of the bill, we see no force to the contention of defendant that acceptance of a past due installment subsequent to the filing of the bill would in any way affect the rights of complainant, and we find no authorities in defendant's brief tending to sustain that contention.

In view of the manifest right of complainant to maintain its bill for the reasons stated, we deem it unnecessary to consider the other question whether, under the pleadings, complainant should be allowed to rely on the conveyance by trust deed without the consent of the contractors or their assigns, as ground for declaring the entire amount due.

All other provisions of the Lien Statute having been fully complied with, we find no error on the part of the Chancellor in entering the decree, and the same will accordingly be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.

in the payment of the installment accumulated the maturity  
of the entire sum remaining unpaid "without notice or demand"  
and the filing of the bill of complaint containing the facts  
going therewith amounted to a declaration that the entire sum  
then became due. In further effect, declaration of fact was  
necessary to accelerate the maturity of the entire indebtedness;  
the filing of the bill of complaint was sufficient. During  
that period the entire indebtedness was by the filing of  
the bill, so far as the declaration of indebtedness that  
accrued at a year and installment payments on the filing  
of the bill would in any way affect the rights of assignment,  
and we find no authorities in testimony which bearing to  
establish that contention.

In view of the material facts of complaint in  
maintain the bill for the reasons stated, we find it necessary  
to consider the other parties thereto, under the language,  
"assignment should be allowed to rely on the assignment by  
which they obtained the benefit of the assignment on their  
behalf, as grounds for declaring the entire sum due."  
All other provisions of the bill having been  
fully explained, we find no error in the part of the  
complaint in setting the default, and the same will accordingly  
be affirmed.

REVEREND.

CHIEF, U. S. AND SUPREME COURT.

34150

EVALD E. GARBE,

Appellant,

v.

UNION BANK OF CHICAGO and  
G. FRANK CROISSANT,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 653<sup>2</sup>

Opinion filed Dec. 10, 1930

MR. JUSTICE FRIEND delivered the opinion of the court.

In the month of November, 1934, Evald Garbe, employed by the Western Electric Company, with a fellow workman, made a trip by bus to Calumet City, accompanied by one Nunyan, a salesman of the G. Frank Croissant organization. On the way out the speaker in the bus detailed facts regarding profits made by investors in reselling real estate. When they reached the Croissant office Garbe was introduced to one Hartenstein, another salesman, who told him about the previous earnings of customers in the resale of property, and suggested that if Garbe would purchase some lots defendant would resell them at a profit within 60 days. Garbe made a down payment of \$700 by check on lot 13, for which a receipt was issued to him. Several days later he was tendered a contract of the Union Bank of Chicago, defendant herein, who was acting as trustee for Croissant, containing the following provisions:

"The above contract is for the sale of vacant property only, and vendor is hereby in no manner obligated to resell above described property for purchaser."

"The undersigned has read and understands the whole of the above contract and now states and in consideration of the contract agrees, that no representation, promise or agreement not expressed in the contract has been made to induce the undersigned to enter into it."

Garbe refused to sign the agreement until he was told,



• *Journal of Management Education*

330 A. 105

Original filed Dec. 10, 1930

1. The first thing I noticed when I stepped out of the plane was the cold air. It was a relief after the warm cabin. I looked around and saw a lot of people, some of whom I recognized. We were in a hurry, and the plane was full. I found my seat and sat down. The flight was uneventful, and we arrived at our destination on time. I was tired but happy to be home.

as he testified, "to pay no attention to the contract, it doesn't mean anything, we resell this property every day", whereupon he executed the contract. Immediately thereafter Croissant addressed those present, stating that any one wishing to have his money refunded might step up to the platform and receive the same. Garbe did not avail himself of this offer. About a month later and upon similar representations he purchased lot 13 in another subdivision, and executed a like agreement. In March, 1925, Garbe called to inquire why his lots had not been resold and was told that business was slow, but that a big building boom in spring would bring better results. Finally on March 7, 1925, plaintiff purchased a third lot, again relying upon similar promises to resell, and executed a contract containing exactly the same provisions as the first two. On the first and second agreements plaintiff made payments until January 3, 1928, and on the third until January 17, 1928, amounting in all to \$3,232.25. \$300 of this sum was represented by a credit to Garbe resulting from the transfer of the amount of an investment in Florida property in 1926, also with the Croissant organization. On February 14, 1928, Garbe, through his attorneys, made a demand for the return of the payments made by him on account of said purchases, which was refused, whereupon suit was instituted in the Municipal Court.

A jury was impaneled to try the cause, and at the close of plaintiff's case, upon motion of defendant, the court instructed the jury to find the issues for defendant, overruled motions for a new trial and in arrest of judgment, and entered judgment on the verdict.

Plaintiff's suit is founded on the alleged fraud of defendant's agents in inducing him to enter into the contracts by means of the following false representations: that the agents had sold and resold property in the past; that they

as he testified, "in my attention to the contract, it doesn't mean anything, we really this property every day".

Thereafter he executed the contract. Immediately thereafter defendant addressed those persons, stating that any one wishing to have his money returned might step up to the platform and receive the same. There he saw well himself at this time.

About a month later and upon similar representations he purchased lot 12 in another subdivision, and executed a like agreement. In March, 1935, he was called to indicate why his lot had not been resold and was told that business was slow, but that a big building boom in that area would bring better results. Finally on March 7, 1935, defendant purchased a third lot, again relying upon similar promises to resell, and executed a contract consisting basically the same provisions as the first two. On the first and second payments defendant made payments until January 3, 1936, but on the third would January 12, 1936, amounting in all to \$4,312.50. This sum was represented by a check to Grace consisting from the proceeds of the payment of an investment in Florida property in 1935, also with the defendant's signature. On February 12, 1936, Grace, through the attorney, made a demand for the return of the payments made by him on account of said contracts, which was refused. Whereupon suit was instituted in the Municipal Court.

A jury was impaneled to try the case, and at the close of plaintiff's case, upon motion of defendant, the court instructed the jury to find the issue for defendant, overruled motions for a new trial and in arrest of judgment, and entered judgment on the verdict.

Plaintiff's suit is founded on the alleged fraud or defendant's agents in inducing him to enter into the contracts by means of the following false representations: that the agents had sold and would property in the past; that they



had made profits for other purchasers by resale; that they would resell plaintiff's lots at a profit within 60 days; that old customers had bought South Lawn, one of defendant's subdivisions, which was 60% sold; and that the bank had sold lots 11 and 12 adjoining plaintiff's property. All of the foregoing representations, except the promise to resell the property, related to past facts. Assuming that these statements were made, and aside from any legal question involved, we fail to find in the record any evidence tending to show that they were untrue. It was incumbent on plaintiff under his amended statement of claim and in conformity with the rules of law governing actions of this nature to prove, among other things, the falsity of the representations, and his failure so to do was, so far as it is applicable to the statements of past facts, fatal to plaintiff's case.

The remaining representation was in the nature of a promise. This pertained to the resale of plaintiff's lots at a profit within 60 days. Whatever reliance plaintiff may have placed on this statement in connection with the first purchase, he certainly must have had some misgiving as to its fulfillment when he bought the second lot a month later, and an abiding conviction that the promises would not be carried into effect when he purchased the third lot almost four months after his first venture, and the fact that he continued to make payments on his contracts and to enter into real estate transactions through the Croissant organization for several years after the first alleged representations were made to him, lends force to the contention that the statements of Croissant's salesmen were mere expressions of opinion as to the probabilities of future resale.

If plaintiff really relied on defendant's promises

but was further in error in that by reason of the fact that  
would result in a loss of a profit within 90 days.  
that old customer had bought South Island, and at defendant's  
indulgence, which was not only not the best but was  
loss of 11 and 12 adjoining defendant's property. All of the  
foregoing representations, except the promise to result in  
property, related to past facts. Assuming that these statements  
were made, and under the fact that defendant failed to  
fail to find in the record any evidence tending to show that  
they were correct. It was incumbent on plaintiff to show  
an honest statement of claim and in conformity with the facts  
of law governing actions of this nature to prove, among other  
things, the truth of the representations, and the failure to  
do so was, so far as it is applicable to the statements of  
past facts, fatal to plaintiff's case.

The remaining representations are in the nature of a  
promise. This pertained to the result of plaintiff's loss of  
a profit within 90 days. Whatever business plaintiff may have  
placed on this statement in connection with the first contract,  
it certainly must have had some significance as to the defendant's  
then he bought the second lot a month later, and on a different  
conviction that the promise would not be carried into effect  
when he purchased the third lot almost two months after his  
first venture, and the fact that he continued to make payments  
on his contract and to enter into real estate transactions  
through the defendant's organization for several years after the  
time alleged representations were made to him, tends to show  
the contention that the statements of defendant's salesman were  
mere expressions of opinion as to the possibilities of future  
results.

It plaintiff really relied on defendant's promises



to resell, it was incumbent upon him to rescind within a reasonable time, and to tender back the lots purchased. His failure to do until February, 1936, constitutes unreasonable delay and is a further indication that he did not rely on the promises contended for.

The law applicable to representations of this character is well settled. It has been generally held that the statements relied upon in order to be available as grounds for rescission of a transaction must refer to existing facts and not merely amount to promises of something to be done in the future. As was said in Day v. Fort Scott Investment Co., 153 Ill. 293, the court quoting from the opinion in Gage v. Lewis, 68 Ill. 604;

"Even if at the time they (the representations) were made, it was not intended to comply with them, it was but an unexecuted intention, which has never been held, of itself, to constitute fraud. As distinguished from the false representation of a fact, the false representation of a matter of intention not amounting to a matter of fact, though it may have influenced a transaction, is not a fraud in law. . . . In Pomeroy's Eq. Jur. Section 877, it is said: 'A statement of intention, merely, cannot be a misrepresentation amounting to fraud, since such a statement is not the affirmation of an external fact, but is, at most, only an assertion that a present mental condition or opinion exists.' Such is no doubt the general rule."

Moreover, we find in the instant case a statement contained in the contract subscribed to by plaintiff that he had read and understands the agreement, and that no representation, promise or agreement not expressed in the contract has been made to induce him to enter into it, together with plaintiff's assent to the vendor's disclaimer of any obligation to resell the property for the purchaser.

We had occasion to pass on one of the Croissant contracts exactly like that now before us, where, in a chancery proceeding, representations similar to those here alleged and many others, were charged in the bill of complaint, and upon





hearing sustained by the evidence, and it was there held, among other things, that representations made regarding a matter subject to a written contract are of no binding force unless found in the contract executed by the parties thereto. (Parker v. Croissant, 250 Ill. App. 836). In that case, which is precisely in point, the court said:

"It is axiomatic that all representations made regarding any matter, subject to a written contract, are of no binding force, unless found in the contract executed by the parties, and in the case at bar nothing of the kind appears in the contract. There is no evidence that any false or fraudulent representations were made to the complainant to induce her to sign the contract without informing herself of its several clauses and provisions, or that any attempt was made to induce her to sign the contract without reading the same. The law will presume that complainant before signing the same informed herself of its contents, and furthermore there is an express provision in the contract reciting that complainant both read and understood the contract and its contents, and 'that no representations, promise or agreement not expressed in the contract has been made to induce the undersigned (complainant) to enter into it.' Likewise there is another clause stating that the vendor was in no manner obligated to resell the property for the purchaser."

It is further argued that a provision in the contracts restricting the transfer of the property to purchasers of the Caucasian race rendered the contracts void. We do not deem it necessary to pass upon the validity of the restriction in question, because the citations relied upon by plaintiff hold that contracts with like restrictions may be valid except as to the particular provision and we deem this to be the correct rule. Therefore, if the restriction is void, as plaintiff contends, he might have disregarded the same and conveyed the premises to purchasers of any race.

Plaintiff also contends that the contract was void because ultra vires the powers of the bank; that banks being creatures of the legislature, possess only such powers as are expressly granted to them by statute and those that are







necessarily implied to give effect to the specific powers granted; and from this it is argued that a corporation empowered to do a banking business cannot, by implication, assume to deal in subdivision realty. It is apparent however, from the face of the contracts in question that the bank was acting in its capacity as trustee for Croissant, and banks being specifically empowered by statute to act as trustees of property, we fail to understand why this delegation of authority should not include real estate. No cases are cited to support plaintiff's contention, except general citations upon the express and implied powers of corporations.

The remaining contention is that the bank having failed to enter its appearance within the time required by law, the plaintiff was entitled to default and judgment. Upon this point the record shows that the bank was served with summons on March 3, 1928, and filed its appearance on April 3, 1928. On the same day motion was made to extend the time to plead. On April 11, 1928, the defendants' motion to strike the statement of claim was allowed and plaintiff given nineteen days to file his amended statement of claim. April 16, 1928, statement of claim and affidavit for plaintiff was stricken as to the bank, and motion was then first made by plaintiff for default of the bank for failure to file an appearance. Thereafter on June 1, 1928, plaintiff amended the amended statement of claim on its face, and subsequently various other pleadings were filed. The abstract fails to show any motion for default until after appearance had been filed and other pleadings had been taken in the case by both parties. Rule 4 of the Municipal Court Rules provides that:

... necessarily implied to give effect to the specific power  
... and that this is in effect a declaration of intent  
... to be a binding contract, by implication, as to  
... in relation thereto. It is suggested, however, that the  
... of the contract is essential to the work now being in  
... the necessity to transfer the contract, and such being neces-  
... ally implied by statute to be an implied contract, as  
... will be understood by this language of necessity which has  
... include that fact. It is also noted as being necessary  
... condition, which is implied in the contract and  
... implied power of representation.

The remaining question is that the work now being done  
to enter the contract which the firm retained by law, the  
plaintiff and defendant as parties to the contract. This is  
point the court states that the work now being done on  
March 1, 1938, and that the agreement to work is made  
the same day when the work is done in fact, as  
April 11, 1938, the defendant, which is within the contract  
of claim and allowed the plaintiff to work on the day of the  
his contract statement of claim. April 11, 1938, defendant  
claim and plaintiff the plaintiff was entitled to the work,  
and when the work was done by plaintiff the defendant  
the work was done to the satisfaction of the plaintiff as  
June 1, 1938, plaintiff claimed the contract statement of claim  
on the fact, and accordingly plaintiff was entitled to the  
claim. The contract was to the work now being done by plaintiff  
after the contract was made and when plaintiff had done  
work in the work of the plaintiff. This is the plaintiff  
... work now being done

"Every Tuesday at 9:30 A. M. judge assigned to that duty shall call cases of first class in which service either by publication or summons has been made in due time for default. When cases are called, defaults may be taken and judgment entered where parties are entitled thereto."

The record fails to show that this case was called within the meaning of the foregoing rule, and therefore plaintiff was not entitled to default within the letter of the rule. Moreover the rule does not make it obligatory upon the court to enter default, as the word may was used and followed by the qualification "where parties are entitled thereto". The entry of the default is a judicial act which may be waived by failure to take advantage thereof prior to the filing of an appearance or pleading by the party in default. By failing to avail himself of the right to move for the default of defendant before appearance filed and thereafter entering upon the trial of the cause, we are of the opinion that plaintiff waived his right and cannot now be heard to urge the point.

Finding no error in the record, the judgment of the trial court will be affirmed.

AFFIRMED.

WILSON, P.J. AND HEBEL, J. CONCUR.



"Every Tuesday at 11:15 A.M. the following  
to the duty shall be done at that time in  
this service at the following times:  
and each week in the day the following:  
the following, the following way be done and the following  
entered shall be the following manner."

The record shall be made in the following manner and shall

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33817

FRANK FEIN,

Appellee,

v.

M. SAMUELS & CO. Inc.,  
a Corporation, doing  
business as the Newark  
Shoe Stores Company,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 653<sup>3</sup>

Opinion filed Dec. 10, 1930

MR. JUSTICE NEBEL delivered the opinion of the court.

This is an action brought by the plaintiff against the defendant in the Municipal Court of Chicago, wherein the plaintiff seeks to recover the sum of \$200.00, deposited with the defendant as security for the faithful performance of the conditions and covenants of a certain written contract of employment entered into by the parties hereto, on July 2, 1928. The cause was tried before a jury upon the statement and affidavit of claim of the plaintiff, the affidavit of merits of the defendant thereto, and evidence introduced by the parties in support thereof, which resulted in a verdict in favor of the plaintiff for the sum of \$300.00. A judgment was entered based on said verdict, from which judgment the defendant prosecutes its appeal.

The contract dated July 2, 1928, contains among other provisions, the following covenant, which provides for an accounting by the plaintiff:

"(4) I further covenant, promise and agree, that I will be legally responsible at law or in equity for all moneys and merchandise entrusted to my care by the employer or that may be entrusted to the care of any other employee of the employer who may be under my control and that I will keep accurate accounts and make proper returns to the employer for all such

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W. J. B. & Co., Inc.,  
a corporation, doing  
business as the  
Shoe Store Company,  
Chicago, Illinois.

1930

Opinion filed Dec. 10, 1930

1. THE COURT HEREIN delivered the opinion of the court.

This is an action brought by the plaintiff against

the defendant in the territorial court of Chicago, wherein the  
plaintiff seeks to recover the sum of \$100.00, together with

the defendant as security for the faithful performance of

the conditions and covenants of a certain written contract of

employment entered into by the parties hereto, on July 2, 1928.

The venue was tried before a jury upon the statement and

affidavit of claim of the plaintiff, the affidavit of notice

of the defendant hereto, and evidence introduced by the parties

in support thereof, which resulted in a verdict in favor of

the plaintiff for the sum of \$100.00. A judgment was entered

based on said verdict, from which judgment the defendant

protested its appeal.

The contract dated July 2, 1928, contains among other

provisions, the following covenant, which provides for an

accounting by the plaintiff:

"(4) I further covenant, promise and agree, that I  
will be legally responsible at law or in equity for  
all moneys and considerations entrusted to my care by the  
employer or that may be entrusted to the care of any  
other employee of the employer who may be under my  
control and that I will keep accurate accounts and  
make proper returns to the employer for all moneys



moneys and merchandise coming into my hands or the hands of such other employees as aforesaid. I further agree that the employer may terminate and annul this contract upon one week's notice if I should become negligent in my duties, or if my services for any reason whatsoever should no longer be desired by the employer. \* \* \*

And I further agree as a condition to my employment hereunder to deposit with the employer the sum of Two Hundred Dollars, which Two Hundred Dollars shall be held by the employer as a guarantee fund for the faithful performance on my part of each and every of the covenants, promises, agreements, and conditions of this contract. \* \* \* Upon the termination of my employment, whether voluntary or involuntary, the employer shall (5) not be bound to return said sum or any interest due thereon until a complete audit, verified by the Home Office, has been made of all moneys, accounts, stock and other property of the employer, under my control but in no event should said money be returned to me until thirty days shall have expired after the termination of my employment. In the event that the said audit, after proper verification, shows that I have less merchandise or cash on hand than I am properly chargeable with, the said sum or accumulated sums and accrued interest or so much thereof as may be necessary, shall be retained by the employer in payment and satisfaction of such shortage. In the event of any breach on my part of any of the covenants, promises, agreements and conditions of this contract, other than a shortage in merchandise and cash on hand, as aforesaid, or in addition thereto, the said sum or accumulated sums and accrued interest, or any portion thereof remaining after reimbursement ( 6 ) by the employer for any shortage or merchandise or cash, immediately upon the happening of such breach, shall be forfeited and I hereby authorize and direct the employer to retain and apply the same as liquidated damages for such breach. \* \* \*

After the execution of the contract, the plaintiff took charge as Store Manager of the defendant's store, located at 3444 South State Street, Chicago, and continued in such management until he was discharged on August 23, 1928. At that time an audit disclosed that there was a shortage in merchandise valued at \$192.09, of which \$192.00 was admitted by the plaintiff. The controversy in this case is whether the plaintiff is liable for this shortage.

It appears from the evidence that on or about August 10, 1928, about three o'clock in the morning, the plaintiff telephoned

1. The undersigned hereby certifies that the above-named person is a bona fide resident of the State of New York, and is entitled to the benefits of the laws of this State.

11/19/47 sat. 12/1/47 sat. 12/5/47 sat. 12/8/47 sat. 12/12/47 sat.

controversy in this case as whether the plaintiff is liable for  
at \$198.00, of which \$198.00 was admitted by the plaintiff. The  
an audit disclosed that there was a shortage in merchandise valued  
went until he was discharged on August 22, 1938. At that time  
at 3444 North State Street, Chicago, and continued in such manage-  
took charge as Store Manager of the defendant's store, located

It appears from the evidence that on or about August 10, 1938, about three o'clock in the morning, the plaintiff telephoned



to Roy C. Woods, attorney for the defendant, that he, the plaintiff, had been called on the telephone and told that the front transom of the store at 3444 South State Street was open. Woods told him to go down there, and if he found anything wrong to notify the police. The plaintiff did so. When the police arrived they found him at the store. There is a conflict as to whether the plaintiff was inside the store or out in front of the store when the police arrived. When the plaintiff and the police officers Bert Gray and Howard entered the store they found some confusion in the matter of paper boxes strewn about the place.

The plaintiff testified that after the police arrived, "I opened the door which was locked. After I went into the store the first thing I noticed there were boxes and shoes lying around in the store, that is in the front part of it, and in the rear there is a big room and that was badly upset. The rear door was open. Then I went back into the store and found the transom was open." Bert Gray, the police officer, testified that he examined the open transom above the door and found that the dust thereon had not been disturbed; that he also examined the front door, the rear doors and windows, and found that none of them had been opened or bore any marks whereby an entrance by force had been attempted. Officer Howard was not called as a witness.

The merchandise that was shown to be missing at the time of the audit immediately after the burglary, consisted of men's and women's shoes, hose and shoe findings, of the value already referred to by the Court. The plaintiff further testified that when he closed the store on the night in question, he looked about to see that everything was closed; that no one was there when he closed up, and that it was impossible for anyone to hide in the place without being seen; that he believed two of



to my G. Woods, attorney for the defendant, that he, the  
plaintiff, had been called on the telephone and told that the  
front entrance of the store at 1114 North Third Street was open.  
Woods told him to go down there, and if he found anything wrong  
to notify the police. The plaintiff did so. When the police  
arrived they found him at the store. There is a corridor on the  
second floor of the store and the plaintiff was in there at  
the time when the police arrived. When the plaintiff and the  
police officers went down and looked at the door they  
found some evidence in the matter of paper boxes about  
the place.  
The plaintiff testified that after the police arrived,  
"I opened the door and looked. After I went into the  
store the first thing I noticed there were boxes and shoes lying  
around in the store, that is in the front part of it, and in the  
rear there is a big room and that was badly messed. The door  
down was open. Then I went back into the store and found the  
entrance was open. Next day, the police arrived, testified  
that he examined the open entrance above the door and found  
that the dust thereon had not been disturbed; that he also ex-  
amined the front door, the rear doors and windows, and found that  
none of them had been opened or were any way thereby an entrance  
by force had been attempted. Officer Brown was not called as  
a witness.  
The authorities that are used to be residing at the  
time of the crime immediately after the burglary, consisted  
of men's and women's, a store, and shoe findings, at the value  
already testified to by the court. The plaintiff further testified  
that when he closed the store on the night in question, he  
looked about to see that everything was closed; that he saw no  
things open or closed up, and that it was impossible for anyone  
to hide in the place without being seen; that he collected two of

the windows in the rear of the store had latches on them; the balance did not; that the rear door and windows were equipped with outside iron bars.

The plaintiff in this case did not file his appearance, and therefore the court does not have the benefit of the plaintiff's brief.

The defendant contends, first, that the written contract or agreement under which the plaintiff was employed by the defendant specifically sets forth in unambiguous terms the liability of the plaintiff for shortage in merchandise and cash entrusted to him by the defendant, and expressly provides that such shortage, after the making of a verified audit, shall be deducted from the \$300.00 deposited by the plaintiff with the defendant; second, that the judgment is against the manifest weight of the evidence.

In passing upon the first contention, it will be necessary for the court to construe the contract of employment, and from the four corners of the instrument determine what the intention of the parties was at the time of the signing of the contract. It is clear from this contract that the plaintiff was obligated to account for the merchandise and moneys entrusted to him by the defendant, and make a proper return therefor, and upon failure to account, the defendant could properly charge and deduct from the \$200.00 deposited with it any sums that were not accounted for by the plaintiff and lawfully due the defendant. If the plaintiff was to be liable for any shortage in merchandise and cash entrusted to him, that would have to appear from the document itself. In construing this contract upon that question, the court considered these words, "I will be legally responsible at law or in equity for all moneys and merchandise entrusted to my care by the employer," which does not seem to indicate that the plaintiff was liable, in any event, for any shortage that



The witness in the case of the above and in other cases when the witness did not; that the witness did not know the witness was not the witness in the case.

The plaintiff in this case did not file his statement, and therefore the court does not have the benefit of the plaintiff's story.

The defendant's statement, filed, that the witness was not the witness in the case.

Of course when the plaintiff was engaged by the defendant especially when the plaintiff was engaged by the plaintiff of the plaintiff for the purpose of the plaintiff and when the plaintiff was engaged by the plaintiff, and especially providing that such evidence, after the matter of a written bill, shall be delivered to the plaintiff by the plaintiff after the plaintiff, second, that the plaintiff is engaged by the plaintiff of the plaintiff.

In dealing with the first question, it will be necessary for the court to consider the nature of the plaintiff's statement, and the fact that the plaintiff was engaged by the plaintiff of the plaintiff and at the time of the plaintiff of the plaintiff. It is clear from this statement that the plaintiff was engaged by the plaintiff for the purpose of the plaintiff and when the plaintiff was engaged by the plaintiff, and especially providing that such evidence, after the matter of a written bill, shall be delivered to the plaintiff by the plaintiff after the plaintiff, second, that the plaintiff is engaged by the plaintiff of the plaintiff. In dealing with the first question, it will be necessary for the court to consider the nature of the plaintiff's statement, and the fact that the plaintiff was engaged by the plaintiff of the plaintiff and at the time of the plaintiff of the plaintiff. It is clear from this statement that the plaintiff was engaged by the plaintiff for the purpose of the plaintiff and when the plaintiff was engaged by the plaintiff, and especially providing that such evidence, after the matter of a written bill, shall be delivered to the plaintiff by the plaintiff after the plaintiff, second, that the plaintiff is engaged by the plaintiff of the plaintiff.



might appear upon the taking of an audit by the defendant. The liability would be only such as the law would impose on the plaintiff. Black's Law Dictionary, on page 708, defines legally as "lawfully; according to law." Applying this definition in the construction of this contract, the liability of the plaintiff to account would be for any merchandise or sums that are lawfully due to the defendant. In this case, the plaintiff as bailee for hire has the burden of showing that he exercised such care in respect to the property that was in his possession as was required of him under the circumstances surrounding the bailment; that where the defendant as bailor has made out a prima facie case by showing that the merchandise entrusted to the plaintiff was not delivered to the defendant upon demand, it then was the duty of the plaintiff to show that he exercised such care as would relieve him of the responsibility to account for or deliver the merchandise by showing that the goods had been stolen, and that the loss by theft was occasioned without his fault.

The Appellate Court in its opinion in the case of Clemenson v. Whitney, 238 Ill. App. 308, announced that the law is, that where goods are bailed and not returned, the fact that they have been lost, stolen or destroyed by fire is not sufficient to overcome plaintiff's prima facie case, but the defendant must go further and show, if he can, that he was guilty of no negligence that would render him liable, which rule of law, was approved by the Appellate Court in the case of Byaloa v. Matheson, 243 Ill. App. 60.

The second contention of the defendant is to the effect that the judgment is against the manifest weight of the evidence. In disposing of that contention, this court will not disturb the judgment on the ground contended for, unless the evidence is such that it is clear that the weight of the evidence is

might appear upon the taking of an audit by the defendant. The liability would be only such as the law would impose on the plaintiff. Black's Law Dictionary, on page 700, defines liability as "liability; answerable to law." Applying this definition to the construction of this contract, the liability of the plaintiff to account would be for any merchandise or money that he lawfully due to the defendant. In this case, the plaintiff as holder for hire has the burden of showing that he received such sums in respect to the property lost and in the defendant as was required of him under the circumstances surrounding the defendant, that where the defendant as holder for hire was not liable. Black's Law Dictionary case by showing that the merchandise mentioned in the plaintiff was not delivered to the defendant upon demand, it then was the duty of the plaintiff to show that he received such sums as would relieve him of the responsibility to account for or deliver the merchandise by showing that the goods had been stolen, and that the loss by theft was a permanent and absolute loss.

The Appellate Court in its opinion in the case of Blackburn v. Blackburn, 201 Ill. App. 101, announced that the law is, that where goods are stolen and not returned, the law is that they have been lost, stolen or destroyed by fire is not sufficient to overcome plaintiff's burden, but the defendant must go further and show, if he can, that he was guilty of no negligence that would render him liable, which this of law, was approved by the Appellate Court in the case of Evans v. Matheson, 241 Ill. App. 10.

The second consideration of the defendant is to the effect that the judgment is against the manifest weight of the evidence. In disposing of that contention, this court will not disturb the judgment on the ground mentioned here, unless the evidence is such that it is clear that the weight of the evidence is

against the judgment. From the evidence in the instant case it appears that merchandise was stolen on the night in question; it also appears that the plaintiff closed and locked the doors and windows upon leaving the premises that night, and thereafter the burglary was committed by a person or persons unknown. It was, therefore, a question of fact for the jury to determine whether it was the plaintiff's negligence in taking care of the defendant's merchandise that contributed in any way to the loss of goods by burglary, or whether the goods in question were stolen. This court cannot say from an examination of the record that the weight of the evidence does not sustain the verdict of the jury.

Finding no error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.



against the defendant. From the evidence in the instant case it appears that merchandise was stolen on the night in question; it also appears that the defendant closed and locked the store and witness upon leaving the premises that night, and that after the burglary was committed by a person or persons unknown to me, therefore, a question at issue for the jury to determine whether it was the plaintiff's negligence in failing to take the defendant's merchandise that contained in any way to the loss of goods by burglary, or whether the goods in question were stolen. This court cannot say from an examination of the record that the weight of the evidence does not sustain the verdict of the jury.

Finding no error in the record, the judgment is

affirmed.

LEONARD B. BROWN,

Attorney, P.A. and Counsel, St. Louis.

33826

A. ROSENFELD and B. SCHNITZER,  
doing business as California  
Bag & Metal Company,

Appellants,

v.

M. MUHLSTEIN & CO., INC.,  
a Corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 653<sup>4</sup>

Opinion filed Dec. 10, 1930

MR. JUSTICE NEBEL delivered the opinion of the court.

This is an appeal from a judgment for the defendant, entered upon a trial in the Municipal Court, without a jury. The plaintiffs started the suit on January 23, 1926, for damages alleged to have resulted from the repudiation of a certain contract between the plaintiffs and the defendant dated July 25, 1925.

The facts are that certain negotiations took place which resulted in a contract between the parties on July 25, 1925. The defendant ordered from the plaintiffs by letter in which was enclosed a purchase form contract, 30,000 pounds of mixed live inner tubes at 11½¢ a pound, and 30,000 pounds No. 1 black rubber boots and shoes at 3¢ per pound, F.O.B. cars Boston, Massachusetts, to be shipped in separate lots and on separate bills of lading on or before August 2, 1925. The terms were stated to be, 90 per cent sight draft with bill of lading and invoice attached after freight is deducted. At the bottom of the letter was the notation to ship the material to New York City and not Boston.

The purchase contract contained a number of provisions that were not contained in the letter. This provision appeared

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Opinion filed Dec. 10, 1930

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in the purchase contract, in the printed part: "Ship in our name," and under that the contract read: "H. Muehlstein & Co., New York, N. Y." This further provision appeared in the printed part of the contract: "Invoices in duplicate must be mailed to this office accompanied by original and memorandum signed bill of lading."

There is no contention that any other provision has any bearing on this controversy.

It further appears from the facts that the plaintiffs, on July 29, 1925, wrote to the defendant, enclosing a signed acknowledgment of their intention to fill the order, and stating, "The material in question is on the dock and will go forward as per your instruction via first sailing"; that the material was shipped on the Steamship Minnewotan of the American Hawaiian Steamship Company, and that on August 3, 1925, bills of lading were issued at Portland, Oregon, for the separate lots of material consigned to the plaintiffs, as consignee, with directions to notify H. Muehlstein & Company, New York, New York; that on the same day, August 3, 1925, the plaintiffs issued a 90 per cent sight draft, attaching the original bills of lading and the invoices and sent the same through the Lumbermens Trust Company Bank, Portland, Oregon, to be presented to the defendant at Chicago; that the sight draft, with the bills and invoices attached, was presented to the defendant at Chicago on four different occasions, and payment was refused.

On August 3, 1925, the plaintiff wrote to the defendant, enclosing copies of the invoices and shipping papers and stating that the original papers had gone forward through the bank with the sight draft attached; that the defendant's evidence denied the receipt of the letter of the plaintiffs

in the purchase contract, in the printed form: "This is our  
bank," and under that the printed words: "The Bank of New York & Co.,  
New York, N. Y." This latter provision appeared in the  
printed part of the contract: "In witness whereof the  
United States of America, this office accompanied by original and memorandum  
signed Bill of Lading."

There is no question that the latter provision

has any bearing on this controversy.

It is further stated that the bill of lading, dated  
on July 22, 1935, refers to the defendant, containing a signed  
acknowledgment of this transaction on July 22, 1935, and  
stated: "The material in question is on the dock and will be  
forwarded as per your instruction and first bill of lading; that the  
material was shipped on the American Shipping Company of the  
American Shipping Company, and that on August 2,  
1935, bills of lading were issued at Portland, Oregon, for  
the separate lots of material consigned to the plaintiff."  
As consequence, this instruction is hereby acknowledged  
Company, New York, New York; that on the same day, August 2,  
1935, the plaintiff issued a bill of lading for the material, stating  
that the original bill of lading and the invoice and copy  
the same through the defendant's bank, Portland, Oregon,  
should be presented to the defendant at Portland, that  
the right party, with the bill and invoice attached, was  
presented to the defendant at Portland on June 11, 1936,  
occasions, and payment was refused.

On August 1, 1936, the plaintiff wrote to the

defendant, enclosing copies of the invoice and shipping papers  
and stating that the original papers had gone forward through  
the bank with the right party attached; that the defendant's  
evidence failed the receipt of the latter of the plaintiff's



dated July 29, 1935, in which letter the defendant was advised that the material was on the dock and would go forward on first sailing.

From the evidence of the defendant it appears that on August 6 and 7, 1935, the defendant, not having received any advice that the material had been shipped, and not having received any invoices or bills of lading, communicated with the plaintiffs by telephone, and was advised that the material was shipped via vessel; that the contract was immediately repudiated by the defendant. Several telegrams passed between the parties, the first of which telegrams from the defendant was received by the plaintiffs on August 7, 1935, and is as follows:

"Account no invoice from you order has expired on mixed tubes and shoes cancelling our contract accordingly and have covered elsewhere."

The plaintiffs, on the same day of the receipt of the defendant's telegram, replied in these words:

"Assume your telegram this date sent under misapprehension since only alternative would be deliberate intent to evade agreement. Stop Material shipped and draft bill of lading delivered to bank on August third within strict letter of agreement. Stop In ordinary course of mail neither invoice nor draft could reach you before today or tomorrow. Please wire withdrawing telegram even date or we shall take necessary steps to protect ourselves."

The following day, August 8, 1935, the defendant again wired the plaintiffs as follows:

"Your letter which has not been opened received today postmarked out of Portland August fourth. Since did not receive your invoice sooner were obliged to cover elsewhere to protect our order with mill. Best price can allow for mixed tubes six cents. Boston and as compromise will take in shoes at contract price. If you accept this proposition wire us immediately on receipt of this telegram."

That on September 15, 1935, the defendant was notified by the plaintiffs through their attorney, that the material



1. The first of these is the fact that the  
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the following information is being furnished to you:

1. The first step is to identify the problem. This involves understanding the symptoms and the context in which they are occurring. It is important to gather as much information as possible about the problem, including any relevant history and current events.

2. Once the problem has been identified, the next step is to analyze it. This involves breaking the problem down into its component parts and examining each part individually. This can help to identify the underlying causes of the problem and to develop a plan for addressing it.

3. The third step is to develop a solution. This involves brainstorming ideas and evaluating them against the problem. It is important to consider the feasibility of each idea and to choose the one that is most likely to be effective.

4. The fourth step is to implement the solution. This involves putting the chosen solution into action and monitoring its progress. It is important to be flexible and to make adjustments as needed.

5. The final step is to evaluate the results. This involves assessing the effectiveness of the solution and identifying any areas for improvement. This can help to ensure that the problem is fully resolved and that the solution is sustainable.

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by the fact that the Government has not been able to obtain any

shipped under the terms of the contract would be sold on the open market as soon as practicable after September 19, 1925, and the proceeds applied in part liquidation of the obligation under the contract.

On September 20, 1925, the plaintiffs sold the goods so shipped to Chalfrin & Company, New York City, for \$2,875.42, including freight, and the plaintiffs paid a commission of 5% of the resale price, which amounted to \$143.77. According to the record, the difference between the contract price and the resale price for the quantity of rubber shipped was figured by both the court and counsel to be \$1,565.88.

The defendant does not contend that if the goods were refused and the contract cancelled in violation of the terms of the contract between the parties to this action, the plaintiffs are not entitled to the difference between the contract price and the resale price, but does insist that the plaintiffs are not entitled to recover because of certain breaches of the contract.

The court will consider the contention of the plaintiffs that the reason assigned for repudiation is untenable and precludes the defendant from now urging other defenses. It is perfectly clear that the telegrams of the defendant dated August 7 and 8, 1925, both assign as a ground for refusing to go on with the contract that no invoices had been received. Therefore, can the defendant, after assigning this reason for the repudiation of the contract, assign other reasons why its cancellation was proper? The defendant urges in justification of its position that the essential elements of waiver are: (a) an existing right, (b) a voluntary act, (c) knowledge of the facts, and (d) an intention to waive.

The evidence of the witness Stein for the defendant



shipped under the terms of the contract would be sold as the open market as soon as practicable after September 18, 1935, and the proceeds applied in part liquidation of the obligation under the contract.

On September 20, 1935, the plaintiffs sold their goods consigned to Phillips & Company, New York City, for \$1,175.41, including freight, and the plaintiffs paid a commission of 2% of the resale price, which amounted to \$23.51. According to the record, the difference between the resale price and the resale price for the quantity of rubber shipped was listed by both the court and counsel to be \$1,151.90.

The defendant does not contend that it is the goods were released and the contract cancelled in violation of the terms of the contract between the parties to this action. The plaintiffs are not entitled to the difference between the contract price and the resale price, but does claim that the plaintiffs are not entitled to recover because of certain process in the contract.

The court will consider the materiality of the plaintiffs' claim that the reason assigned for cancellation is false and pretenses the defendant from now without other defense. It is pointed out that the defendant of the defendant dated August 7 and 8, 1935, both assign as a ground for refusing to go on with the contract that no payment had been received.

Therefore, on the defendant, after assigning this reason for the repudiation of the contract, assign other reasons why the cancellation was proper. The defendant urges in justification of its position that the essential elements of a contract are: (a) an existing right, (b) a voluntary act, (c) knowledge of the facts, and (d) an intention to relieve. The evidence of the witness claim for the defendant



is to the effect that when he had a telephone talk with Mr. A. Rosenfelt of the plaintiff company on August 6 or 7, 1925, and learned that the shipment of the goods was by boat, he thereupon cancelled the contract. The defendant then had knowledge of the fact that the goods were not shipped by rail, and if we accept the theory of the defendant and apply the essential elements of waiver as contended for, the defendant, by its voluntary act after knowledge of the shipment, waived the right to complain upon that ground, for the reason that in the telegrams of August 7 and 8, 1925, sent to the plaintiffs by the defendant, no mention is made of the fact that the goods were not shipped according to contract. It is singularly strange that when the telegram of August 8, 1925 was sent, the defendant reiterated that the reason for cancellation was that the invoices were not received sooner. Failure to ship by rail was not considered seriously by the defendant. In fact, the defendant in this same telegram made an offer for the goods although shipped by water. This is inconsistent with the defendant's claim that the shipping instructions were violated, and was an effort to buy the goods at a cheaper price than for which they were contracted. It is reasonable to conclude from the facts that the suggestion that the plaintiffs failed to ship by rail is a ground for the forfeiture of the contract by the defendant was an afterthought, and from the record it is apparent that it was urged for the first time when this suit was started. The courts of this state have approved the rule of law that a party cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration, and have cited Railway Company v. McCarthy, 96 U. S. 258, as authority for the rule. In that case the Supreme Court expressed its views in these words:

1. In the effort that when he had a telephone talk with Mr. A. A. ... of the ... company on August 3 or 4, 1935, ... and ... that the shipment of the goods was by boat, he ... the defendant then had ... knowledge of the fact that the goods were not shipped by rail, ... and it was ... the ... of the defendant and ... the ... essential elements of which are contained in the ... by its ... and after ... of the ... the right to ... upon ... for the reason that in the ... of August 7 and 8, 1935, ... to the ... by the defendant, no mention is made of the fact that the goods were not shipped according to contract. It is ... strange that when the telegram of August 8, 1935 was sent, the defendant ... that the reason for cancellation was that the ... were not received ... Failure to ship by rail was not ... by the ... In fact, the defendant in this case ... after the goods although shipped by rail. This is ... the defendant's ... the ... was an effort to pay the ... of a ... for which they were ... It is ... contains from the facts that the suggestion that the plaintiff failed to ship by rail ... the ... by the defendant was an ... and the ... record it is apparent that it was ... for the first time when this suit was ... The ... of this case have ... the ... of law that a party cannot, after litigation has begun, change his ground, and put his ... upon another and a different ... and have cited Malley v. ... v. ... 33 U. S. 435, ... for the rule. In that case the Supreme Court expressed the view in these words:



"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law. *Gold v. Banks*, 9 Wend. (N.Y.) 562; *Holbrook v. White*, 24 id. 189; *Everett v. Saltus*, 15 id. 474; *Wright v. Reed*, 3 Durnf. & E. 554; *Duffy v. O'Donovan*, 46 N. Y. 223; *Winter v. Coit*, 7 id. 288."

And applying the same rule, the Supreme Court of the State of Illinois, in the case of County of Schuyler, et al. v.

Missouri Bridge & Iron Company 256 Ill. 348, 352, says:

"There is still another reason why appellant cannot avail itself of the defense which it has sought to interpose. After the contract was executed by appellant's agent appellant refused to carry out the contract, and gave as a reason that its agent had made a mistake and had contracted at a figure for which the bridge could not be built without a loss, and offered in its letter to go on and perform the contract for \$3,350. By placing its refusal to perform the contract on the ground, alone, that the price was too low, it thereby admitted the validity of the contract and estopped itself from making the contention now insisted upon. Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is permitted thus to amend his hold. He is estopped from doing it by a settled principle of law. *Ohio and Mississippi Railway Co. v. McCarthy*, 96 U. S. 258; *Gibson v. Brown*, 214 Ill. 330."

The reason stated in the defendant's telegram to the plaintiffs that because the invoices did not reach the defendant before August 7, 1925, the contract was cancelled, is not a legal justification for such action. The plaintiffs, immediately upon the receipt of the bills of lading for the goods shipped did on August 3, 1925, notify the defendant by letter that the original bills of lading, invoices and 90% sight draft were delivered to the plaintiffs' bank to be forwarded to Chicago for presentation, and that duplicate



[illegible][illegible][illegible]

invoices and shipping papers had been forwarded by mail to the defendant at Chicago. The plaintiffs acted within a reasonable time, and that was all that was required, and from an examination of the record, this act of cancellation was but an effort on the part of the defendant to avoid the responsibilities under the contract between the parties.

The defendant insists that as the plaintiffs did not raise the question of waiver of defenses in the trial court they cannot for the first time raise it on appeal. The evidence of forfeiture was contained in the telegrams of the defendants which were admitted by the trial court in evidence, and are in the record to be considered by the court.

The defendant did not object to the admissibility of the telegrams of August 7 and 8, 1925, on the ground that they were not admissible under the pleadings. One of the defenses which the defendant seeks to interpose is that the plaintiffs did not ship the goods according to the contract between the parties. This was first raised by the affidavit of merits. Under the practice of the Municipal Court of Chicago no further pleadings are required, and the case was tried upon the issues so joined. The trial court permitted the evidence of the parties to be received, and the only question in the record is, did the plaintiffs default in any respect in failing to perform and carry out any of the provisions of the contract; and if so, did the defendant waive any such default? The evidence is in the record for all purposes and admissible under the pleadings, and this court will consider such evidence in order to determine the issues between the parties.

The defendant further contends that at the time of repudiation the plaintiffs had failed to comply with the contract in other respects as well; that the plaintiffs chose



invoiced and shipping papers had been forwarded by mail to the defendant at Chicago. The plaintiff's case is a reasonable one, and that was all that was required, and from an examination of the record, this act of concealment was not an effort on the part of the defendant to avoid the responsibility under the contract between the parties.

The defendant insists that as the plaintiff's bill was raised the question of waiver of defense in the trial court they cannot for the first time raise it on appeal. The evidence of concealment was contained in the testimony of the defendant which was admitted by the trial court in evidence, and was in fact so admitted by the court.

The defendant did not object to the admissibility of the testimony of August V and E. L. Lott, on the ground that they were not admissible under the plaintiff's case. One of the witnesses which the defendant seeks to introduce is that the plaintiff did not raise the goods according to the contract between the parties. This was first raised by the plaintiff at trial.

Under the practice of the Municipal Court of Chicago no further pleading was required, and the case was tried upon the issues so joined. The trial court permitted the evidence of the parties to be received, and the only question is the record is, and the plaintiff's failure in any respect in failing to return and carry out any of the provisions of the contract; and

if so, did the defendant waive any such defense? The evidence is in the record for all purposes and admissible under the plaintiff's case, and this court will consider such evidence in order to determine the issues between the parties.

The defendant further contends that at the time of registration the plaintiff had failed to comply with the contract in other respects as well; that the plaintiff's case



to ship by boat, and mailed the shipping bills of lading, with draft attached, to a bank in Chicago for payment. The defendant insists that under no theory was the defendant in default when it failed to pay the draft, as the same was not accompanied by railroad bills of lading, and the bills of lading were sent to the bank before any complaint whatever was made by the defendant, and therefore the plaintiffs cannot recover.

In the letter of July 29, 1925, which was mailed by the plaintiffs and addressed to the defendant in Chicago, it was stated that the "material in question is on the dock and will go forward as per your instructions via first sailing."

The witness Stein, on examination with reference to the receipt of this letter, answered questions which were put to him by the court, as follows:

"Well, you won't say that there wasn't such a letter received at the office, would you?"

A. Not to my knowledge.

The Court: Not to your knowledge. Now, was there or was there not?

A. Well, not to my knowledge, your Honor. It might have been received unknown to me, but it would have been handed to me."

From the answers made to the questions put to the witness by the trial court, it is not at all certain that the letter was not received by the defendant. For the reasons expressed in this opinion, we conclude that the defendant had knowledge from the contents of this letter that the goods were to be shipped by boat, and that the letter of August 3, 1925, advised the defendant that the plaintiffs enclosed copies of invoices and shipping papers covering the material sold on the contract in question, and that the original papers had gone forward through the bank with the sight draft attached, and the defendant was not justified in refusing to accept the goods and pay the contract price for them. The trial court

to ship by boat, and mailed the shipping bills of lading, with their attached, as a cover in Chicago for payment. The defendant insists that under no theory was the defendant in default when it failed to pay the bill, as the same had not been presented by railroad bills of lading, and the bills of lading were sent to the bank before any commercial invoice was made by the defendant, and therefore the defendant's demand is correct.

In the letter of July 27, 1904, which was mailed by the defendant and addressed to the defendant in Chicago, it was stated that the defendant in question is on the hook and will go forward as per instructions of their attorney.

The witness stated, on examination with reference to the receipt of this letter, answered questions which were put to him by the court, as follows:

"Well, you won't say that your agent sent a letter received at the office, would you?"  
A. Not to my knowledge.  
Q. The letter not to your knowledge, now, was there to be a letter sent?  
A. Well, not to my knowledge, your honor, it might have been received somewhere, but it would have been handed to me."

From the answer made in the questions put to the witness by the trial court, it is not at all certain that the letter was not received by the defendant. The witness testified in this opinion, as elsewhere, that the defendant had knowledge from the contents of this letter that the goods were to be shipped by boat, and that the letter of August 1, 1904, advised the defendant that the defendant's demand was correct of invoice and shipping papers covering the material sold on the contract in question, and that the original papers had gone forward through the bank with the right draft attached, and the defendant was not justified in refusing to accept the draft and pay the contract price for them. The trial court

was in error in not finding the issues for the plaintiffs and assessing the plaintiffs' damages at the sum of \$1709.65 which represents the difference between the contract price and the resale price for the quantity of goods shipped, or \$1565.88, and includes the expense of resale amounting to \$143.77, which is 5 per cent of such resale price of \$2875.42.

The plaintiffs suggest that an allowance of interest be added to the \$1709.65, due from the date of sale. The fact that the defendant appeared and offered a defense is not to be construed as an unreasonable and vexatious delay of payment without impairing the right itself, and would be adding a penalty upon the defendant for insisting upon a right to defend. The mere failure to pay a demand does not necessarily constitute such delay in payment as to make it unreasonable or vexatious. The damage in this case resulting from the defendant's breach of contract was a disputed matter, both as to the law and the facts involved, and the delay in payment was occasioned by the defense made by the defendant. Therefore, interest will not be allowed. Bady v. Condit, 104 Ill. App. 507. Reeb v. Bronson, 198 Ill. App. 518.

The judgment of the Municipal Court is therefore reversed and a judgment entered here in favor of the plaintiffs and against the defendant for the sum of \$1709.65.

JUDGMENT REVERSED AND JUDGMENT  
HERE WITH FINDING OF FACT.

WILSON, P.J. AND FRIEND, J. CONCUR.

FINDING OF FACT:

The plaintiffs and the defendant entered into a written contract for the purchase of rubber goods to be shipped to the defendant in New York City, New York. The goods were



and in error in not finding the issue for the plaintiff and assessing the plaintiff's damages at the sum of \$100.00 which represents the difference between the contract price and the resale price for the quantity of goods shipped, or \$100.00, and includes the expense of resale amounting to \$10.75, which is 8 per cent of resale price of \$130.75.

The plaintiff suggests that an allowance of interest be added to the \$100.00, and from the date of sale. The date that the defendant appeared and offered a judgment is not to be construed as an acknowledgment and voluntary delay of payment without alleging the facts itself, and would be adding a penalty upon the defendant for insisting upon a right to delay. The law favors to pay a demand that not necessarily constitutes some delay in payment as to which it is unnecessary to speculate. The damage in this case resulting from the defendant's breach of contract was a delayed action, such as to the loss and the facts involved, and the delay in payment was necessitated by the defense made by the defendant. Therefore, interest will not be allowed. Wells v. Wells, 104 Ill. App. 617, 618 v.

Richmond, 108 Ill. App. 618.

The judgment of the Municipal Court is therefore reversed and a judgment entered here in favor of the plaintiff and against the defendant for the sum of \$100.00.

FORWARD BY THE COURT  
JULY 10, 1927.

WILLIAM F. J. JUDGE, J. COURT.

RECORDING BY CLERK:

The plaintiff and the defendant entered into a written contract for the purchase of rubber goods to be shipped to the defendant in New York City. The goods were

shipped, and the plaintiffs notified the defendant to that effect, and also delivered original invoices and bills of lading to the plaintiffs' bank in Portland, Oregon, for presentation to the defendant in Chicago. Payment was refused, and said goods were not accepted, which was a violation of the terms of the agreement. Upon a resale of the goods by the plaintiffs in New York City, N. Y., after notice to the defendant, the difference between the resale price and the contract price was \$1585.88. The expense of such sale was \$143.77, making a total of \$1709.65, and the clerk will enter judgment here for said amount.

shipped, and the plaintiff notified the defendant to that effect, and also delivered original invoices and bills of lading to the plaintiff, bank in Portland, Oregon, for presentation to the defendant in Chicago. Payment was refused, and said goods were not accepted, which was a violation of the terms of the agreement. Upon a resale of the goods by the plaintiff in New York City, N. Y., after notice to the defendant, the difference between the resale price and the contract price was \$112.77. The balance of such difference, \$112.77, making a total of \$112.77, and the clear value of the goods, were for said account.



33865

NICK G. STANGARONE and FRANK  
GLORIOSA,

Appellees,

v.

MADISON & KEDZIE STATE BANK,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 654

Opinion filed Dec. 10, 1930

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an action in the Municipal Court of Chicago by the plaintiffs upon an agreement, and it is alleged that there is due thereon from the defendant the sum of \$1,318.50. The trial court heard the evidence upon the issues joined and found for the plaintiffs. Judgment was entered for the sum of \$1,318.50, from which the defendant prosecutes this appeal, and urges that the judgment should be reversed for the following reasons: That the judgment is against the manifest weight of the evidence; that the alleged promise of the defendant is not in writing, and is a promise to answer for the debt, default or miscarriage of another, and therefore the action is barred by the Statute of Frauds; and also that such promise was beyond the powers of the bank and is unenforceable. However, the defendant did not urge in its brief the reasons for such last contention, and not having done so it is waived. The admitted facts are that Michael Busa entered into a contract with George Florence, the owner of premises known as Nos. 4014 to 4024 Melrose Street, Chicago, to do the carpentry work in the construction of two sixteen-apartment buildings on said premises, and in order to perform and carry out the terms of said contract,

259 I.A. 654

Opinion filed Dec. 10, 1930

Mr. Justice Brandeis delivered the opinion of the court.

This is an action in the Municipal Court of Chicago by the defendant against the plaintiff, and it is alleged that there is due thereon from the defendant the sum of \$1,115.00. The trial court found the evidence upon the issues joined and found for the plaintiff. Judgment was entered for the sum of \$1,115.00, from which the defendant presented this appeal.

and urges that the judgment should be reversed for the following reasons: That the judgment is against the manifest weight of the evidence; that the alleged promise of the defendant is not in writing, and is a promise to answer for the debt, default or miscarriage of another, and therefore the action is barred by the Statute of Frauds; and also that such promise was payable the power of the bank and is unenforceable. However, the defendant did not urge in its brief the reasons for such last contention, and not having done so it is waived. The admitted facts are that Michael Weiss entered into a contract with George Williams, the owner of certain land at No. 4324 Madison Street, Chicago, to do the carpentry work in the construction of two sixteen-apartment buildings on said premises, and in order to perform and carry out the terms of said contract,

the said Busa entered into a written sub-contract with the plaintiffs, as co-partners, whereby the plaintiffs agreed to do the carpentry work on the buildings to be constructed for the sum of \$27,400, and thereupon the plaintiffs proceeded to perform said work, and continued to do so until December 27, 1927, when the plaintiffs ceased work, for the reason that payment of money for work performed was not paid.

It is stated in both the statement of claim and the affidavit of merits, in substance, that the defendant had underwritten a bond issue, secured by a mortgage, securing the payment of said bonds, on the property on which the plaintiffs were engaged to do the work; that the defendant requested the plaintiffs to resume work under their contract and complete the same. The controversy is, what agreement was entered into between the plaintiffs and the defendant. The plaintiffs contend that they were to be paid by the defendant the amount due on the contract when the work was finished and the buildings completed. The defendant, on the other hand, insists that the plaintiffs were to be paid by the defendant for whatever amount became due the plaintiffs for work done on said buildings after March 1, 1928.

From the evidence it appears that on or about March 1, 1928, the defendant bank, through its representative, Mr. Philip Kent, Trust Officer and Manager of the defendant's Real Estate Loan Department, talked with Stangarone, one of the partners, on the subject of completing the work on the buildings in question, and inquired about the plaintiffs' contract, and was told that the plaintiffs had money coming. The plaintiff wanted to know, "Who is going to pay it?" and Kent promised to see that said plaintiff would get the money. It was also stated that Kent inquired as to how much money the plaintiffs had



the said lease entered into a written sub-contract with the plaintiff, as co-partner, whereby the plaintiff agreed to do the carpentry work on the building to be constructed for the sum of \$27,400, and thereupon the plaintiff proceeded to perform said work, and continued to do so until December 31, 1927, when the plaintiff ceased work, for the reason that payment of money for work performed was not made.

It is stated in the statement of claim and the

affidavit of service, in substance, that the defendant had undertaken a bond issue, secured by a mortgage, covering the payment of said bonds, on the property on which the plaintiff was engaged to do the work; that the defendant represented the plaintiff to receive work under their contract and complete the same. The controversy is, what agreement was entered into between the plaintiff and the defendant. The plaintiff contends that they were to be paid by the defendant the amount due on the contract when the work was finished and the building completed. The defendant, on the other hand, insists that the plaintiff was to be paid by the defendant for the work done on said building after March 1, 1927.

From the evidence it appears that on or about March 1, 1927, the defendant bank, through its representative, Mr. Philip Kent, Vice President and Manager of the defendant's First National Loan Department, talked with the plaintiff, one of the partners, on the subject of completing the work on the building in question, and inquired about the plaintiff's contract, and was told that the plaintiff had money coming. The plaintiff wanted to know, "Who is going to pay it?" and Kent promised to see that said plaintiff would get the money. It was also stated that Kent indicated as to how much money the plaintiff had

coming, and was told they were unable to state accurately, because they did not know how much the cost of completion would be. Immediately after being promised the money, Stangarone, on behalf of the plaintiffs, proceeded to finish the work under the contract, and the only amounts which the bank paid from week to week were the actual payrolls for the carpentry work performed during that period. When the plaintiffs requested the balance of the money during the course of the work, Kent, the Trust Officer, told them they would receive it.

In corroboration of the plaintiffs' case, H. F. Coffey, a witness, testified that he was present with plaintiff Stangarone at the meeting at the bank in the first part of March, 1938; that Kent then agreed to pay the Hill-Sehan Lumber Company, which company the witness represented, and did subsequently pay its claim; that at that time the plaintiff wanted to know about the money that was coming to him, and that Kent told him he would take care of him in the same manner, and that when the work was completed everybody would be taken care of.

Philip Kent, the Trust Officer, was called as a witness for the defendant, and testified that at the meeting in question Stangarone told him that he would not finish the job unless "he got what was coming to him;" that he told Stangarone if there was money coming, they wanted to find out what it was and see if it could be worked out and get the job completed. He then testified that a few days later he had another talk with Stangarone in the presence of Ryan, an employee of the Bank, in which he pointed out to Stangarone that his claim would be better if it were against a finished building, and that as a result of this Stangarone agreed to go ahead with the work. He also testified that the item of \$1,318.50, which is the amount



...and was said they were unable to state definitely,  
because they did not know how much the cost of completion  
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contract work performed during that period. When the plain-  
tiff requested the balance of the money during the course of  
the work, Kent, the Trust Officer, told them they would receive  
it.  
In conversation at the plaintiff's case, N. Y.  
testify, a witness, testified that he was present at the plaintiff  
Stangorone at the meeting at the bank in the first part of  
March, 1933; that Kent then agreed to pay the \$111,000 under  
contract, which company the witness represented, and did subse-  
quently pay the claim; that at that time the plaintiff wanted to  
know about the money that was coming to him, and that Kent told  
him he would take care of him in the same manner, and that when  
the work was completed completely would be taken care of.  
Willie Kent, the Trust Officer, was called as a witness  
for the defendant, and testified that at the meeting in question  
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with Stangorone in the presence of Kent, an employee of the bank,  
in which he pointed out to Stangorone that his claim would be  
better if it were against a finished building, and that as a re-  
sult of this Stangorone agreed to go ahead with the work. He  
also testified that the item of \$1,315.00, which is the amount



of the present judgment, was specifically discussed at this meeting. Ryan, the other witness for the defendant, stated that at the meeting early in March, at which Mr. Coffey was present, Kent told Stangarone that if he went back to work and finished the building, he would pay his pay-roll; that Stangarone said he would, but asked where he was to get the balance of his money, and that Ryan figured out on a paper what he had coming. He also testified that there was only one conversation between Kent and Stangarone before the latter went back to work, and that was the one at which Coffey was present. The trial court must determine the credibility of the witnesses and the weight of the evidence from the facts that are before it, and no doubt it took into consideration the contradiction that appears in the evidence that was offered by the defendant. This court will not reverse the judgment unless it is clear that the manifest weight of the evidence is against the finding and we are satisfied that the trial court was justified in finding the issues for the plaintiffs.

The only other point urged is that the promise made by the defendant bank was not in writing, and was a promise to answer for the debt, default or miscarriage of another, and is within the Statute of Frauds.

It appears from the record that the defendant bank was interested in the completion of the buildings and the protection of the bondholders, and they admit in their affidavit of merits that they agreed to pay the plaintiffs whatever became due to them from Busa, the original contractor, for work performed and materials delivered, on and after March 1, 1938. It may be noted that while the contract with Busa required the plaintiffs to complete the work, the defendant contends in this case that it agreed to pay plaintiffs only for work

of the present judgment, was specifically mentioned at the meeting. Then, the other witness for the defendant, stated that at the meeting early in March, at which it is alleged that defendant was present, defendant told Stangor that if he went back to work and finished the building, he would pay his pay-roll; that Stangor said he would, but asked where he was to get the balance of his money, and that then figured out on a paper what he had owing. He also testified that there was only one conversation between defendant and Stangor before the latter went back to work, and that was the one at which Gately was present. The trial court must determine the credibility of the witnesses and the weight of the evidence from the facts that are before it, and no doubt it took into consideration the contradiction that appears in the evidence that was offered by the defendant. This court will not reverse the judgment unless it is clear that the admitted weight of the evidence is against the finding and we are satisfied that the trial court was justified in finding the issue for the plaintiff.

The only other point urged is that the promise made by the defendant was not in writing, and was a promise to answer for the debt, default or misfeasance of another, and is within the Statute of Frauds.

It appears from the record that the defendant had been interested in the construction of the building and the possession of the bookshelves, and they admit in their affidavits of matters that they agreed to pay the plaintiff whatever he came due to them from him, the original contractor, for work performed and materials delivered, on and after March 1, 1928. It may be noted that while the contract with him was terminated the plaintiff is complete the work, the defendant contends in this case that it agreed to pay plaintiff only for work



performed under the same contract on and after March 1, 1928. That surely was an original contract between the plaintiffs and the defendant. The obligation to pay for such work was a liability of the defendant, and not a liability in the event Busa did not pay. That would also apply to the facts as contended for by the plaintiffs, that the defendant was to pay the plaintiffs the amount due after the completion of the work under the Busa contract. The consideration for the promise by the defendant bank to pay whatever became due under the contract between the plaintiffs and Busa, the original contractor, was the completion of the buildings, and that the completion of the buildings would mean additional security for the bondholders, whom the defendant bank wished to protect. It was an original undertaking, the promise being that the bank would pay the amount that was due, and not a promise to pay what was due under the contract if Busa, defaulted.

In the case of Holmes, et al. v. Suffrin, 198 Ill. App. 45, the Court, in passing upon the question as to when a promise is a direct and original promise, and therefore not within the Statute of Frauds, quotes from Howell v. Harvey, 65 W. Va. 310; 22 L.R. A., N. S. 1027. where there is a note in which the authorities on the question are cited and examined. In the opinion in the case last cited it was said:

"The rule by which to determine whether a promise is original or collateral and without consideration, is thus stated in 29 Am. & Eng. Ency. Law, 2d ed. p. 929; 'An absolute promise to pay the debt of another is not within the statute, though the liability of the original debtor still subsists, where the leading object of the promisor is to subserve some pecuniary interest or business purpose of his own, and he receives a benefit which he did not before enjoy and would not have possessed but for the promise.' In support of the text a large number of authorities are cited, among them the case of Emerson v. Slater, 22 How. 28, 16 L. ed. 360, which seems to be a leading case upon the subject. That case is so very similar to the one now under consideration that we think it well to state it. The plaintiff, Emerson, had been employed by a railroad company to build certain bridges. The Company failed to make payments



performed under the same contract on and after March 1, 1915. That entry was an original contract between the plaintiff and the defendant. The obligation to pay for work done was a liability of the defendant, and not a liability in the event that it not pay. That would also apply to the facts as contended for by the plaintiff, that the defendant was to pay the plaintiff the amount due after the completion of the work under the same contract. The consideration for the promise by the defendant not to pay money was the value of the contract between the plaintiff and him, the original contract, was the completion of the building, and that the completion of the building would earn additional money for the bandholders, when the defendant was asked to present. It was an original contract, the promise being that the work could pay the amount that was due, and not a promise to pay that was due under the contract of 1911, but not.

ALL THEI, althou, v. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 8

1. The Commission is of the opinion that the evidence is not sufficient to establish that the defendant is a member of the Communist Party, United States of America, or that he is a member of any other organization which is prohibited by the Espionage Laws of the United States.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine organization or a front organization for the purpose of subverting the Government of the United States.

according to agreement, and Emerson refused to proceed with the work. The defendant was a large stockholder in the road, and had leased to it large quantities of railroad iron, and held an assignment of the earnings of the road to secure payments on his lease. The road could not operate and there could be no earnings until the bridges were completed. Under these circumstances the defendant orally promised to pay plaintiff if he would go on and complete the bridges, which he did. Defendant refused to comply with his oral promise, and plaintiff brought assumpsit. The court held his oral promise to be binding, and stated the law to be that 'whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damages to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.' The opinion further says: 'Nothing is better settled than the rule that, if there is a benefit to the defendant, and a loss to the plaintiff consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation.'<sup>2</sup>

The Court further says:

"In *Clifford v. Lohring*, 69 Ill. 401, where the defendant employed a party to build a house and on his failure the plaintiff, who was a sub-contractor, made known the fact to the defendant and informed him that he would be obliged to quit work, and the defendant thereupon told the plaintiff to go on with his part of the work and he would pay him, it was held; That the defendant's undertaking was not a collateral but an original one and was not within the Statute of Frauds, as assuming to answer for the contractor, his main object being to serve a purpose of his own. To the same effect are *Crawford v. Edison*, 45 Ohio St. 239; *Oldenburg v. Dorsey*, 102 Md. 172, and a large number of cases cited in the note to *Howell v. Harvey*, 23 L. R. A., N. S. 1027."

Finding no error in the record, the judgment is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.



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OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

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33883

FRANK HUSAR, doing business as  
The Illinois Surgical Supply  
Company,

Appellant.

v.

MARGARET HOLUBEY.

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

259 I.A. 654<sup>2</sup>

Opinion filed Dec. 10, 1930

MR. JUSTICE NEBEL delivered the opinion of the court.

This is an appeal by the defendant from a judgment for the sum of \$75.00, rendered in the Municipal Court of Chicago for damages alleged to have been sustained by the plaintiff.

The plaintiff has alleged in her statement of claim that on March 27, 1928, she bought from the defendant a set of artificial fingers at a price of \$75.00, upon his promise that said artificial fingers would be in every way satisfactory and usable in the manner of natural fingers; that the defendant deceived and defrauded the plaintiff in that the artificial fingers were not satisfactory or usable as natural fingers; that the plaintiff returned said artificial fingers to the defendant, who exchanged them for another set; that the defendant deceived the plaintiff a second time in that the second set was not satisfactory or usable.

The plaintiff did not file her appearance in this Court, and therefore this court is not aided by the plaintiff's brief.

The facts disclose that the defendant is in the surgical appliance business; that the plaintiff and her daughter Helen Holubey, visited the defendant's place of business in February, 1928, for the purpose of having a set of artificial

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THE ILLINOIS NATIONAL BANK  
CHICAGO, ILL.

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259 I.A. 654

Opinion filed Dec. 10, 1880

THE ILLINOIS NATIONAL BANK, CHICAGO, ILL., PLAINTIFF,  
vs.  
JAMES H. HANCOCK, DEFENDANT.

The plaintiff has alleged in her statement of claim that on March 27, 1878, she received from the defendant a set of artificial dentures of a value of \$75.00, upon his promise that said artificial dentures would be in every way satisfactory and useful in the manner of natural dentures; that the defendant decided not to deliver the dentures in that the artificial dentures were not satisfactory to her as natural dentures; that the plaintiff returned said artificial dentures to the defendant, who refunded them the amount of \$25.00; that the defendant failed to refund the plaintiff a second time in that the second set was not satisfactory or useful.

The plaintiff did not file her statement in this court, and therefore this court is not aided by the plaintiff's trial.

The facts disclose that the defendant is in the business of making artificial dentures; that the plaintiff was not satisfied with the first set of dentures, and returned them to the defendant, who refunded her the amount of \$25.00; that the plaintiff returned the second set of dentures to the defendant, who refunded her the amount of \$25.00; that the defendant failed to refund the plaintiff a second time in that the second set was not satisfactory or useful.

fingers made for her daughter's left hand; that after talking with Randall H. Hale, an employee of the defendant, the defendant agreed with the plaintiff to make a set of artificial fingers for her daughter at a price of \$75.00.

The plaintiff testified, in part, as follows:

"We were waited on by a man called Dr. Hale. I asked him how much it would cost to have a set of fingers made for my daughter. He said it would cost \$75.00 and I gave him the order and gave him a deposit of \$20.00. My daughter went back there a number of times alone for fittings and afterwards the fingers were delivered to her and she paid them the balance of \$55.00. My daughter did not like the fingers so I went back there with her and complained that the fingers were not good. Hale then said he would make another set for her, which he did, but my daughter did not like that set either. About two or three months later I went back with my daughter and asked them to return my money but Hale said that he would not give it back to me, that I could bring suit if I wanted to."

The only other witness called by the plaintiff in her behalf was her daughter Helen Holubey, who testified, in part, as follows:

"He (Hale) took a cast of my left hand and I came back after that for quite a number of fittings. In the latter part of March, 1938, the fingers were ready for delivery. Hale fitted them on me at that time and asked me to wear them home, but I told him to wrap them up and I would try them on at home. Hale told me to wear them so that the stump could shrink and to come back later and have them adjusted. I took them home with me and tried them on but they were too heavy, so I took them back and told Mr. Hale that the fingers were too heavy. Hale told me he would make another set for me, which he did. I came back a little while later and got the second set from him, but they were too stiff; they did not feel like normal. When I put on my glove the fingers looked large. I made a great many visits to the defendant's place of business for fittings and adjustments. About three months elapsed between the time the last set was turned over to me and the time my mother and I went there to try to get our money back."

which was all the evidence that was offered in behalf of the plaintiff.

The evidence offered by the defendant is to the



"I have waited on by a man called Mr. Mole. I asked him how much it would cost to have a suit made for me. He said it would cost \$75.00 and I gave him the money and gave him a check for \$75.00. The next day I received a number of times about the fittings and afterwards the things were delivered to me and she said from the balance of \$65.00. My husband did take the things and I went back down with her and explained that the things were not good. She told me to send them back and she said they were all right and she said they were all right. I sent them all up to her and asked her to return my money and she said that she would give me \$15.00 and I would keep the rest."

in part, as follows:

THE FOLLOWING IS A SUMMARY OF THE INFORMATION RECEIVED FROM THE ABOVE SOURCES:

effect that three sets of artificial fingers were made, and numerous adjustments to fit the artificial fingers to the stump of the daughter's left hand; that it was necessary that adjustments be made so that when the stump shrunk the sockets of the artificial fingers could be adjusted and made smaller; that the defendant spent 100 hours in making and adjusting the sets of fingers. It also appears from the evidence that the sets of fingers that were made by the defendant were made in a proper and workmanlike manner, and were fit for the purposes and uses intended. There is no evidence in the record that the workmanship was faulty; that the materials were improper, or that the various sets of fingers were not reasonably fit for the purposes for which they were made, and there is nothing in the record that would indicate that any fraud was practiced upon the plaintiff.

The plaintiff made no complaint other than that it appears in her testimony that her daughter did not like the fingers, and complained that they were not good. The daughter's testimony was to the same effect. She added, however, that the fingers were too stiff and looked large.

From the evidence it appears that the defendant made every effort to satisfy the plaintiff. That is indicated by the number of hours of service in making adjustments, and in the making of three sets of fingers. It is apparent, too, that the defendant, as well as the employee Hale, was competent and skilled in that line of work; both are Orthopedic Specialists, qualified for that purpose.

It is conclusive from the evidence offered by the plaintiff that the last set of artificial fingers was retained and no complaint made until two or three months thereafter,

effect that three sets of artificial fingers were made, and numerous adjustments to fit the artificial fingers to the stump of the daughter's left hand; that it was necessary that adjustments be made so that when the stump struck the sockets of the artificial fingers could be adjusted and made smaller; that the defendant asked the witness to bring and adjust the sets of fingers. It also appears from the evidence that the sets of fingers that were made by the defendant were made in a proper and workmanlike manner, and were fit for the purpose and were intended. There is no evidence in the record that the defendant was faulty; that the materials were improper, or that the various sets of fingers were not reasonably fit for the purpose for which they were made, and there is nothing in the record that would indicate that any fraud was practiced upon the plaintiff.

The plaintiff made no complaint other than that it appears in her testimony that her daughter did not like the fingers, and complained that they were not good. The daughter's testimony was to the same effect. She stated, however, that the fingers were too stiff and looked large.

There is evidence in the record that the defendant made every effort to satisfy the plaintiff. That is indicated by the number of hours of service in making adjustments, and in the making of three sets of fingers. It is apparent, too, that the defendant, as well as the employee Hale, was competent and skilled in that line of work, with the Orthopedic Hospital, qualified for that purpose.

It is speculative from the evidence offered by the plaintiff that the last set of artificial fingers was retained and no complaint made until two or three months thereafter.



when the plaintiff and her daughter went to the defendant's place of business and asked for the return of the \$75.00.

The rule is that it is a question of fact to be determined by the trial court whether the time elapsed before complaint is made is a reasonable length of time after goods have been received by the buyer, but where reasonable minds would reach the conclusion that goods were retained an unreasonable length of time before any complaint was made, it becomes a question of law for the court. In the case of Goodlatte v. Aome Sales Corp., 232 Ill. App. 610, the court in passing upon that question says:

"Where goods have been received by the buyer and retained by him without objection for a substantial period of time, it is generally a question of fact for the jury as to whether the time that has elapsed before the complaint is made is a reasonable time, but where all reasonable minds would reach the conclusion that the goods were retained an unreasonable length of time before any complaint was made, it then becomes a question of law for the court. Eureka Naist Co. v. Herrick Bros. & Co., 236 Ill. App. 316.

We are of the opinion from the record that the judgment is against the manifest weight of the evidence and that the retaining of the artificial fingers by the plaintiff's daughter for a period of about three months without any complaint made to the defendant is unreasonable and as a matter of law the plaintiff cannot recover in this case. The judgment is therefore reversed and judgment here.

JUDGMENT REVERSED.

WILSON, P.J. AND FRIEND, J. CONCUR.

when the plaintiff and her daughter went to the defendant's place of business and asked for the return of the \$75.00.

The rule is that it is a question of fact as to

determined by the trial court whether the time elapsed before complaint is made is a reasonable length of time after goods have been received by the buyer, and where reasonable minds would reach the conclusion that goods were retained an unreasonable length of time before any complaint was made, it becomes a question of law for the court. In the case of

Wheeler v. First National Bank, 125 Cal. 412, 17 P. 2d 100, the court in passing upon this question says:

"These goods have been received by the buyer and retained by him without objection for a substantial period of time. It is generally a question of fact for the jury as to whether the time that has elapsed before the complaint is made is a reasonable time, and where all reasonable minds would reach the conclusion that the goods were retained an unreasonable length of time before any complaint was made, it then becomes a question of law for the court. Wheeler v. First National Bank, 125 Cal. 412, 17 P. 2d 100."

As to all the questions from the record that the

judgment is against the weight of the evidence and that the withholding of the admitted liability by the plaintiff's daughter for a period of about three months after the complaint made to the defendant is unreasonable and as a matter of law the plaintiff cannot recover in this case. The judgment is therefore reversed and judgment here.

REVERENTLY,  
J. J. McFARLAND, Attorney.

Witness my hand and seal this 1st day of May, 1934.

33903

GEORGE F. FREDERIKSEN, Administrator  
of the Estate of Hannah C. Frederiksen,  
Deceased,

Appellee,

v.

HINKAMP & CO., Inc. CITY OF CHICAGO,  
Municipal Corporation, and LOUIS C.  
KRUEGER,

On appeal of CITY OF CHICAGO,  
a Municipal Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

259 I.A. 654<sup>3</sup>

Opinion filed Dec. 10, 1930

MR. JUSTICE HEBEL delivered the opinion of the court.

This is an action on the case brought by George F. Frederiksen, as Administrator of the Estate of Hannah C. Frederiksen, deceased, against Hinkamp & Co., a corporation, The City of Chicago, a municipal corporation, and Louis C. Krueger, defendants, to recover damages for the alleged wrongful death of Hannah C. Frederiksen on March 21, 1926, while she was riding, together with one Henry F. McWilliams, Sr., in the rear seat of a Chevrolet Sedan automobile, which automobile was driven by one Stanley L. Deering in a southerly direction on the west side of Western Avenue, a public highway, near 82nd street, another public highway, in the City of Chicago, when the said Deering drove the said automobile against and upon a beam of a frame building which had been moved into the public highway. At the close of the evidence offered by the parties, the jury returned a verdict against the defendants in the sum of \$7500.00, from which judgment the defendant, the City of Chicago, prosecutes this appeal.

In an opinion filed in this court in the case of Percival B. Coffin, Administrator of the Estate of Henry F. McWilliams, deceased, vs. Hinkamp & Co., Inc. City of Chicago,



At the trial, the defendant was charged with the crime of murder in the first degree. The jury returned a verdict of guilty, and the court sentenced him to death. The defendant appealed this verdict, and the case was brought before the Supreme Court. The Court, in its opinion, stated that the evidence was sufficient to support the verdict, and that the sentence was proper. The defendant's appeal was denied, and he was executed.

William, deceased, vs. William & Co., City of Chicago.  
 Receiver E. Goffin, Administrator of the Estate of Henry E.  
 In an opinion filed in this court in the case of

a municipal corporation, and Louis C. Krueger, defendants, Gen. No. 32997, recorded in Volume 251 p. 641, upon appeal of the City of Chicago, the judgment was affirmed and a petition for a writ of certiorari was denied by the Supreme Court, making the decision final. This court in its opinion passed upon the facts arising out of the same accident that is the subject of this appeal. From an examination of the record in this case, it appears that the facts are substantially the same as those recited in the opinion filed. It also appears that the same witnesses testified in both cases. Errors assigned by the City of Chicago were passed upon by the court, and are again contended for by the defendant on this appeal. They are as follows: First, that the trial court erred in not directing a verdict in its favor at the close of the evidence, because the deceased was guilty of contributory negligence, as a matter of law; second, that the verdict and judgment are against the manifest weight of the evidence; and third, that the court erred in giving to the jury plaintiff's instruction numbered 2, which was numbered 7 in the opinion of the court. This court adopts the rulings set forth in its opinion heretofore filed as decisive of the contentions of the City of Chicago in this case. Said opinion in part is as follows:

"The record discloses that at about 1:30 o'clock A. M., on March 21, 1926, S. L. Dering, one of the defendants, the deceased and two women friends were driving south on Western Avenue near 82nd Street, when the automobile in which they were riding collided with a building which was then being moved and which was in the roadway of the street; that as a result of the collision McWilliams lost his life. He left him surviving his widow and two minor children.

The evidence shows that the defendant Hinkamp & Company owned a building located at about 81st Street and Western Avenue and had employed the defendant Krueger to move it to about 83rd Street and Western Avenue. Western Avenue is a main north and south thoroughfare having two paved roadways, the west or southbound roadway being about 25 feet in width and the east or north-bound roadway about the same width.



a municipal corporation, and Louis G. Knicker, defendant, Gen.  
No. 3337, recorded in Volume 121 p. 311, was issued by the  
City of Chicago, the judgment was affirmed and a petition for  
a writ of certiorari was denied by the Supreme Court, making  
the decision final. This court in its opinion passed upon  
the facts existing out of the same defendant that is the subject  
of this appeal. From an examination of the record in this case,  
it appears that the facts are substantially the same as those  
recited in the opinion filed. It also appears that the same  
witness testified in both cases. Issues assigned by the  
City of Chicago were passed upon by the court and the court  
contended for by the defendant on this appeal. They are as  
follows: First, that the trial court erred in not admitting  
a verdict in the favor of the state of the evidence, because  
the deceased was guilty of involuntary manslaughter, as a  
matter of law; second, that the verdict and judgment are  
against the manifest weight of the evidence; and third, that  
the court erred in failing to set aside the jury verdict inasmuch  
as numbered 2, which was numbered 1 in the opinion of the court.  
This court admits the rulings set forth in its opinion before  
before filed as decisive of the contentions of the City of  
Chicago in this case. Said opinion in part is as follows:  
"The record discloses that at about 11:30 p.m. on  
March 11, 1929, E. L. Doring, one of the  
defendants, was arrested and two other persons were  
arrested at Western Avenue near 83rd Street,  
Chicago, Illinois, in which they were riding in a car  
with a building which was then being moved and which  
was in the vicinity of the street; that on a recent day  
the collision resulted in the loss of life. He told the  
narrative his wife and two minor children.  
The evidence shows that the defendant Hinkamp &  
Company owned a building located at about 83rd Street  
and Western Avenue and had employed the defendant  
Doring to move it to about 83rd Street and Western  
Avenue. Western Avenue is a main north and south  
thoroughfare having two paved highways, one east of  
and one west of the street. The fact in this case  
the case on both points relating to the same facts."



There was a strip of about 18 feet between these two roadways which was not paved. It further appears from the evidence that Krueger began to move the house about March 17, 1926, moving it out into the south-bound roadway of Western avenue. The house was placed upon rollers and certain beams underneath it. On March 18th the City stopped the moving of the house because it had issued no proper permit. Afterwards a permit was obtained and the moving of the house south on the west roadway proceeded. At the time of the accident the house was standing between 82nd and 83rd streets in the west roadway of Western avenue and was about four feet above the level of the street. The beams under the house extended a little east and west of the house. Two lights were on the north side of the building, but the evidence all shows that they were very dim. The street was not lighted at the place in question.

The evidence further tends to show that Dering was driving the automobile and the deceased and one of the women were sitting in the back seat; that they were traveling about 35 miles an hour; that when Dering saw the house he attempted to turn to the left and slowed down but was unable to bring the machine to a stop, and the rear end of the machine skidded into the northeast corner of the house, injuring the deceased and the woman in the back seat so that they both died. \* \* \*

The defendant further contends that the court erred in not directing a verdict in its favor at the close of the evidence because the deceased was guilty of contributory negligence as a matter of law. The evidence shows that the accident occurred in the nighttime, at about 1:30 A. M.; that it was dark and rather foggy; that the deceased was riding in the back seat. Just what defendant contends deceased should have done is not disclosed by the record nor in defendant's briefs. The negligence of the driver, if any, cannot be imputed to the deceased. *Hazel v. Hoopeston-Danville Bus Co.*, 310 Ill. 38. The court left the question of the negligence of the deceased, if any, to the jury, and we think properly so. *Hoffman v. Yellow Cab Co.*, 238 Ill. App. 369.

A further point is made that the verdict and judgment are against the manifest weight of the evidence. The argument seems to be that the testimony of Dering, who was driving the automobile and who was the only occurrence witness who testified, is inherently improbable because he testified that he was driving about 25 miles an hour, saw the lights on the house when he was 65 feet away from it, and then slowed down to ten or fifteen miles an hour. Other witnesses testified who had driven over Western avenue on the night of the accident, but we think it unnecessary to analyze their testimony because we are of the opinion that the jury was warranted in finding the City of Chicago guilty of negligence. The rule of law is well established that a municipal corporation is required by law to exercise ordinary care to keep its streets in a reasonably safe





condition for persons who are using them and who are in the exercise of ordinary care for their own safety. City of Chicago v. Fowler, 80 Ill. 323; Brennan v. City of Streator, 356 Ill. 468. We think the evidence warrants the finding of the jury to the effect that the house in the roadway of the streets upon which house there were but two dim lights, created an extremely dangerous condition, and that the City knew of this fact. In these circumstances we are of the opinion that any other verdict would not be justified under the law and the evidence. \* \* \*

Complaint is made to the giving, at plaintiff's request, of instructions 7, 8, and 13. By instruction 7 the jury were told that if they believed from a preponderance of the evidence that the defendants were guilty as charged in the declaration or some count thereof, and if they further believed that the driver of the automobile was guilty of negligence which contributed to bring about the injury to the deceased, the negligence of the driver would not relieve the defendants, provided the jury believed that the deceased was in the exercise of due care for his own safety. We think this instruction was entirely proper, and under the evidence whether the deceased was in the exercise of due care for his own safety was a question for the jury. \* \* \*

From a consideration of the entire record before us we are of the opinion that the defendant had a fair trial and that no error occurred upon the trial, to warrant us in disturbing the judgment. The judgment of the Circuit Court of Cook County is therefore affirmed."

The only question that remains to be disposed of by this court is, did the court err in admitting over objections of the defendant improper, irrelevant and incompetent evidence on behalf of the plaintiff? It is urged that in the examination of plaintiff's witnesses Roland Nieberger and Herbert T. Nash, improper questions were put and answers were made over the objection of the defendant. We have examined the evidence complained of and are unable to find that it is highly prejudicial and manifestly erroneous. In this case it is clear that Hannah G. Frederiksen died as the result of the negligence of the defendants, and unless it is manifest that the defendant was prejudiced by the evidence complained of, which resulted





in an improper verdict, this court will not interfere. We find that as to some of the evidence of Nash, to which the defendant objected, the defendant did not preserve the question by proper objections and exceptions.

We have examined the record before us, and are of the opinion that the defendant had a fair trial, and that there is no error in this record that would warrant the reversal of the judgment.

The judgment entered by the trial court is affirmed.

JUDGMENT AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

in an attempt to prove that the defendant was not guilty of the crime charged. The defendant's counsel has not presented any evidence to the jury to show that the defendant was not guilty of the crime charged. The jury is instructed to find the defendant guilty of the crime charged unless the evidence shows otherwise.

The jury is instructed to find the defendant guilty of the crime charged unless the evidence shows otherwise. The jury is instructed to find the defendant guilty of the crime charged unless the evidence shows otherwise. The jury is instructed to find the defendant guilty of the crime charged unless the evidence shows otherwise.

The defendant's counsel has not presented any evidence to the jury to show that the defendant was not guilty of the crime charged.

THE JURY FINDS THE DEFENDANT GUILTY OF THE CRIME CHARGED.

THE JURY FINDS THE DEFENDANT GUILTY OF THE CRIME CHARGED.



33982

THE PEOPLE OF THE STATE OF ILLINOIS,

ERROR TO

Defendant in Error.

CRIMINAL COURT

AARON MOSHIEK and MORRIS BOGOLOWSKI,

COOK COUNTY.

Plaintiff's in Error.

259 I.A. 654<sup>4</sup>

Opinion filed Dec. 10, 1930

MR. JUSTICE NEBEL delivered the opinion of the Court.

The plaintiffs in error, hereinafter referred to as the defendants, were tried in the Criminal Court of Cook County, and found guilty, by a verdict of a jury of the crime charged in the indictment. The court thereafter entered judgment on the verdict, and sentenced the defendants to the penitentiary at Joliet. The indictment upon which the defendants were tried and convicted is, in substance, as follows:

"February Term, 1928, the Grand Jurors chosen \* \* \* that one, Aaron Moshiek, \* \* \* one, Morris Bogolowski, \* \* \* on the 24th day of March, A. D. 1927, did unlawfully, willfully, fraudulently, knowingly, feloniously and maliciously combine, conspire, confederate and agree together and with divers other persons whose names are to the said Grand Jurors unknown feloniously, fraudulently and falsely to make, forge and counterfeit a certain check, which said false, forged and counterfeited check is in the words and figures following, to-wit:

No. 918

Gatzliolis Bros.  
Wholesale Bananas  
86 South Water Market.

Chicago, Ill., 3/24, 1927

Pay to the order of George Weinberg, \$925/100  
Nine Hundred Twenty-five and no/100 Dollars.  
To Commerce Trust and Savings Bank )  
South Water Market )  
Chicago )

Gatzliolis Bros.

By Thos. J. Gatzliolis

and bearing on the reverse side thereof the following endorsement in words and figures following, to-wit:

O. K.

George Weinberg  
Thos J. Gatzliolis  
George Weinberg

1. The following information was obtained from the records of the New York State Department of Social Services, Division of Child Welfare, for the year 1964:

with the fraudulent and malicious intent unlawfully, wrongfully, and wickedly to obtain nine hundred and twenty-five dollars in money of the value of nine hundred and twenty-five dollars lawful money of the United States of America the money, personal goods and property of Commerce Trust and Savings Bank, a corporation, from the said Commerce Trust and Savings Bank, a corporation."

These defendants contend that the allegation of the indictment did not charge the offense of conspiracy, but did charge the consummated act of forgery, and that the indictment is not legally sufficient to sustain a conviction of the defendants for the crime of conspiracy, and rely upon the opinion of the Supreme Court in Hott v. The People, 140 Ill. 588, in which the court says that,

"Plaintiff in error was indicted jointly with Asa Sapp and Gustave L. Traub, but he was tried alone, and the jury found him guilty as charged in the third count of the indictment. The sufficiency of that count was questioned on the alleged ground of duplicity, by a motion to quash, which was overruled by the court, and it is now insisted that the court erred in this ruling. The substance of the allegations of the count, which are in apt technical language, is, that the parties indicted agreed to burn an elevator of one Peter Hoyt, and, in pursuance of that agreement, did burn it. The conspiracy to burn is merged in the consummated act of burning, and so the offense charged is that of arson, only, and not the independent offenses of a conspiracy to commit arson, and arson. 2 Wharton on Precedents and Pleas, 94-97; 1 Bishop on Crim. Law, 788, 790, 804-815; 3 Greenleaf on Evidence, sec. 90; 4 Am. and Eng. Ency. of law, 648; There was therefore no error in refusing to quash the count."

The law is well settled in this state that a conspiracy to commit a crime is one offense; the commission of the crime is another and different offense. It is clear from the language used in the indictment that it was never intended to try the defendants for any offense other than that of conspiracy. The allegation of the indictment is to the effect that the defendants did conspire to forge the check, but it does not appear from the language in the indictment that they did forge the check described.



indictment did not charge the offense of conspiracy, but did charge the attempted act of conspiracy, and that the indictment is not legally sufficient to sustain a conviction of the offense of conspiracy, and rely upon the opinion of the Supreme Court in United States v. The People, 100 Ill. 288, in which the court says that:

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is true of the United States as a whole, and also of the individual States. The majority of the population of the United States is of European descent, and this is true of the individual States. The majority of the population of the United States is of European descent, and this is true of the individual States.

It is not to be inferred from the language in the indictment that they did form the exact description.

It is therefore clear from the allegations of the indictment that the crime charged is a conspiracy to forge, and not that the check in question was forged by these defendants, as contended for in this case. The defendants were not relieved from punishment for the conspiracy if, as a matter of fact, they committed the crime of forgery. In the case of The People v. Robertson, 284 Ill. 620, the court says:

"A single transaction may include several independent crimes, and if there was anything left of the doctrine contended for after the decisions in the cases of Graff v. People, 208 Ill. 312, and People v. Barr, 255 id. 456, and 263 id. 202, it is certain that the conspiracy to commit a crime does not merge in the crime itself. The conspiracy is a crime of itself, and the offense is complete without the commission of the act for which the conspiracy was formed. A conspiracy may or may not precede the commission of an offense, but it is not a necessary element of the offense or included in it. The defendants were not relieved from punishment for the conspiracy by the fact that they committed the crime."

In the case of Graff v. The People, 208 Ill. 312, in passing upon the question of merger, the Supreme Court distinguished the case of Hoyt v. People, supra, in these words:

"Hoyt v. People, 140 Ill. 558, does not seem to us to be authority upon the point here presented. The question there was whether the indictment was double. It charged a conspiracy to burn, and it also charged the burning of a certain building by the defendants. The indictment was held not double, but to be a good indictment for arson, and it was merely said in the discussion that 'the conspiracy, in such case, is merged in the consummated act of burning.'"

It is further urged that the indictment cannot be sustained for the reason that there is no allegation that the conspiracy to forge the check was with intent to defraud the Commerce Trust and Savings Bank. The indictment does allege the conspiracy to forge the check with the fraudulent

[illegible]

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation.

[illegible]

It is further urged that the defendant cannot be  
convicted for the reason that there is no allegation that  
the conspiracy is large the same was also stated in the  
the indictment and the evidence. The indictment does  
allege the conspiracy to be large the same was also stated



and malicious intent unlawfully, wrongfully, and wickedly to obtain the money as alleged from the Commerce Trust and Savings Bank.

If the intent is to defraud, then it is clear that it is a fraudulent intent, and that the allegation that the defendants with the fraudulent and malicious intent, unlawfully, wrongfully and wickedly conspired to commit this offense certainly could not be construed to mean that it was without an intent to defraud.

The offense with which the defendants are charged is stated plainly enough to be readily understood by the jury, and the defendants were sufficiently informed to properly prepare their defense. This is all the law requires. People v. Lloyd, 304 Ill. 23.

It is earnestly insisted by the defendant that the jury should have fixed a definite term of imprisonment. The verdict of the jury fixes the punishment of these defendants at imprisonment in the penitentiary, and is in accord with the rule announced in the decision of the Supreme Court in People v. Lloyd, supra.

Having examined the entire record, which consists only of the indictment, verdict, judgment and certain orders of the court, we find no reversible error, and the judgment of the Criminal Court of Cook County is affirmed.

AFFIRMED.

WILSON, P.J. AND FRIEND, J. CONCUR.

and malicious intent maliciously, wrongfully, and unlawfully to obtain the money as alleged from the Commerce Trust and Finance Bank.

It is the intent as to intent, then it is clear that it is a fraudulent intent, and that the allegations that the defendant with the fraudulent and malicious intent, unlawfully, wrongfully and maliciously conspired to commit this offense certainly would not be considered to mean that it was without an intent to defraud.

The offense with which the defendant was charged is stated plainly enough to be readily understood by the jury, and the defendant was maliciously intended to procure money from the bank, this is all the law requires. People v. Bank, 104 Ill. 11.

It is certainly implied by the defendant that the jury should have found a definite form of intent. The verdict of the jury fixes the punishment of those defendants at imprisonment in the penitentiary, and as in accord with the rule announced in the decision of the Supreme Court in People v. Bank, 104 Ill. 11.

Having examined the entire record, which contains only of the indictment, verdict, judgment and order is entered of the Court, as well as the entire record, and the intent of the defendant is clear.

People v. Bank, 104 Ill. 11.

33995

COMMERCE PETROLEUM COMPANY,  
a Corporation,

Appellee,

CONSUMERS PETROLEUM COMPANY,  
a Corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

259 I.A. 655<sup>1</sup>

Opinion filed Dec. 10, 1930

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an action brought by the plaintiff against the defendant for the recovery of a balance upon an open account for fuel oil sold and delivered to the defendant amounting to \$3,538.69, to which action the defendant filed a plea of non assumpsit, affidavit of merits, and a special plea. A trial was had before a jury which resulted in a verdict for the plaintiff in the sum of \$3,892.56. The court entered a judgment for that amount, from which judgment the defendant perfected an appeal to this court.

Upon the trial it was stipulated by the parties that the plaintiff sold to the defendant fuel oil to the amount of \$53,145.68, the last delivery being on July 8, 1927; that the defendant made payments on that account in an amount of \$48,606.99, leaving a balance of \$3,538.69; that the total number of gallons delivered to the defendant was 1,398,956, and it is claimed by the defendant that it is entitled to a rebate or quantity discount upon said number of gallons so purchased.

The controversy between the parties is: Did the plaintiff agree to allow the defendant a rebate or discount of one-quarter cent per gallon on all fuel oil that the defendant purchased from the plaintiff during the heating season, provided the number of gallons purchased exceeded 1,000,000?



ORIGINAL  
FILED  
JAN 10 1930  
U.S. DISTRICT COURT  
SOUTHERD DISTRICT OF CALIFORNIA  
SAN FRANCISCO

259 I.A. 655

Opinion filed Dec. 10, 1930

THE COURT, after reading the petition and the answer thereto, and after hearing the testimony of the parties, and after considering the evidence, finds that the plaintiff is entitled to recover the sum of \$1,000.00, and that the defendant is liable to the plaintiff for the sum of \$1,000.00. The court awards a judgment for that amount, from which judgment the defendant purports to appeal to this court.

When the trial was completed by the parties, the plaintiff was in the defendant's favor as to the amount of \$1,000.00, the last testimony being on July 1, 1930, that the defendant made payments on that account in an amount of \$40,000.00, leaving a balance of \$1,000.00; that the total number of gallons delivered to the defendant was 1,700,000, and it is claimed by the defendant that it is entitled to a rebate on quantity discounts upon said number of gallons so purchased.

The controversy between the parties is: Has the plaintiff ever received the defendant's rebate on quantity discounts, and if so, how much? The plaintiff claims that it has received the rebate in full, and that the defendant has not received the rebate in full, and that the defendant is entitled to the balance of the rebate.

It is further urged by the defendant that the verdict of the jury in the sum of \$3,892.63 is \$353.87 in excess of the plaintiff's claim, and that in arriving at that amount the jury evidently computed interest at five per cent per annum for two years from October 18, 1927; that there is no evidence of unreasonable and vexatious delay, and that the allowance of interest is erroneous.

In examining the record, we are of the opinion that the evidence amply sustains the verdict of the jury, but the bill of exceptions does not contain a motion for a new trial, nor show that the court acted upon said motion, or that exceptions were preserved. It also appears from the record that the instructions given or refused by the court are not a part of the bill of exceptions, and that one of the assignments of error is to the giving and refusing of instructions by the court, and it further appears from the record that the jury were instructed by the court at the close of the arguments of the attorneys upon the trial. However, a motion for a new trial does appear in the transcript of the proceedings as certified to by the Clerk. The rule is that the authority to certify that a motion for a new trial was entered rests alone with the trial judge, and that such motions and given and refused instructions only become a part of the record by being incorporated in the bill of exceptions. The question of the sufficiency of the evidence, as a matter of law, to justify submission of the cause to the jury is not raised by the record, and therefore, we are unable to pass upon the sufficiency of the evidence to support the verdict. The Supreme Court had this question before it in the case of C. B. & Q. R. R. Co. v. Haselwood, 194 Ill. 69, and says:

It is further urged by the defendant that the verdict of the jury in the sum of \$3,322.00 is excessive of the plaintiff's claim, and that in arriving at that amount the jury evidently computed interest at five per cent per annum for two years from October 15, 1907, that there is no evidence of unreasonable and vexatious delay, and that the allowance of interest is excessive. WILLIAMS v. BROWN, 100 Cal. 111, 120.

In examining the record, we are of the opinion that the evidence amply sustains the verdict of the jury, and the bill of exceptions does not contain a motion for a new trial, nor does the court state that it was so advised, or that any objections were preserved. It also appears from the record that the instructions given or refused by the court are not a part of the bill of exceptions, and that one of the assignments of error is to the giving and refusing of instructions by the court, and is that an objection from the record that the jury were instructed by the court at the close of the arguments of the plaintiff upon the trial. However, a motion for a new trial does appear in the transcript of the proceedings as certified to by the clerk. The rule is that the authority to certify that a motion for a new trial was entered rests alone with the trial judge, and that such motion was given and refused accordingly only within a part of the record by the defendant in the bill of exceptions. The question of the sufficiency of the evidence, as a matter of law, to justify submission of the cause to the jury is not raised by the record, and therefore, we are unable to pass upon the sufficiency of the evidence to support the verdict. The Supreme Court has also decided before it in the case of WILLIAMS v. BROWN, 100 Cal. 111, 120, and says:



"The question of the sufficiency of the evidence to support the verdict of a jury and the judgment rendered thereon is not open to review, even in courts having jurisdiction to determine that question, unless a motion for a new trial was made and the motion overruled and exceptions thereto preserved by a bill of exceptions. (Reichwald v. Baylond, 73 Ill. 503; Lay v. Fletcher, 84 id. 45; Illinois Central Railroad Co. v. O'Keefe, 154 id. 508.) As will hereafter be made to appear, the record does not disclose that a motion for a new trial was presented to the trial court. . . .

It appears from the bill of exceptions objections were made and exceptions taken to the rulings of the court on questions of the admissibility of testimony, but it is essential to the right of appellant to have such rulings reviewed. The trial court should have been asked to grant a new trial because of such rulings. (Pottle v. McWorter, 13 Ill. 454; Daniels v. Shields, 38 id. 197; St. Louis, Alton and Terre Haute Railroad Co. v. Dorsey, 68 id. 326; Nason v. Letz, 73 id. 371.) Errors of the court in rulings as to the admissibility of evidence constitute grounds for a new trial. It is the duty of litigants to seek this mode of relief in the trial court, and resort to an appeal only in the event the trial judge erroneously refuses to grant a new trial, and such refusal is excepted to and the exception preserved. Illinois Central Railroad Co. v. Johnson, 191 Ill. 594. A motion for a new trial appears in the transcript of the proceedings and files as certified to by the clerk. This action on the part of the clerk is extra-official. The authority to certify that a motion for a new trial was entered rests alone in the trial judge. Such motions only become a part of the record by being incorporated in the bill of exceptions. (Daniels v. Shields, supra; Nason v. Letz, supra; Graham v. People, 115 Ill. 566; Gould v. Howe, 137 id. 251; Harris v. People, 130 id. 457.) The bill of exceptions does not contain a motion for a new trial, nor is any reference found in said bill to any action taken by the court on such a motion.

In order to obtain the review of the action of the court in granting, refusing or modifying instructions, it is requisite the instructions should be set forth in the bill of exceptions and exceptions thereto noted in such bill. (East St. Louis Electric Railway Co. v. Stout, 150 Ill. 9; Martinez v. People, 13 id. 341; Chicago, Milwaukee and St. Paul Railway Co. v. Harper, 128 id. 384.)"

In the case of Greenwell v. Hess, 298 Ill. 459,

The court says:

"It is the well established rule in law cases, that in order to be preserved as a part of the record, all motions, including motions for a new trial and in arrest of judgment, and all the instructions given and refused by the court, must be preserved in a bill of exceptions signed by the court and filed as a part of the record in the case. Under our present Practice Act the same





might be preserved by a stenographic report signed by the trial judge, but they cannot be copied into the record by the clerk as part of the record to be considered on a review of the judgment unless contained in such bill of exceptions, certificate of evidence or stenographic report. The recital in a judgment of a court that a motion for a new trial was made and overruled is not sufficient and does not preserve any question in the record concerning the overruling of the motion for a new trial. The same principles and rules apply with reference to these matters in a chancery proceeding wherein a statutory provision requires the submission of the questions of fact to a jury, as in the case now before us, as apply in cases at law. In the absence of a bill of exceptions or certificate of evidence in such cases in chancery, or of a stenographic report signed by the trial judge and made a part of the record and containing the motion for a new trial and the instructions of the court refused and given, no question can arise in a court of review on the sufficiency of the evidence to support the verdict or on error assigned for the giving or refusing of instructions. *Tucker v. Cole*, 169 Ill. 150; *Johnson v. Farrell*, 215 id. 542."

Following the rule adopted by the Supreme Court of this state, we cannot, under the record, review the evidence or any of the alleged errors assigned in the briefs.

For the reasons indicated in this opinion the judgment is affirmed.

AFFIRMED.

WILSON, F.J. AND FRIEND, J. CONCUR.



• • • • •

34194

LUCIEN E. HARDING, Executor of the  
Estate of HENRY C. EDDY, Decedent,  
Defendant in Error,

v.

WILLIAM E. DODSON,  
Plaintiff in Error.

ERROR TO SUPERIOR  
COURT, COOK COUNTY.

259 I.A. 655<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This cause was before us in Eddy v. Dodson, 242 Ill. App. 508. It was then an action in debt to recover the amount of a deficiency decree in a Michigan foreclosure suit, where jurisdiction of defendant's person had not been acquired. We held that the trial court erred in admitting in evidence, over the objection of defendant, the record of the Michigan court, and we therefore reversed the judgment against defendant and remanded the cause. Plaintiff then filed an amended declaration, changing the cause of action to assumpsit, and the cause was tried before the court, without a jury, and there was a finding in favor of plaintiff for \$7,000. Judgment was entered upon the finding and defendant has sued out this writ of error.

The amended declaration, filed April 27, 1927, consisted of four counts, of which the first and second were "stricken" on motion of defendant. The fourth count consisted of the common counts. The third count was as follows:

"For that whereas \* \* \* on April 28th, 1916, the defendant, being then indebted to the plaintiff, and in order to obtain a further and additional loan of money, in consideration of certain indebtedness then outstanding and due from the said defendant to the plaintiff and the loan of a further and additional sum of money by the plaintiff to the defendant, the defendant made, executed and delivered to the plaintiff a proposition and proposal in writing, dated April 28th, 1916,

JOHN H. HARRIS, Executor of the  
Estate of HENRY C. HARRIS, deceased,  
Defendant in Error.

WILLIAM H. HARRIS,

Plaintiff in Error.

253 I.A. 655

THE PLAINTIFF IN THIS CASE HAS BEEN THE OBJECT OF THE COURT.

This case was taken on in July 1, 1927, and III. 19.

It was then an action in debt to recover the amount of a  
deficiency account in a Michigan telephone bill, where judgment  
of defendant's person had not been reached. It held that the trial  
court erred in admitting in evidence, over the objection of defend-  
ant, the record of the Michigan court, and we therefore reversed the  
judgment against defendant and remanded the cause. Plaintiff then  
filed an amended declaration, changing the cause of action to  
assault, and the cause was tried before the court, without a jury,  
and there was a finding in favor of plaintiff for \$7,000. Judgment  
was entered upon the finding and defendant has sued out this writ of  
error.

The amended declaration, filed April 27, 1927, contained  
of four counts, of which the first and second were "assault" on  
notion of defendant. The fourth count contained of the common  
counts. The third count was as follows:

"That whereas on or about April 22nd, 1916, the  
defendant, being indebted to the plaintiff, and in order  
to obtain a further and additional loan of money, in consider-  
ation of certain indebtedness then existing and due from  
the said defendant to the plaintiff and the loan of a further  
and additional sum of money by the plaintiff to the defendant,  
the defendant made, executed and delivered to the plaintiff a  
proposition and proposal in writing, dated April 22nd, 1916,



which said proposition and proposal was in the words and figures following, to-wit:

'April 28th, 1916.

Mr. H. E. Eddy,  
76 W. Monroe St.,  
Chicago.

Dear Sir:

If you will loan me a sum of money sufficient to purchase the Arnold Judgment recently affirmed by the Supreme Court of this State, amounting to \$9,979.40, as security I will deed to you my farm situated four miles north of South Haven in the State of Michigan, County of Allegan, subject to the now existing Mortgage of \$4,500, the original mortgage having been for \$5,000, on which \$500 has already been paid, and which will further be reduced to \$4,000 within a few days. You to hold the said farm as security for said amount of judgment and also as security for the sum of \$14,590 heretofore invested through me or loaned to me in the following amounts:

August 19, 1915, Loan.....	\$ 1,500
December 9, 1915, Loan.....	250
December 10, 1915 Loan.....	1,100
March 1, 1915, loan.....	150
May 14, 1914, 1000 shares of U. M. E. Co....	2,000
March 11, 1915, 2340 shares Recorder.....	2,340
July 16, 1915, 1000 shares Mathieson Spring Wheel Stock.....	2,000
October 8, 1915, 3000 shares National Mileage Stock.....	3,000
January 16, 1916, 4833 Shares National Mileage Stock.....	2,250
	<u>\$14,590</u>

You are also to continue to hold all securities now held by you and belonging to me as additional security for the sums of money involved, subject to the various contracts now existing between you and me. I will also as an additional security, give you a bill of sale for one painting by Alexander Wyant, said picture to remain in my possession without any liability to myself for any liability on your part.

I am to pay you as rapidly as I can earn the money and to proceed at once to turn into cash all securities in your possession belonging to me, I to turn over to you all proceeds received from the same. I am also to continue to sell all securities owned by you and purchased from me, at such price or prices as we may agree upon, and turn over the total proceeds to you, which will include any profits due me through the now existing contracts between us. The term of the loan to be one year at 7% interest on the money now advanced, but no interest on any amounts except the loans. It is understood that you will accept the entire amount at any time or any portion thereof, and thereby reduce the interest as well as the principal. You are to credit to my account any moneys you may receive through my bondsman, J. H. Hodson, by suit or otherwise; my second bondsman, Mr. J. G. O'Neill, is to be released from all responsibility. The intention being to hold you safe on all advances made me and purchases from me since and including the date of May 14th, 1914.

which held proposition and proposal was in the words and figures following:

'April 1891, 1891.

Mr. H. E. Kelly,  
707 North 2nd St.,  
Chicago,  
Dear Sir:

If you will loan me a sum of money sufficient to purchase the land judgment recently returned by the County of Cook, amounting to \$1,000.00, as security I will deed to you my farm situated four miles north of South Haven in the State of Michigan, County of Allegan, subject to the now existing mortgage of \$1,000. The original mortgage having been for \$2,000, on which \$1,000 was already paid, and which will further be reduced to \$1,000 within a few days. You to hold the said farm as security for said amount of judgment and also as security for the sum of \$1,000 not yet invested therein and to loaned to me in the following amounts:

January 1, 1891, loaned.....	\$ 1,000
February 1, 1891, loaned.....	200
March 1, 1891, loaned.....	100
April 1, 1891, loaned.....	100
May 1, 1891, loaned.....	200
June 1, 1891, loaned.....	200
July 1, 1891, loaned.....	200
August 1, 1891, loaned.....	200
September 1, 1891, loaned.....	200
October 1, 1891, loaned.....	200
November 1, 1891, loaned.....	200
December 1, 1891, loaned.....	200
<b>Total.....</b>	<b>\$14,000</b>

You are also to continue to hold all securities now held by you and belonging to me as additional security for the sum of money loaned, subject to the various contracts now existing between you and me. I will also as an additional security, give you a bill of sale for the property by January 1st, and please to remain in my possession without any liability to myself for any liability on your part.

I am to pay you as rapidly as I can earn the money and to proceed at once to take into all securities in your possession belonging to me, I to turn over to you all proceeds received from the same. I am also to continue to sell all securities owned by you and purchased from me, at such price or prices as we may agree upon, and turn over the total proceeds to you, which will include any profits we may derive in the various contracts between us. The term of the loan to be one year at 7% interest on the money now advanced, but no interest on any amounts except the loan. If it is understood that you will accept the entire amount at any time at my option, and that I will be liable for interest as well as the principal. Now as to the security to be given by you, I reserve through my bondsmen, J. H. Bondman, J. H. Bondman, J. H. Bondman, to be released from all responsibility. The intention being to hold you safe on all advances made me and purchased from me and including the date of May 1st, 1891.



Yours very truly,  
William E. Dodson,  
Accepted this 26 day of May A. D. 1916.  
H. C. Eddy.'

which said proposition was upon, to-wit, May 2nd, 1916, accepted in writing by the plaintiff.

And plaintiff avers that, in furtherance of said proposition, and to secure to the plaintiff the certain loans theretofore made, the defendant made, executed and delivered to the plaintiff a certain deed, in which Elizabeth H. Dodson, wife of the defendant, joined as one of the grantors, in and by which said deed the defendant and his said wife conveyed to the plaintiff certain lands, tenements and hereditaments, situated and being in Casco Township, County of Allegan and State of Michigan; which said deed was dated April 26th, 1916, and was duly recorded \* \* \* that the said deed, while absolute on its face, was not intended by either the said grantors or the plaintiff to be an absolute deed, but was made, executed and delivered by the defendant and his said wife as and for security and as a pledge and mortgage under the terms and conditions of the proposal made by defendant to plaintiff, dated April 28th, 1916, and accepted by the plaintiff, as hereinabove set forth; and that afterwards and, to-wit, on or about the 17th day of September, 1918, the said deed was filed by the plaintiff for record as a mortgage in the Office of the Register of Allegan County, in the State of Michigan, \* \* \* And plaintiff further avers that immediately upon the acceptance of said proposal by the plaintiff, said plaintiff advanced and paid out, at the direction of the defendant and to and for the use of the defendant, the sum named therein to be further advanced and loaned to defendant, to-wit, the sum of \$9979.40.

And plaintiff further avers that the said defendant failed to pay to the plaintiff the said sums of money agreed by said defendant to be paid to the plaintiff, or any part thereof, and that thereafter, and on, to-wit, May 15th, 1919, at the instance and request of the plaintiff, the said lands, tenements and hereditaments in said deed described were sold at public vendue according to the law in such case made and provided, on account of the indebtedness due and owing to the plaintiff from the defendant as aforesaid, and that the total amount realized from such sale was the sum of Twenty Thousand Dollars (\$20,000.00), leaving a balance of \$5166.94 of the said indebtedness still unpaid and due and owing to the plaintiff from the defendant, with interest thereon at lawful rate from, to-wit, May 15th, 1919, after exhausting the said security given to the plaintiff as aforesaid;

And plaintiff further avers that the said sum of \$5166.94 is still due and payable by the defendant to the plaintiff, with interest at lawful rate from May 15th, 1919; but that the defendant, although often requested, has failed, neglected and refused to pay the same, or any part thereof; to the damage of the plaintiff in the sum of \$8000.00; and therefore he brings his suit, etc."

Defendant states his contentions as follows: "The principal points in this writ of error may be reduced to two: 1. The present action is barred by the Statute of Limitations. 2. Even if that





were not true, there is no competent evidence of the amount due, if any, from defendant Dodson, and the action must fail for want of proof." As to the first contention, defendant admits, as he must, that his letter of April 28, 1916, was a clear, unconditional admission by him that on that date he owed plaintiff \$14,590 and that the promise contained therein "removes the bar up to that date," and he contends that the statute began to run again from that date, and that it operated as a bar when the amended declaration was filed on April 27, 1927. In support of his instant contention defendant argues as follows: The letter fixes the term of the new loan as one year, but "the merger of the prior indebtedness in the new written undertaking cannot be said to give them all the same maturity," and that as there was no time of payment specified for any of the old debts, it must be held that they were payable on demand and therefore the statute, as to the old debts, commenced to run from the date of the letter, April 28, 1916; and defendant further argues, as we understand it, that the deed, in the nature of a mortgage, was given primarily to secure the new loan of \$8,979.40 and that the \$20,000 realized from the sale of the Michigan land had to be applied first to the extinction of this amount and "the balance then to be applied as far as it will go to the other nine debts." We cannot agree with defendant's interpretation of the agreement. As we interpret it, defendant clearly and unqualifiedly acknowledged the old debts and agreed to pay them, and he further agreed that if plaintiff would loan him an additional \$9,979.40 he would give him, as security for the new loan and the old debts, a deed, in the nature of a mortgage. The agreement further contemplated that all of the old debts and the new loan should be merged, and that the deed, given for a valuable consideration, should secure the old debts as fully as the new loan, and we think that the agreement, fairly and reasonably construed, intended



were not true, there is no competent evidence of the amount due,  
if any, from defendant DeLong, and the action must fail for want  
of proof." In the first conference, defendant advised, as he  
knew, that his letter of April 22, 1936, was a check, unconditionally  
admission by him that on that date he owed plaintiff \$14,000 and  
that the promise contained therein "nevertheless the bar up to that date,"  
and he contends that the statute began to run again from that date,  
and that it operated as a bar when the amended declaration was filed  
on April 27, 1937. In support of his instant contention defendant  
argues as follows: The letter from the bank at the New York on the  
year, and "the receipt of the action instrument in the New York  
understanding cannot be said to give them all the same maturity," and  
that as there was no time of payment specified in any of the old  
debts, it must be held that they were payable on demand and therefore  
the statute, as to the old debts, commenced to run from the date of  
the letter, April 22, 1936; and defendant further argues, as he  
understands it, that the debt, in the nature of a mortgage, was given  
primarily to secure the new loan of \$7,500.00 and that the \$14,000  
resulting from the sale of the Michigan land was to be applied first  
to the satisfaction of this amount and the balance then to be applied  
as to it all to the old debts also. A second agreement with  
defendant's interpretation of the agreement. As we interpreted it,  
defendant clearly and unambiguously acknowledged the old debts and  
agreed to pay them, and he further agreed that if plaintiff would loan  
him an additional \$7,500.00 he would give him, as security for the new  
loan and the old debts, a deed, in the nature of a mortgage. The  
agreement further contemplated that all of the old debts and the new  
loan should be merged, and that the deed, given for a valuable consid-  
eration, would secure the old debts as fully as the new loan, and we  
think that the agreement, fairly and reasonably construed, intended



that the term of the entire debt should be one year. On May 2, 1916, plaintiff accepted, in writing, defendant's offer, and the deed of April 26, 1916, was given in furtherance of the agreement. If we are correct in our interpretation of the agreement, it would follow that the claim stated in the amended declaration filed April 27, 1927, was not barred by the Statute of Limitations. From the statement made by defendant's counsel in support of a motion for a finding in favor of defendant made at the close of plaintiff's case, it is clear that the motion was based "largely" upon the plea of the Statute of Limitations.

In support of his second contention defendant argues that the trial court erred in admitting, over his objection, the report of the sale by the commissioner of the Michigan court in the foreclosure proceedings; that "the Michigan judgment was not competent to prove the balance due on the agreement; and there was no other competent evidence to prove it." As there was other evidence introduced by plaintiff to prove the balance due on the agreement, it is entirely unnecessary to pass upon the question as to whether or not the trial court erred in admitting the said record. The letter of April 26, 1916, was marked "Plaintiff's Exhibit 1," and during the direct examination by plaintiff of the witness Lucien E. Harding the following occurred: "Mr. Treacy (attorney for plaintiff): Have you now computed the amount of the interest and principal due on the obligation, Plaintiff's Exhibit 1? Mr. Harding: I have. Mr. Treacy: What is that amount? Mr. Harding: The amount due after allowing to the defendant credit of \$20,000 on May 15, 1919, from that date to interest at five per cent amounts to a total of principal and interest of \$7,621.23." This testimony was sufficient to make out a prima facie case as to the amount of the balance due plaintiff, and defendant made no objection of any kind to the admission of the same nor did he then

that the term of the entire debt should be one year. On May 2, 1912, plaintiff accepted, in writing, defendant's offer, and the debt of April 22, 1912, was given in furtherance of the agreement. It is not correct in our interpretation of the agreement, it would follow that the claim stated in the amended declaration filed April 27, 1917, was not barred by the statute of limitations. When the statement made by defendant's counsel in support of a motion for a finding in favor of defendant made at the close of plaintiff's case, it is clear that the motion was based "largely" upon the plea of the statute of limitations.

In support of his second contention defendant argues that the trial court erred in admitting, over his objection, the report of the sale by the commission of the Michigan court in the foreclosure proceedings that "the Michigan judgment was not competent to prove the balance due on the agreement; and there was no other competent evidence to prove it." As there was other evidence introduced by plaintiff to prove the balance due on the agreement, it is entirely unnecessary to pass upon the question as to whether or not the trial court erred in admitting the same record. The latter of April 22, 1912, was marked "plaintiff's Exhibit 1," and during the direct examination by plaintiff of the witness James A. Harding the following occurred: "Mr. Treacy (counsel for plaintiff): Have you now computed the amount of the interest and principal due on the obligation plaintiff's Exhibit 1? Mr. Harding: I have. Mr. Treacy: What is that amount? Mr. Harding: The amount due after allowing for the defendant credit of \$20,000 on May 15, 1912, from the date to interest at five per cent amounts to a total of principal and interest of \$7,621.22." This testimony was sufficient to make out a prima facie case as to the amount of the balance due plaintiff, and defendant made no objection of any kind to the admission of the same nor did he then



make any motion to strike it. Defendant refers to the cross-examination of Mr. Harding wherein it appears that the witness used the record in the Michigan foreclosure suit in arriving at his computations and he argues that because of this fact the quoted evidence of the witness was incompetent and should be entirely disregarded. At the conclusion of the cross-examination defendant made no objection to the testimony of the witness nor did he then make any motion to strike the same, and even if it be conceded that there is merit in the contention of defendant that the direct evidence of the witness, when tested by the cross-examination, was not competent evidence, nevertheless, in the light of the record, we would not be justified in disregarding the quoted evidence of the witness. Incompetent evidence, if material, is sufficient to establish a fact in issue, when received without objection. (Jones Commentaries on Evidence, 2d Ed., Vol. 2, p. 1436.) The evidence in question was relevant and material to the issues and the rule is well settled that when evidence is let in generally, without objection, it is in for all purposes, and it must be considered and allowed its full force. Even hearsay evidence which has been received without objection must be treated as competent. (Hoover v. Empire Coal Co., 149 Ill. App. 258; Perceival v. Schneider, 255 Ill. App. 428, 435. Other authorities to the same effect might be cited.) Had defendant at the time of the examination objected to the evidence on the ground of its incompetency, plaintiff might then have removed the objection to the same or introduced competent evidence by other witnesses as to the amount due. Defendant states in his brief that "if plaintiff Eddy will not furnish the court with competent evidence as to the amount of the note less the credits, that is his misfortune." This statement very clearly expresses the attitude of defendant. In answer to defendant's statement we feel impelled to say that if defendant





allowed plaintiff to prove any material issues in the case by incompetent evidence he will not now be heard to complain of the character of that evidence. In support of his contention defendant cites Pemoyer v. Heff, 95 U. S. 714, but in that case it appears (see p. 716) that the defendant objected to the evidence and gave specific reasons for his objection. Eddy v. Dodson, *supra*, presents a like record. Although defendant was a witness in the present suit he made no attempt to show in any way that he had paid the instant claim of plaintiff in whole or in part. His testimony shows that he was thoroughly familiar with the steps taken in the Michigan proceedings and that he knew that the property was sold for \$20,000 and that there was a deficiency of \$3,166.94. The trial court erred in allowing him to testify, over the objection of plaintiff, that the Michigan property, at the time of the sale, was actually worth \$40,000 and that if it had been sold for what it was worth the amount realized would have paid his entire indebtedness to plaintiff. He had full opportunity to rebut the testimony given by Harding but he failed entirely to do so. Defendant states, in his brief, that if plaintiff had introduced the letter of April 23, 1916, and rested, he would have made out a prima facie case, but that because he admitted that there was a credit of \$20,000 due defendant by reason of the foreclosure, his evidence thereby failed to make out a prima facie case, and yet defendant, in the trial court, asked plaintiff to stipulate that the Michigan land was sold for \$20,000 and that defendant was entitled to credit for that amount.

The judgment of the Superior Court of Cook County should be and it is affirmed.

AFFIRMED.

Gridley and Barnes, JJ., concur.



allowed plaintiff to prove any material issues in the case by in-  
 competent evidence he will not be deemed to complain of the  
 character of that evidence. In support of his contention defendant  
 and other Forney v. Hall, 88 W. 2. 124, was in that case it appears  
 (see p. 118) that the defendant objected to the evidence and gave  
 specific reasons for his objection. Forney v. Hall, 88 W. 2. 124.  
 a like reason. Although defendant was a witness in the present case  
 he made no attempt to show in any way that he had the instant  
 claim of plaintiff in whole or in part. His testimony shows that  
 he was thoroughly familiar with the steps taken in the Wisconsin prop-  
 erty and that he knew that the property was sold for \$20,000 and  
 that there was a deficiency of \$1,100. The trial court erred in  
 allowing him to testify, over the objection of plaintiff, that the  
 Wisconsin property, at the time of the sale, was actually worth  
 \$20,000 and that it had been sold for what it was worth the sum of  
 \$18,900 would have paid his entire indebtedness to plaintiff. He  
 has fully explained to rebut the testimony given by plaintiff but  
 he failed entirely to do so. Defendant states, in his brief, that  
 it plaintiff had introduced the issue of April 28, 1912, was rejected,  
 he would have had a trial issue over, but that because he objected  
 that there was a credit of \$20,000 the defendant by reason of the  
 testimony, his evidence thereby failed to make out a trial issue  
 over, and yet defendant, in the trial court, asked plaintiff to  
 stipulate that the Wisconsin land was sold for \$20,000 and that  
 defendant was entitled to credit for that amount.

The judgment of the Superior Court of Cook County should

be and it is affirmed.

ATTEST:

Ordley and Palmer, J.L., counsel.



34229

SADIE T. DEVITT, for use of  
LONDON GUARANTEE & ACCIDENT  
CO., LTD., a corporation,  
Appellee.

v.

MORRIS & COMPANY,  
a corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

259 I.A. 655<sup>3</sup>

MR. PRESIDING JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

This case was commenced July 16, 1923, in the name of Sadie T. Devitt. On October 17, 1929, leave was granted to substitute as party plaintiff "Sadie T. Devitt, for use of the London Guarantee & Accident Company, Ltd., a corporation." An amended declaration was filed, which alleged, inter alia, that Sadie T. Devitt, an employer, and defendant were operating under and subject to the provisions of the Workmen's Compensation Act; that said employer became liable to Bernard McNally, an employee, under the terms and provisions of the act, in the sum of \$3,943; that the Accident company had theretofore issued its policy of insurance indemnifying said employer against all payments she would have to make by reason of and in accordance with the act and that under the terms of the policy it paid to the employee the \$3,943 and thereby became subrogated to all of the rights of Sadie T. Devitt, the employer, and that defendant had notice of said subrogation prior to January 14, 1922. To the amended declaration defendant pleaded the general issue and a plea of release. The case was tried before the court, with a jury, and there was a verdict returned finding defendant guilty and assessing plaintiff's damages at \$3,584. Judgment was entered on the verdict and defendant has appealed.

The evidence shows that on September 27, 1921, a motor truck belonging to defendant collided with a team of horses attached

EDWARD T. LEVITT, for use of  
EDWARD T. LEVITT & COMPANY  
CO., INC., a corporation,  
Appellant,

v.

HOWARD A. LEVITT,  
a corporation,  
Appellee.

259 I.A. 655

STATE OF NEW YORK  
COURT OF APPEALS

MEMORANDUM FOR THE COURT

This case was commenced July 28, 1933, in the name of  
Edward T. Levitt. On October 14, 1933, leave was granted to sub-  
stitute as party plaintiff "Edward T. Levitt, for use of the com-  
pany known as 'Edward T. Levitt & Company, Inc., a corporation.'" In amended  
petition was filed, which alleged, inter alia, that Edward T.  
Levitt, an employer, and defendant were operating under and subject  
to the provisions of the Workers' Compensation Law; that said  
employer became liable to defendant, an employee, under the  
terms and provisions of the act, in the sum of \$5,000; that the  
defendant company had thereafter failed to pay to defendant  
the amount of said employer's liability to defendant; that said  
defendant company had in connection with the act and that under the  
terms of the policy it paid to the employer the \$5,000 and thereby  
became subrogated to all of the rights of Edward T. Levitt, and  
employer, and that defendant had failed to pay compensation prior  
to January 14, 1933. To the amended petition defendant pleaded  
the general issue and a plea of release. The case was tried before  
the court, with a jury, and there was a verdict returned finding  
defendant guilty and assessing plaintiff's damages at \$5,000. There-  
upon the court on the verdict and findings has granted  
The verdict was set on September 17, 1934, a writ  
of certiorari to defendant's verdict with a writ of habeas corpus



to a wagon belonging to Sadie T. Devitt and driven by Bernard McAnally, her employee, and that as a result of the collision McAnally was seriously injured.

Defendant argues several contentions, but in the view that we take of this appeal it will be necessary to refer to one only. Defendant offered in evidence a general and special release to defendant, executed by Sadie T. Devitt on January 14, 1922. The latter admitted the execution of the release and the receipt by her of the consideration named in it, \$225. There was no evidence that at the time of the execution of the release defendant had any notice of any interest of the subrogee plaintiff that would in any way affect the right of defendant to make the settlement in question. The decision of the Industrial Commission of Illinois fixing the compensation that should be paid McAnally by Sadie T. Devitt was filed on October 13, 1922. The court excluded the release and defendant contends that this ruling constitutes reversible error. Plaintiff concedes that the trial court gave a faulty reason for his ruling, but it seeks to justify the ruling on the ground that the release offered in evidence was for "an accident which occurred on or about the 27th day of September, 1922," whereas the special plea of release was "for an accident which occurred on or about the 27th day of January, 1921." Plaintiff argues that the court's ruling was correct because the instrument offered "was at variance with the special plea and at variance with the accident as alleged in plaintiff's declaration and proved by plaintiff." It is conceded that the release was executed on January 14, 1922, and therefore the date of the accident mentioned therein, September 27, 1922, is clearly a mistake. It appeared, however, that the release was executed in duplicate and defendant offered to introduce the duplicate, in which the date of the accident was stated as September 27, 1921, but the court also excluded the duplicate. The defense of release need not be set up by special plea



as a wagon belonging to Marie T. Davis and driven by Bernard McNally, her employee, and that as a result of the collision

McNally was seriously injured.

Defendant argues several contentions, but in the view

that we take of this appeal it will be necessary to refer to one

only. Defendant offered in evidence a general and special release

to defendant, executed by Marie T. Davis on January 14, 1932. The

latter admitted the execution of the release and the receipt by her

of the consideration named in it, \$2500. There was no evidence that

at the time of the execution of the release defendant had any notice

of any interest of the wharves plaintiff that would in any way affect

the right of defendant to make the settlement in question. The decision

of the Industrial Commission of Illinois fixing the compensation that

should be paid McNally by Marie T. Davis was filed on October 13,

1931. The court excluded the release and relevant evidence that

this release constituted a valid defense. Plaintiff contended that

the trial court gave a ruling in error, but it is not to

justify the ruling on the ground that the release offered in evidence

was for "an accident which occurred on or about the 13th day of

September, 1932," whereas the special plea of release was "for an

accident which occurred on or about the 13th day of January, 1931."

Plaintiff argues that the court's ruling was correct because the

instrument offered "was at variance with the special plea and at

variance with the fact that as alleged in plaintiff's declaration and

proved by plaintiff." It is contended that the release was executed

on January 14, 1932, and therefore the date of the accident men-

tioned therein, September 17, 1931, is clearly a mistake. It appeared,

however, that the release was executed in duplicate and defendant

offered to introduce the duplicate, in which the date of the accident

was stated as September 17, 1931, but the court also excluded the

duplicate. The defense of release need not be set up by special plea

as in an action on the case defendant is permitted under the general issue to give in evidence a release (Papke v. Hammond Co., 192 Ill. 631, 643), and the special plea may therefore be disregarded, and the question of variance need not be considered. The mere fact that the release stated a wrong date of the accident would not destroy the admissibility of the instrument. Moreover, the release offered also recites that Sadie T. Devitt "released and forever discharged the said Morris & Company of and from all claims, demands, damages, actions, causes of action, or suits at law or in equity, of whatsoever kind or nature, for or because of any matter or thing done, omitted or suffered to be done by said Morris & Company prior to and including the date hereof." The release should have been admitted and the trial court committed reversible error in excluding it.

The judgment of the Circuit Court of Cook County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley and Barnes, JJ., concur.

as in an action on the case defendant is permitted under the general  
issue to give in evidence a release. (Thompson v. Thompson, 102 Ill.  
411, 413), and the special plea may therefore be disregarded, and  
the question of release need not be considered. The court found that  
the release stated a wrong state of the defendant's mind not necessary to  
establish liability of the defendant. Moreover, the release stated also  
that the defendant, "Lewis T. Lewis" released and forever discharged the said  
Lewis & Company of and from all claims, demands, damages, costs,  
expenses of action, or suits or in equity, or whatsoever kind or  
nature, for or because of any matter or thing done, omitted or omitted  
to be done by said Lewis & Company before or including the date  
hereof. The release should have been signed and the trial court  
committed reversible error in admitting it.

The judgment of the Circuit Court of Cook County is

reversed and the cause is remanded for a new trial.

WILLIAM A. HARRIS, JUDGE.

GRILLY AND GIBSON, ATTORNEYS.



34253

BENZOLINE MOTOR FUEL CO.,  
a corporation,

Appellee.

v.

F. J. LEWIS,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 655<sup>4</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Benzoline Motor Fuel Company, a corporation, sued F. J. Lewis in the Municipal Court of Chicago in a first class action. The case was at issue on April 15, 1926. The record, as written up by the clerk, recites that on September 17, 1929, the cause came on in regular course for trial before Judge Fairbank and that "the plaintiff, though called in open Court, comes not, and fails to prosecute this cause. Wherefore, for want of prosecution of this cause, it is ordered that said plaintiff be nonsuited and that this suit be and it hereby is dismissed out of this Court \* \* \* that the defendant have judgment herein as in case of nonsuit and that the defendant have and recover of and from the plaintiff the costs," etc. On December 30, 1929, plaintiff made a written motion to vacate and set aside the order of September 17, 1929, and in support of the motion filed an affidavit of one of its attorneys. In the view that we have taken of this appeal it will not be necessary to recite all of the averments contained in the affidavit. The averments upon which the decision in this case is predicated are as follows: That on September 17, 1929, no order in reference to this case was made by Judge Fairbank and that the cause was dismissed for want of prosecution by the clerk of Judge Fairbank "for the reason that neither party appeared to have said cause set for trial on a day certain" and that

31223

RECORDED & INDEXED  
a corporation

Appellate

v.

F. J. Lewis

Appellant

LEGAL FIRM MUNICIPAL

CHICAGO, ILL.

253 I.A. 655

MR. JUSTICE LOUIS BRANHAM delivered the opinion of the court.

Remondine Motor Fuel Company, a corporation, sued F. J.

Lewis in the Municipal Court of Chicago in a first class action.

The case was at issue on April 18, 1930. The record, as written

up by the clerk, recites that on September 17, 1929, the case came

on in regular course for trial before Judge Fairbank and that "the

plaintiff, though called in open court, came not, and fails to

present this cause. Wherefore, for want of presentation of this

cause, it is ordered that said plaintiff be nonsuited and that this

suit be and it hereby is dismissed out of this court." \* \* That the

defendant have judgment herein as in case of nonsuit and that the

defendant have and recover of and from the plaintiff the costs."

etc. On December 30, 1929, plaintiff made a written motion to vacate

and set aside the order of September 17, 1929, and in support of the

motion filed an affidavit of one of its attorneys. In the view that

we have taken of this appeal it will not be necessary to recite all

of the averments contained in the affidavit. The averments upon which

the decision in this case is predicated are as follows: That on

September 17, 1929, no order in reference to this case was made by

Judge Fairbank and in the course was dismissed for want of presentation

by the clerk of Judge Fairbank "for the reason that neither party

appeared to have said cause set for trial on a day certain" and that



neither of the parties to the said suit was present at that time and place. Defendants filed a written motion to strike the motion of plaintiff from the files for the reason that "the matters therein in said motion contained as the same are stated and set forth therein are not sufficient in law for the said defendant to have or maintain or prevail in said motion against this defendant and that this defendant is not bound by law to answer the same." On January 10, 1930, the court denied defendant's said motion and further ordered that "on hearing petition of plaintiff to vacate order of dismissal of September 17, 1929, sustained, and cause reinstated." Defendant has appealed from this order.

While both parties have treated the motion of plaintiff as one in the nature of a writ of error coram nobis, we are of the opinion that it should be considered as a motion to vacate or expunge from the record what purports to be a judgment of the court but which, according to the uncontradicted averments in plaintiff's affidavit, was not the judgment of the court, but was interpolated in the record by the clerk of the court. Defendant did not deny the facts set up in plaintiff's affidavit, and his motion to strike is in the nature of a general demurrer.

"If, for any reason, the judgment is void, the court may, at a subsequent term, set aside such void judgment." (Keeler v. The People, 160 Ill. 179, 182.) "The rule that the court may not, after the lapse of the term, modify or set aside its final judgment, except motion to that end be entered at the judgment term, has no application to the vacating of void orders." (Peterson v. Metropolitan Nat. Bank, 83 Ill. App. 190, 191.) To the same effect is Rybarczyk v. Weglarsz, 204 Ill. App. 232, 235.) "A court may at any time clear its records of unauthorized and illegal entries therein." (Feikert v. Wilson, 38 Minn. 341.) This language is quoted with approval in Zandstra v. Zandstra, 226 Ill. App. 293, 302. In Cook v. Wood,



neither of the parties to the suit was present at that time and place. Defendant filed a written motion to strike the motion of plaintiff from the files for the reason that "the motion therein in said motion contained as the same are stated and set forth therein are not sufficient in law for the said defendant to have or maintain or prevail in said motion against this defendant and that this defendant is not bound by law to answer the same." On January 19, 1933, the court denied defendant's said motion and further ordered that "on hearing petition of plaintiff to vacate order of dismissal of September 17, 1932, reinstated, and cause reinstated." Defendant has appeared from this order.

This both parties have brought the motion of plaintiff on one in the nature of a writ of certiorari. We are of the opinion that it should be considered as a motion to vacate an order from the record that purpose is to be a judgment of the court but which according to the uncontested averments in plaintiff's affidavit was not the judgment of the court, but was introduced in the record by the clerk of the court. Defendant did not deny the facts set up in plaintiff's affidavit, and his motion to strike is in the nature of a general demurrer.

"It, for any reason, the judgment is void, the court may, at a subsequent term, set aside such void judgment." (Ex parte Y. The People, 100 Ill. 179, 182.) "The rule that the court may not, after the lapse of the term, modify or set aside its final judgment, except motion to that end be entered at the judgment term, has no application to the vacating of void orders." (Ex parte Y. The People, 100 Ill. 179, 182.) To the same effect is Ex parte Y. The People, 100 Ill. 179, 182, 183. "A court may at any time clear its records of unauthorized and illegal entries therein." (Ex parte Y. The People, 100 Ill. 179, 182, 183.) This language is quoted with approval in Ex parte Y. The People, 100 Ill. 179, 182, 183.

24 Ill. 295, it was held that courts, at a subsequent term, might correct misprisions of their clerks. After the expiration of the term courts have the power over the record to correct errors and mistakes of their officers. (Coughran v. Gutcheus, 18 Ill. 390, 392.) In Blakemore v. Wilson, 61 Ill. App. 454, the appellees made a motion in the Circuit Court to expunge from the record a false jurat appearing in it. It was shown to the court that it was a false record and that it had been interpolated in the record by the clerk on November 15, 1894, and dated November 9, 1894, so as to appear to have been made in term time. The court (opinion by Mr. Justice Cartwright) said: "It is contended that the motion was to amend a record after the term, and that no amendment could be made in the absence of a memorial paper or minute from which the fact could be ascertained. The motion was not to amend or change a record made by the court, but to expunge a false and fraudulent interpolation from the record which had neither been made or authorized by the court. That the court had power to protect its records from such acts we think can not be doubted." There is nothing in the affidavit of plaintiff to warrant the assumption that the clerk acted with fraudulent intent, but the rule would be the same if he acted through mistake only.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley and Barnes, JJ., concur.



24 Ill. 285, it was held that courts, as a subsequent term, might correct misstatements of their clerks. After the expiration of the term courts have the power over the record to correct errors and mistakes of their clerks. (Conaghan v. Conaghan, 18 Ill. 390, 392.) In Wainwright v. Wainwright, 51 Ill. App. 484, the appellee made a motion in the Circuit Court to expunge from the record a false entry appearing in it. It was shown to the court that it was a false record and that it had been indicated in the record by the clerk on November 15, 1894, and dated November 9, 1894, so as to appear to have been made in term time. The court (opinion by Mr. Justice Conaghan) said: "It is contended that the motion was so amended a record after the term, and that no amendment could be made in the absence of a memorial paper or minute from which the fact could be ascertained. The motion was not to amend or change a record made by the court, but to expunge a false and fraudulent interpolation from the record which had neither been made or authorized by the court. That the court had power to protect the record from such acts we think can not be doubted." There is nothing in the authority of plaintiff to warrant the assumption that the clerk acted with fraudulent intent, but the rule would be the same if he acted through mistake only.

The judgment of the Municipal Court of Chicago is

affirmed.

GRUBBS and KERNAN, JJ., concur.



34259

142  
ECONOMY PUMPING MACHINERY CO.,  
a corporation,  
Appellant,

v.

CHARLES R. EWING, EDDYSTONE HOMES  
BUILDING CORPORATION, a Corporation,  
A. W. S. CONSTRUCTION COMPANY, a  
Corporation, and ALBERT W. SWAYNE  
et al.,  
Appellees.

7  
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

259 I.A. 655<sup>5</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the above entitled cause the chancellor sustained a general demurrer to an amended bill to foreclose a mechanic's lien, denied the motion of complainant for leave to file a second amended bill and dismissed the bill for want of equity. Complainant has appealed from this order.

Complainant contends that "this Court should either reverse the decision of the trial Court sustaining the demurrer or remand the case to the trial Court with directions to grant leave to the complainant to file a further amended bill."

"Complainant concedes at the outset that its bill is not usual in form and lacks the conciseness which would be possible under a less involved set of facts, but contends that all the facts essential to maintaining its action appear therein, that the remedy sought is clearly stated and that the defendants are sufficiently apprised of complainant's claim, particularly since the facts lie peculiarly within their knowledge." Defendants, in support of their contention that the order should be affirmed in toto, call attention to the fact that the amended bill contains allegations that complainant was a contractor and other allegations

1970

... ..  
... ..  
... ..

UNION PACIFIC RAILROAD CO., CHICAGO, ILL.  
SHEPHERDSON & COMPANY, NEW YORK  
JANUARY 10, 1907

1. The first group of people who are not allowed to enter the country are those who are not citizens of the United States.

● 2008 年 10 月 1 日起

7. Was ist die Bedeutung der folgenden Begriffe?

is the above original name the Chinese listed as follows:

3-10-68 10:00 AM

There is still a great deal of work to be done in this field.

Investigation of the above cases has shown that the following factors are important in the development of the disease:

• 7470 51st Ave NE, Seattle, WA 98115

*[Faint, illegible text at the bottom of the page]*

Reverse the position of the "X" marks and repeat the test.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

<sup>10</sup>. I did not know whether a child is born in the same way as a man or a woman.

“Confidential”

is from and I hope the conversation will be useful to me and to you.

about 100 ft. in length and about 10 ft. in diameter and

ALL THIS, without regard to the right of information of citizens

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

...the ... ..

... ..

RECOMMENDATION: The Committee recommends that the Department of Health and Human Services be authorized to conduct a study to determine the feasibility of establishing a national system of health care delivery, including the establishment of a national health care delivery system, and to report the results of the study to the Committee by the end of the fiscal year 1990.

Attention is directed to the fact that the number will continue

Mr. [redacted] has returned a new photograph and another



that he was a subcontractor, and argue "that a bill of complaint to foreclose a mechanic's lien cannot be so loosely drafted that the complainant may allege alternative causes of action inconsistent with each other." Even if defendants are correct that the said allegations make the amended bill defective, such defect can be cured by a second amended bill. Defendants further contend that certain material allegations in the amended bill are contradictory. There is warrant for this contention, but a new amended bill may also cure such defects. Defendants further argue that "under Section 33 of the Mechanic's Lien Act, a subcontractor must commence suit to enforce his lien within four months from the time that the final payment is due;" that "the statute commenced to run on February 19, 1929, this being the date that the last of the materials, labor and apparatus were furnished," and that "the Eddystone Homes Building Corporation, the owner of the property, was not brought into the suit until August 30, 1929, when the amendment to the bill of complaint was filed, and at that time the four-month period within which to file suit as provided for by statute, had expired." It is sufficient to say, in answer to this contention, that the amended bill alleges "that on the 22nd day of December, A. D. 1928, at the request of said defendant, Charles R. Ewing, complainant furnished for temporary service in connection with said improvements on said premises a 3 x 6 Triplex Plunger Pump the reasonable value of which is \$35.00 and that was the price named therefor and agreed to by said defendant, Charles R. Ewing; and again at the request of the defendant, Charles R. Ewing, complainant furnished for use in the improvement of said premises a pump and motor for five months prior to May 6, 1929, at the reasonable price and agreed price with said defendant, Charles R. Ewing, of \$15.00 each month, amounting to \$75.00, making a total of extras furnished by the complainant of \$100.00, no part of which has been



that he was a subcontractor, and argue "that a bill of complaint  
to recover a mechanic's lien cannot be so loosely drafted that  
the complaint may allege alternative causes of action known-  
alike with each other." Even if statements are correct that the  
said allegations make the amended bill defective, such defect can be  
cured by a second amended bill. Defendant further claims that  
certain material allegations in the amended bill are contradictory.  
There is nothing in this contention, but a new amended bill  
may also be filed. Defendant further argues that "Under  
Section 30 of the mechanic's lien act, a subcontractor must commence  
suit to enforce his lien within four months from the time that the  
final payment is due," that "the statute commenced to run on February  
12, 1927, this being the date that the last of the materials, labor  
and apparatus were furnished," and that "the Wisconsin House Building  
Corporation, the owner of the property, was not brought into the suit  
until August 30, 1927, when the amendment to the bill of complaint  
was filed, and at that time the four-month period within which to  
file suit was provided for by statute, has expired." It is sufficient  
to say, in answer to this contention, that the amended bill alleges  
"that on the 22nd day of December, A. D. 1927, at the request of said  
defendant, Charles E. Swing, complaint was filed for recovery  
against in connection with said improvements on said premises a B & B  
Tulip Trustee using the reasonable value of which is \$25.00 and that  
said price named defendant and agreed to by said defendant, Charles  
E. Swing; and again at the request of the defendant, Charles E. Swing,  
complaint was filed for use in the improvement of said premises a  
pump and motor for five months price to May 2, 1928, at the reasonable  
price and agreed price with said defendant, Charles E. Swing, of  
\$15.00 per month, amounting to \$75.00, making a total of expense  
furnished by the complaint of \$100.00, no part of which has been

paid;" and that four months had not elapsed between May 6, 1929, and August 30, 1929. Defendants next contend that "Section 24 of the Mechanic's Lien Act is mandatory and when the contractor has failed to furnish the owner with a sworn statement under Section 5, the subcontractor must serve his notice on the owner or his agent in order to perfect his lien," and that complainant admits that his bill does not allege service on the owner as required by this section. Section 24, ch. 82, Cahill's Ill. Rev. St., 1929, contains the following proviso: " \* \* \* such notice shall not be necessary when the sworn statement of the contractor or sub-contractor provided for herein shall serve to give the owner notice of the amount due and to whom due, \* \* \*." The amended bill alleges "that the defendant, A. W. S. Construction Company, or its duly authorized agent, furnished to the defendant Eddystone Homes Building Corporation, a statement under oath, or affidavit, from which said defendant, Eddystone Homes Building Corporation, obtained full notice and knowledge of the agreement between the complainant and the defendant Ewing." The legal title to the premises, according to the allegations, was in the Eddystone Homes Building Corporation and the amended bill also contains allegations that Ewing was the general contractor with whom complainant made the agreement to furnish the materials, labor and apparatus in question. There is no merit in the instant contention.

We have considered several other contentions of defendants but we are satisfied they do not fairly answer the contention of complainant that the chancellor erred in denying his motion for leave to file a second amended bill. While we do not hold that the chancellor erred in sustaining the demurrer to the amended bill, we are satisfied that there are sufficient allegations in it to warrant the conclusion that a new amended bill might cure the defects



paid" and the two months has not elapsed between July 1, 1933, and August 30, 1933. Defendants next contend that "Section 24 of the Mechanics' Lien Act is mandatory and when the contractor has failed to furnish the owner with a sworn statement under Section 2, the subcontractor must serve his notice on the owner or his agent in order to perfect his lien," and that complainant admits that his bill does not allege service on the owner as required by this section. Section 24, ch. 88, Caplin's Ill. Rev. St., 1929, contains the following provision: " \* \* \* such notice shall not be necessary when the sworn statement of the contractor or sub-contractor provided for herein shall serve to give the owner notice of the amount due and is when due, \* \* \* ". The amended bill alleges "that the defendant, A. W. E. Construction Company, or its duly authorized agent, furnished to the defendant Haysman House Building Corporation, a statement under oath, or affidavit, sworn to by said defendant, Haysman House Building Corporation, which said statement was knowledge of the agreement between the complainant and the defendant being". The legal title to the premises, according to the allegations, was in the defendant Haysman Building Corporation and the amended bill also contains allegations that being was the general contractor with whom complainant made the agreement to furnish the materials, labor and expenses in question. There is no merit in the instant contention.

We have examined several other contentions of defendants but we are satisfied they do not fairly answer the contention of complainant that the chancellor erred in denying his motion for leave to file a second amended bill. While we do not hold that the chancellor erred in overruling the demurrer to the amended bill, we are satisfied that there are sufficient allegations in it to warrant the conclusion that a new amended bill might cure the defects



in the instant one and set up a state of facts that would justify relief, and as it is clear from the allegations that complainant furnished materials, labor and apparatus in the improvements made on the premises in question it would be inequitable to deny him an opportunity to file a new amended bill to enforce his claim.

The order of the Circuit Court of Cook County, in so far as it overrules the motion of complainant for leave to file a second amended bill of complaint and dismisses complainant's amended bill for want of equity, is reversed and the cause is remanded with directions to allow complainant to file a further amended bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Barnes, JJ., concur.

in the instant one and set up a state of facts that would justify  
relief, and as it is clear from the allegations that complainant  
furnished materials, labor and expertise in the improvements made  
on the premises in question it would be inequitable to deny him  
an opportunity to file a new amended bill to enforce his claim.  
The order of the Circuit Court of Cook County, in so far  
as it overrules the motion of complainant for leave to file a second  
amended bill of complaint and dismisses complainant's amended bill  
for want of equity, is reversed and the same is remanded with  
directions to allow complainant to file a further amended bill.  
BY THE COURT: WILLIAM J. HARRIS, Clerk.

GRILLY and BARNES, Pls., versus.

34289

MID-CITY SECURITIES CORPORATION,  
Appellee,

v.

MILOUR DANIELS et al.,  
Defendants.

DANIEL D. CRAFT et al.,  
Appellants.

APPEAL FROM CIRCUIT  
COURT OF COOK COUNTY.

259 I.A. 656<sup>1</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On June 20, 1927, Mid-City Securities Corporation filed its bill to foreclose an alleged mechanic's lien. Milour Daniels, Jack Daniels, her husband, Daniel D. Craft and Arthur C. Lueder, trustees, Harold S. Anderson et al. were made defendants. A cross-bill praying that the bill be dismissed for want of equity and that complainant's notice of lien be declared a cloud upon the title of cross-complainants was filed by Daniel D. Craft, trustee, and Daniel D. Craft, Joseph E. McCaughy and Ryland A. Wolcott, doing business as Craft, McCaughy & Wolcott. A master made a report recommending a decree in favor of complainant and against cross-complainants. The chancellor confirmed the report and a decree was entered directing the sale of the premises in question for the purpose of satisfying complainant's lien. Daniel D. Craft, trustee, and Daniel D. Craft et al., doing business as Craft, McCaughy & Wolcott have appealed.

On September 1, 1923, Harold S. Anderson, who then owned the premises, 1322 West 108th street, in Chicago, entered into a written contract of sale of the said premises with Jack Daniels and Milour Daniels, his wife, at a price of \$4,350. The contract recites that the vendee has paid \$300 on the purchase price and has assumed and agreed to pay an incumbrance on the premises of \$1,500.



WILSON BROS. CO.,  
Applicant.

v.

WILSON BROS. CO.,  
Defendants.

DANIEL D. GRAFT, et al.,  
Appellants.

WILSON BROS. CO.,  
Defendants.

3591A.656

MR. JUSTICE DELIVERED THE OPINION OF THE COURT.

On June 30, 1927, Wilson Bros. Corporation filed its bill to recover an alleged mechanic's lien. Wilson Bros. claimed that it had furnished materials and labor for the construction of a building owned by Daniel D. Graft and Arthur C. Jacoby, trustees. Harold S. Anderson, et al. were made defendants. A cross-complaint was filed by Daniel D. Graft, trustee, and Daniel D. Graft, Joseph E. McGowan and Richard A. Weiss, doing business as Graft, McGowan & Weiss. A master made a report recommending a decree in favor of complainant and against cross-complainant. The chancellor confirmed the report and a decree was entered directing the sale of the premises in question for the purpose of satisfying complainant's lien. Daniel D. Graft, trustee, and Daniel D. Graft, et al., doing business as Graft, McGowan & Weiss have appealed.

On September 1, 1928, Harold S. Anderson, who then owned the premises, 1328 West 108th Street, in Chicago, entered into a written contract of sale of the said premises with Jack Daniels and his wife, as a price of \$4,250. The contract recited that the vendor had paid \$200 on the purchase price and had assumed and agreed to pay an incumbrance on the premises of \$1,500.

and that the balance is to be paid in monthly payments of \$40. About the date of this contract Anderson sold his interest in the same to the firm of Craft, McCaughy & Wolcott, cross-complainants, and also conveyed the legal title to the premises to Daniel D. Craft, trustee. Craft was a member of that firm. On August 1, 1927, the Danielses owed, on the contract, \$390.57 principal past due and \$43.24 interest, and \$22.50 interest on the first mortgage. On August 9, 1927, Craft, McCaughy & Wolcott served notice upon the Danielses of the forfeiture of the said contract and demanded immediate possession of the premises, and they then brought a forcible entry and detainer suit in the Municipal Court of Chicago against the Danielses and a judgment for possession was entered therein in their favor, and under process of the court the Danielses were evicted from the premises. The latter were personally served in the instant case, but failed to file an appearance and were defaulted as to the original bill and the cross-bill. On April 28, 1925, Milour Daniels entered into a written contract with Triangle Plumbing & Heating Company for the work and materials which form the subject matter of the alleged lien set up in the bill. That company commenced work on the contract June 2, 1925, and completed it June 29, 1925, and on the following day assigned the contract to complainant. Prior to the time that the Triangle company entered into the said contract an official of the company discovered that the legal title to the premises was not in the Danielses, and he then had a conversation with the latter in reference to the title to the property, and about April 28, 1925, the Danielses furnished the company with an equity statement in writing which showed that the legal title was in Craft, McCaughy & Wolcott and that the Danielses had merely a written contract to purchase the property. The address of Craft, McCaughy & Wolcott was given in the statement. The company served no notice upon Craft et al. of the making of the



and that the balance is to be paid in monthly payments of \$40.  
 About the date of this contract Anderson sold his interest in the  
 same to the firm of Grant, McGowan & Volcott, whose commission  
 and also conveyed the legal title to the premises to Daniel D. Grant,  
 trustee. Grant was a member of that firm. On August 1, 1887, the  
 balance owed, on the contract, \$300.57 principal past due and \$48.24  
 interest, and \$28.50 interest on the first mortgage. On August 7,  
 1887, Grant, McGowan & Volcott served notice upon the Danielson  
 of the forfeiture of the said contract and demanded immediate possession  
 of the premises, and they then brought a forcible entry and detainer  
 suit in the Municipal Court of Chicago against the Danielson and a  
 judgment for possession was entered therein in their favor, and under  
 process of the court the Danielson were evicted from the premises.  
 The latter were personally served in the instant case, and failed to  
 file an appearance and were defaulted as to the original bill and the  
 cross-bill. On April 26, 1888, Milton Danielson entered into a written  
 contract with Triangle Plumbing & Heating Company for the work and  
 materials which form the subject matter of the alleged law set up in  
 the bill. That company commenced work on the contract June 2, 1888,  
 and completed it June 20, 1888, and on the following day assigned the  
 contract to complainant. What is the time that the Triangle company  
 entered into the said contract an official of the company discovered  
 that the legal title to the premises was not in the Danielson, and he  
 then had a conversation with the latter in reference to the title to  
 the property, and about April 26, 1888, the Danielson furnished the  
 company with an equity statement in writing which showed that the  
 legal title was in Grant, McGowan & Volcott and that the Danielson  
 had merely a written contract to purchase the property. The address  
 of Grant, McGowan & Volcott was given in the statement. The  
 company never received notice upon Grant et al. of the making of the



contract with Milour Daniels nor of its intention to carry out the terms of the same. It sent a representative to examine the terms of the contract between Anderson and the Danielses and he reported the result of his examination to the president of the company. The purchase contract contained a provision that the Danielses should not sell, assign or convey their interest in the contract or incumber the property, without the written consent of Anderson. It also provided for forfeiture if the Danielses failed to comply with the provisions of the contract. The proof showed that none of the members of the firm of Craft, McCaughy & Wolcott had any notice of the contract between the Triangle company and Milour Daniels or that the company had made any of the improvements that form the basis of the mechanic's lien claim until late in 1926 or early in 1927. The charge made by the company for labor and materials furnished under the contract was about \$550, but payments made by the Danielses on account of the same reduced the amount due to \$406.50.

The decree found that the bill was filed more than thirty days before the forfeiture was declared and that the lien of complainant had fully attached to the interest of the Danielses in the premises prior to the forfeiture "and that therefore complainant's lien on the interest of Daniels could not be and was not vitiated nor affected by the forfeiture, and that complainant has a valid mechanic's lien against the interest or equity of Daniels in said premises on which Daniels had paid the sum of \$923.18 at the time of the forfeiture, to secure the payment of \$406.50 with interest at five per cent from the 29th day of June, 1927, and costs and expenses of this proceeding \* \* \* against the interest or equity of Daniels in said premises at the time of said forfeiture; \* \* \* that there is due and owing the complainant \* \* \* \$440.56, for which amount the complainant has a prior lien against the premises involved and that the interests of

contract with Wilson Daniels nor of its intention to carry out  
the terms of the same. It sent a representative to examine  
the terms of the contract between Anderson and the Daniels  
and he reported the results of his examination to the president of  
the company. The purchase contract contained a provision that  
the Daniels should not sell, assign or convey their interest  
in the contract or in the property, without the written con-  
sent of Anderson. It also provided for forfeiture if the Daniels  
failed to comply with the provisions of the contract. The president  
showed that none of the members of the firm of Swift, McGowan &  
Associates had any notice of the contract between the Daniels company  
and Wilson Daniels or that the company had made any of the improve-  
ments that form the basis of the mechanics' lien claim until after  
in 1935 or early in 1937. The change made by the company for labor  
and materials furnished under the contract was about \$100, but pay-  
ments made by the Daniels on account of the same reached the amount  
due to \$400.00.

The board found that the bill was filed more than thirty  
days after the Daniels had received and paid the lien of com-  
plaintant and fully attached to the interest of the Daniels in the  
premises prior to the forfeiture and that character of complaintant's  
lien on the interest of Daniels could not be and was not violated nor  
affected by the forfeiture, and that complaintant has a valid mechanics' lien  
against the interest of Daniels in said premises on  
which Daniels had paid on or about \$100.00 at the time of the forfeit-  
ure, to secure the payment of \$400.00 with interest at five per cent  
from the 23rd day of June, 1937, and costs and expenses of this pro-  
ceeding \* \* \* against the interest or equity of Daniels in said premises  
at the time of said forfeiture; \* \* \* and there is due and owing  
the complaintant \* \* \* \$400.00, less which amount the complaintant has  
a prior lien against the premises involved and the interest of



all other parties to this cause are subsequent to the lien of the complainant herein;\*\* that the defendants pay or cause to be paid to complainant or its solicitors within three days from the entry of the decree, that sum (\$440.56) with interest from the date of the Master's report, and also the costs as taxed and in the event payment was not so made, the premises described in the bill of complaint, including all buildings and improvements thereon \* \* \* or such part as should be sufficient to satisfy the amount of money adjudged to be due complainant, with interest \* \* \* should be sold," etc.

The principal points relied upon for reversal are that the lien of complainant was a lien only on the equity of the Danielses arising out of the purchase contract and that the forfeiture of this contract extinguished the equity of the Danielses, and that the decree in finding that complainant had a prior lien against the premises that was superior to the interests of all the other parties to the cause was clearly erroneous under the facts and the law of the case, and also that the chancellor erred in not dismissing the original bill and in dismissing the cross bill. On the trial appellants conceded that if the lien claimant would offer to comply with the terms of the contract between the Danielses and Anderson, equity would then protect its lien, and it appears that they stood ready and willing, in the trial court, to allow complainant to take over the interest of the Danielses in the contract notwithstanding the forfeiture, but that complainant refused to accept the offer. The attitude of the lien claimant in the lower court and in this court is that it was not obliged to carry on the contract to protect its lien and that for this reason it refused the offer.

Section 1 of the Mechanics' Liens Act provides: "That any person who shall by any contract \* \* \* with the owner of a lot



all other parties to this case are respondents in the list of the  
complainant herein; that the defendant pay or cause to be paid  
to complainant or its solicitors within three days from the entry  
of the decree, sum of (\$440.88) with interest from the date of  
the Master's report, and also the costs as taxed and in the event  
payment was not so made, the premises described in the bill of  
complaint, together with all other and improvements thereon  
or such part as should be sufficient to satisfy the amount of money  
adjudged to be due complainant, with interest \* \* \* should be sold,  
etc.

The principal points raised upon the reversal are that  
the lien of complainant was a lien only on the equity of the  
mortgage arising out of the purchase contract and that the for-  
feiture of this contract extinguished the equity of the mortgagor,  
and that the decree in finding that complainant had a prior lien  
against the premises that was superior to the interests of all the  
other parties to the cause was clearly erroneous under the facts  
and the law of the case, and also that the chancellor erred in not  
dissolving the original bill and in dismissing the cross bill. On  
the trial appellant contended that if the lien claimant would offer  
to comply with the terms of the contract between the mortgagor and  
mortgagee, equity would then protect the lien, and it appears that  
they stood ready and willing, in the trial court, to allow complainant  
to take over the interest of the mortgagor in the contract notwithstanding the forfeiture, but that complainant refused to accept the  
offer. The attitude of the lien claimant in the lower court and  
in this court is that it was not obliged to comply on the contract  
to protect the lien and that this reason is waived the offer.  
\* \* \* I of the Chancellor, I have not provided that  
any person who shall by any contract \* \* \* with the owner of a fee

\* \* \* or with one whom such owner has authorized or knowingly permitted to contract for the improvement of, or \* \* \* furnish material \* \* \* shall have a lien upon the whole of such lot \* \* \*. This lien shall extend to an estate in fee, for life, for years, or any other estate \* \* \* or interest which such owner may have in the lot \* \* \* at the time of making such contract or may subsequently acquire therein," etc. Under this section work must be authorized by the owner if not contracted for by him, or be contracted for by one whom he has knowingly permitted to make such contract. The evidence shows that appellants did not make the contract and did not knowingly permit the making of it, and did not authorize the contract to be made by Milour Daniels, and did not know the work was being done. The contention of appellee that the Danielses, vendees, were "owners" within the meaning of the act is, of course, a meritorious one. A number of decisions of the Supreme Court support this contention. In fact, section 1 provides that "this lien shall extend to an estate in fee, for life, for years, or any other estate \* \* \* or interest which such owner may have in the lot \* \* \* at the time of making such contract or may subsequently acquire therein." While the Danielses were owners within the meaning of the statute, only such interest in the premises as they might have would be subject to the lien. Hickox v. Greenwood, 94 Ill. 266, is the leading case on the subject. In that case the contract was not made with Hickox, the owner of the fee, but with Peat, who was the owner of a contingent interest in the lot, depending upon his compliance with his contract of purchase with Hickox. The court said: "The lien, then, was not upon the fee which Hickox held, but upon the interest of Peat, whatever that was, under his contract with Hickox. \* \* \* Hickox in this case holds the fee, and it can not be taken from him lawfully until his



1. The first question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.

2. The second question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.

3. The third question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.

4. The fourth question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.

5. The fifth question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.

6. The sixth question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.

7. The seventh question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.

8. The eighth question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.

9. The ninth question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.

10. The tenth question is whether the defendant is a person who is habitually in the company of the plaintiff. The evidence shows that the defendant is a person who is habitually in the company of the plaintiff.



purchase money and interest thereon be fully paid to him. This, too, can only be done in accordance with his contract. He is not bound to part with that title, under the terms of his sale, until he be paid the whole of the principal and interest to accrue up to 1886; \* \* \* No doubt, the interest of Peat in this land may be subjected to sale in this proceeding, but nothing else." In the Hickox case the purchaser was, apparently, still in possession and the vendor had not forfeited the purchase contract. Appellee contends that even in a mechanic's lien proceeding equity must be done and that the instant case presents a state of facts which calls for the exercise of the broadest equitable powers of the court. In the recent case of Heier v. Kaplan, 313 Ill. 448, 451, the court said: "Mechanics' liens are purely statutory. This court has uniformly held that the statute relative to mechanics' liens is in derogation of the common law and that it must be strictly construed. \* \* \* The lien should be enforced when the party brings himself within the provisions of the statute, but it should not be extended to cases not provided for by the language of the act even though they may fall within its reason." And again at 455-6: "The remedy by mechanic's lien is in addition to the ordinary remedies afforded by the common law and is a privilege enjoyed by one class of the community above other classes. A party seeking to enforce such a lien must bring himself strictly within the terms of the statute." The burden was therefore upon the lien claimant to bring itself strictly within the terms of the statute. Nor can we agree with its major argument that this case presents facts that should specially appeal to the equitable powers of the court. The evidence shows that before the Triangle Plumbing & Heating Company entered into the contract with Milour Daniels it learned that the title to the property was in appellants and it secured from the Danielses a written equity statement that apprised it fully of the exact interest of the Danielses, and the names and

government money and interest thereon be truly paid to him. This, too, can only be done in accordance with his contract. He is not bound to pay with that title, under the terms of his sale, until he has paid the whole of the principal and interest to amount up to \$1000; \* \* \* He says, the interest of fact in the land may be retained to sale in this proceeding, but nothing else. In the Hickox case the government was, apparently, still in possession and the vendor had not forfeited the purchase contract. Appellate courts have even in a vendor's lien proceeding simply said he owns and that one instant case presents a state of facts which calls for the exercise of the broadest equitable powers of the court. In the recent case of Wright v. Kagan, 215 Ill. 446, 451, the court said: "Mechanics' liens are purely statutory. This court has uniformly held that the estate relative to mechanics' liens is in derogation of the common law and that it must be strictly construed. \* \* \* The lien should be enforced when the party brings himself within the provisions of the statute, and it should not be extended to cases not provided for by the language of the act even though they may fall within the reason." And again at 450-51: "The remedy by mechanics' lien is an addition to the ordinary remedies afforded by the common law and is a privilege enjoyed by one class of the community against other classes. A party seeking to enforce such a lien must bring himself within the terms of the statute." The burden was therefore upon the lien claimant to bring himself entirely within the terms of the statute. You can agree with the writer's statement that this case presents facts that should specially appeal to the equitable powers of the court. The evidence shows that before the Triangle Building & Machinery company entered into the contract with Wilson Daniels it learned that the title to the property was in Wright and it secured from the Danielses a written equity statement that Wright is truly of the exact interest of the Danielses, and the names and



address of the title holders. Its representative read the contract between the Danielses and Anderson and reported to the president of the company the contents of the same. This contract provided that the Danielses should not encumber the premises without the written consent of Anderson and it further provided for forfeiture if the Danielses failed to comply with the contract provisions, and yet the Triangle company took no steps to notify cross-complainants, title holders, that it intended to furnish material and labor for improvements to be made upon the premises. Knowing the entire situation in reference to the title and the limited interest of the Danielses in the property, it ignored the title holders and entered into a contract with Milour Daniels and for some time after the improvements were made sought payment from the Danielses only. If it desired a lien as to the interest of the title holders, and wished to deal <sup>fairly</sup> with them, it was an easy matter to obtain it at the time the contract was made, or prior to the time of furnishing the work and material. It had notice that the continuance of the interest of the Danielses in the premises was conditioned upon the performance of the covenants of the purchase contract and if it wished to protect its lien as to their interest it should have made the payments due under the contract, if the Danielses failed in that regard. Even at the hearing, when cross-complainants offered to allow the lien claimant to step into the shoes of the Danielses, it refused the offer. As a special ground for equitable relief complainant states that the Danielses "were compelled, for reasons of sanitation, \* \* \* to comply with the requirements of the Health Department of the City of Chicago to install sewer, water and toilet facilities, where none had ever been before." It apparently wishes the court to understand that all the work and material furnished by the Triangle company was ordered by Milour Daniels solely because required to do so by the health department. The vice-president of the Triangle company testified



address of the State holders. The representative used the contract between the State and the company to the president of the company the contract of the State. The contract provided that the State should not withdraw the promise without the written consent of the company and it further provided for the State to be bound to comply with the contract provisions, and that the State should not be able to stop or delay the work. It is further provided that it is intended to be a binding contract and that the State should be bound to make upon the promise. Having the entire situation in reference to the State and the limited interest of the State in the property, it appears the State holders and entered into a contract with the State holders and for some time after the improvement was made sought payment from the State holders only. It is desired a lien on the interest of the State holders, and wished to be paid in full, it was an easy matter to obtain it at the time the contract was made, or prior to the time of furnishing the work and material. It had notice that the continuance of the interest of the State in the property was conditional upon the performance of the obligations of the purchase contract and it is wished to protect the lien on the State interest it should have made the payment the way the contract, it is wished to be paid in full. Even at the time, when the contract was offered to allow the lien claimants to stop into the State of the State, it returned the offer. A special ground for equitable relief complaint states that the State "were compelled, for reasons of necessity, to comply with the requirements of the Health Department of the City of Chicago to install sewer, water and toilet facilities, where none had ever been before." It apparently wishes the court to understand that all the work and material furnished by the State company was ordered by William Hendon solely because required to do so by the Health Department. The vice-president of the State company testified

that he had a conversation with the Danielsons in reference to the work to be done and that they gave him a notice that they had received from the Board of Health of the City of Chicago, which he had been unable to find, that notified the Danielsons "to do away with the privies they had in the back yard, have the sewer out in the street, that they were to connect in the sewer and the water." The witness was allowed to give his recollection as to the contents of the alleged notice, over the strenuous objection of appellants. Apparently, the testimony was allowed upon the promise of the witness that he would obtain a correct copy of the notice from the records of the Board of Health. This promise was not kept. Complainant also contends that there was an ordinance of the City of Chicago that required improvements of the kind involved in the claim of complainant, but no such ordinance appears to have been introduced in evidence. Appellants were not apprised of the receipt of the alleged notice and they are not charged with constructive notice of the receipt of the same. Furthermore, the work done by complainant was not limited to the work required by the alleged notice, but in addition covered the installation of a bathtub, pedestal lavatory and down spouts. The proof with respect to the alleged notice is not of a satisfactory kind. Neither the City nor the Danielsons were called to give testimony in reference to the same. But assuming that the Danielsons did receive such a notice, that fact did not authorize them to bind cross-complainants as to work done where the evidence clearly shows that no request was made upon them to make the said installations and the proof shows that they knew nothing about the notice. The vice-president of the Triangle company, with full knowledge of the interest of appellants in the property, saw fit to ignore them in the matter of the notice and the work done.

Complainant admits that cross-complainants, appellants,



that he had a conversation with the Defendant in reference to the work to be done and that they gave him a notice that they had received from the Board of Health of the City of Chicago, which he had been unable to find. That notified the Defendant "to do away with the privies they had in the back yard, have the sewer out in the street, and they were to connect in the sewer and the water." The witness was allowed to give his recollection as to the contents of the alleged notice, over the strenuous objection of the appellant. The testimony was allowed upon the ground of the witness that he would obtain a correct copy of the notice from the records of the Board of Health. This promise was not kept. The witness also contends that there was an ordinance of the City of Chicago that required improvements of the kind involved in the claim of defendant, but no such ordinance appears to have been introduced in evidence. Appellants were not apprised of the result of the alleged notice and they are not charged with constructive notice of the result of the same. Furthermore, the work done by defendant was not limited to the work required by the alleged notice, but in addition covered the installation of a bathroom, several lavatories and down spouts. The proof with respect to the alleged notice is not of a contradictory kind. Neither the City nor the Defendant were called to give testimony in reference to the same. But assuming that the Defendant did receive such a notice, that fact did not entitle them to bind cross-complainants as to work done where the evidence clearly shows that no payment was made upon them to make the said installation and the proof shows that they knew nothing about the notice. The vice-president of the Triangle company, with full knowledge of the interest of appellants in the property, now fit to ignore them in the matter of the notice and the work done. Defendant admits that cross-complainants, appellants,



had the right to forfeit the Danielsses' purchase contract, but it insists, as we understand the argument, that as the bill to enforce the lien had been filed and appellants served with summonses before appellants forfeited the contract, such action on the part of appellants came too late to extinguish the right of the lien claimant to enforce its lien and that therefore the decree properly ordered a sale to enforce the lien. Hickox v. Greenwood, supra, and Henderson v. Connolly, 123 Ill. 98, are cited in support of this contention. In the first of these cases, as we have heretofore noted, there was no forfeiture and the purchaser was still in possession. In the second case the court stated that it was entirely satisfied with the law laid down in the Hickox case, but that the rule therein announced had no application to the facts of the case before it. In the Henderson case it was held that where the vendor of real estate has done nothing to authorize the vendee to improve the premises, and the latter, on his own responsibility, incurs a liability with a builder, the lien of the mechanic will be confined to the interest of the purchaser in the premises, and the vendor cannot be required to part with his title until he is fully paid the purchase price, but where the vendor, by his contract of sale, expressly authorizes his vendee to erect a building on the premises, agreeing to advance money to aid in such improvement as the work progresses, and before any termination of the contract, and notice thereof, a mechanic furnishes materials and performs labor in the erection of such building, the latter will not be required to look alone to the title held by the vendee, but may enforce his lien against the legal as well as the equitable title. Under the facts of the instant case the lien of complainant could never have reached any interest in the premises save that of the Danielsses, and when the contract was forfeited the latter lost all their interest and there then remained no interest in the premises which could be subjected to the lien of

has the right to take the land, purchase contract, but  
 is liable, as we understand the contract, that he will be  
 entered the land had been filed and registered with the  
 before appeals to take the contract, and after on the part  
 of appellants came too late to extinguish the right of the land  
 claims to enter the land and that therefore the lower court  
 ordered a sale to enter the land. Richard v. Richardson, 1889  
and Richardson v. Connolly, 1891, 123 Ill. 92, are cited in support of this  
 contention. In the first of these cases, as we have heretofore  
 noted, there was no testimony and the court was still in  
 possession. In the second case the court stated that it was satisfied  
 satisfied with the law laid down in the Highway case, but that the  
 rule therein announced had no application in the facts of the case  
 before it. In the Highway case it was held that where the vendor  
 of real estate has some interest in the property he is to improve  
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 authorized his vendee to erect a building on the premises, agreeing  
 to advance money to aid in such improvement as the work progresses,  
 and before any completion of the contract, and before interest, a  
 mechanic furnishes materials and performs labor in the erection of  
 such building, the latter will not be required to look alone to the  
 title held by the vendor, but may enforce his lien against the legal  
 as well as the equitable title. Under the facts of the instant case  
 the lien of complainant could never have reached any interest in the  
 premises save that of the defendant, and when the contract was for-  
 feited the latter lost all their interest and there then remained no  
 interest in the premises which could be subjected to the lien of

complainant. (See Mentzer v. Peters, 33 Pac. (Wash.) 1078; Hunt Hardware Co. v. Herzoff, 195 N. W. (Ia.) 264, 265; Pine v. Lyke, 175 Ark. 672. See also Scales v. Griffin, 2 DouglassRep. (Mich.) 54.) Had there been no forfeiture of the contract the decree might properly have ordered a sale of the interest of the Danielses. The decree found that the lien of complainant was superior to the interests of all other parties to the suit and a sale of the fee was ordered. Such a decree would have been unwarranted even if there had been no forfeiture. The Danielses have lost all interest in the premises and there is nothing left to which the lien of complainant could attach.

The decree of the Circuit Court of Cook County is reversed and the cause is remanded with directions to enter a decree dismissing the bill and granting cross-complainants the relief prayed for in the cross-bill.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Barnes, JJ., concur.



complaint. (See Exhibit A, page 10.) In the same  
Exhibit A, page 10, it is stated that the  
 175 and 176. (See also Exhibit B, page 11.)  
 84.) Had there been no testimony of the company the above might  
 properly have been a case of the interest of the defendant. The  
 record shows that the law of complaint was applied to the  
 interests of all other parties to the suit and a case of the law  
 was ordered. When a decree would have been entered even if  
 there had been no testimony. The defendant have lost all  
 interest in the premises and there is nothing left to which the  
 law of complaint could apply.  
 The decree of the Circuit Court of Cook County is  
 reversed and the case is remanded with directions to enter a  
 decree dissolving the bill and granting costs-complaintance was  
 relief granted her in the above bill.  
 REVEREND THE HONORABLE THE COURT.

WILLIAM AND HENRY, 11, COURT.

34300

ACME INDUSTRIAL COMPANY,  
a Corporation,

Plaintiff in Error.

vs.

CHARLES E. ALYEA,

Defendant in Error.

ERROR TO SUPREME COURT  
OF COOK COUNTY.

259 I.A. 656<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Acme Industrial Company, a corporation, plaintiff, sued Charles E. Alyea, defendant, in assumpsit. The declaration contained the common counts and a special count on an account stated. The latter count alleged that on January 1, 1923, defendant owed plaintiff \$2,226.08 and promised to pay it. Defendant filed a plea of set-off in which he claimed (inter alia) \$3,350 for license fees due from plaintiff under a certain written contract. To the set-off plaintiff filed a replication alleging that the contract was made February 16, 1923, but that on January 1, 1924, it was cancelled and rescinded by a new agreement by which defendant agreed to pay plaintiff \$2,226.08. There was a trial before the court, without a jury, and a judgment in favor of defendant on the set-off in the sum of \$2,250. Plaintiff has sued out this writ of error.

On a former trial, without a jury, there was a judgment in favor of defendant, on his set-off, in the sum of \$1,623.92. On an appeal by plaintiff the judgment was reversed by this court on the ground that the case was not tried in an orderly way, and the record was in such confusion that it was concluded that there should be a new trial.

Plaintiff contends that the court erred in permitting improper cross-examination of the witness Steelhammer; that this witness testified on direct only to a book account and that defendant was permitted to ask questions "which related to matters





not brought out on the direct examination, and which pertained mostly to the establishment of the contract on which the defendant based its claim of set-off," and that the court erred in permitting defendant, during the cross-examination of this witness, and before plaintiff rested its case, to introduce the said contract in evidence. At the very outset of the trial the following occurred: "The Court: Let the record also show, for the purpose of hurrying the case along and not taking up time to rule on each objection made in the record, that counsel for either side may state their objections, and the general ruling of the Court will be that the witness may proceed to answer the questions subject to counsel's objection and the Court will consider the objection at the time of considering the case. That hurries it along." No objection was made to the proposed procedure and it would appear that the court followed it during the entire trial. At the conclusion of the evidence plaintiff did not renew any of its objections, nor did it ask the court to reconsider any of its rulings, nor was any motion made to strike out any part of the cross-examination of Steelhammer. During the examination of Steelhammer, president of plaintiff corporation, plaintiff introduced in evidence the plea of set-off, and this plea included the contract in question. Plaintiff, during the examination of Steelhammer, first agreed that the contract should be admitted by agreement, and it was so ordered. Thereafter it asked for leave to withdraw its said agreement and that the contract be stricken, which was denied. But assuming that the court erred in admitting the contract in evidence during the hearing of plaintiff's case, we fail to see how plaintiff was injured thereby, as defendant would have a right to introduce it in support of his set-off, and during the examination of Alyea, who gave evidence in support of his set-off, defendant, as well as plaintiff, referred to the contract. As to the contention that it was error to allow defendant,

not brought out on the direct examination, and which pertained  
merely to the establishment of the contrast as with the defendant  
based the claim of self-defense, and that the court erred in permitting  
defendant, during the cross-examination of this witness, and before  
plaintiff rested his case, to introduce the same matter in evidence.  
Answer. At the very outset of the trial the following occurred: "The  
Court: Let the record also show, for the purpose of burying the  
case along and not taking up time to raise an empty objection made in  
the record, that counsel for either side may make such objection,  
and the general ruling of the Court will be that the witness may  
proceed to answer the questions subject to counsel's objection and  
the Court will consider the objection at the time of considering  
the case. That hereby it is ruled." An objection was made to the  
proposed evidence and it would appear that the court followed in  
having the entire trial. At the conclusion of the evidence of this  
witness did not remove any of the objections, nor did it ask the court  
to reconsider any of the rulings, nor was any motion made to strike  
out any part of the cross-examination of defendant. During the  
examination of defendant, president of plaintiff corporation,  
plaintiff introduced in evidence the plan of self-defense, and this plan  
indicated the contrast in question. Plaintiff, during the examination  
of defendant, first asked that the contrast should be ad-  
mitted by agreement, and it was so ordered. Thereafter it asked  
for leave to withdraw its said request and that the contrast be  
admitted, which was denied. This reasoning that the court erred in  
admitting the contrast in evidence during the testimony of plaintiff's  
witness, we fail to see how plaintiff was injured thereby, as defendant  
would have a right to introduce it in support of his self-defense, and  
during the examination of Ayles, who gave evidence in support of  
his self-defense, as well as plaintiff, referred to the con-  
trast. As to the contention that it was error to allow defendant,



on cross-examination, to elicit from Steelhammer evidence to establish the claim of set-off, we might say that as part of the examination of this witness plaintiff introduced in evidence its ledger account with defendant, and from the nature of that account and also from certain testimony given by Steelhammer on direct, we are not prepared to hold that the cross-examination was clearly improper. The trial was before the court, and while it was not conducted in a strictly formal way, nevertheless, the cross-examination in question had to do with the merits of the case and defendant would have had the right to elicit from Steelhammer the testimony in question if he had stated that he made him his witness for that purpose.

Plaintiff next contends that defendant's proof did not establish that he had complied with all of the conditions of the contract upon which he sought to recover upon his set-off. In support of its contention plaintiff claims that defendant failed to offer any evidence to prove that he had performed his obligations under paragraph One of the contract between plaintiff and defendant, upon which the latter relies. Said paragraph reads as follows:

**"ONE:** The party of the first part hereby agrees to do all things necessary, at his own expense, in and about obtaining letters patent from the Government of the United States of America, for said Air Displacement Water Pumps, and in the event that a patent on said Air Displacement Water Pumps is rejected by the United States Government, it is hereby mutually agreed by and between the parties hereto, that the life of this contract shall be for two (2) years from the date of its execution; otherwise from the date of its execution for the full life of the letters patent so granted by the United States Government on improvements on said Air Displacement Water Pumps as covered thereby."

This contention is plainly an afterthought. Plaintiff did not raise this question in the trial court. The replication alleged that the contract was, on January 1, 1924, cancelled and rescinded by a new agreement. Plaintiff admitted in its testimony that it manufactured pumps under the contract until the year 1928, that it did not manufacture any pumps in 1928 nor 1929 but that it "assembled





pumps during that time and took care of repairs to those pumps that were outstanding." It appears that plaintiff made several efforts to have the contract rescinded or modified in the spring of 1924, but defendant insisted that the contract was satisfactory to him and that he would not sign a new one. In plaintiff's letter to defendant, dated March 1, 1924, in which it sought a modification of the contract, it made no complaint that defendant had failed to perform under paragraph One. Defendant testified that in February or March, 1925, he offered to settle for the royalties that were then owing him under the contract but Steelhammer said "they were hard up, so he couldn't settle then" with defendant. The contract provided that plaintiff desired "the exclusive right to manufacture and sell said Air Displacement Water Pumps prior to the issuance of said letters patent" as well as the exclusive right to manufacture and sell said pumps for the entire life of said patent. Plaintiff treated the contract as in full force and effect and manufactured and sold pumps under it, and it will not now be heard, under the record in this case, to raise the instant contention. We may add that plaintiff offered no evidence tending to show that defendant failed to perform under the said paragraph of the contract or that it ever made any complaint to defendant in reference to the same.

Plaintiff next contends that "the Court did not grant an opportunity to counsel to argue the case orally as agreed to by the Court, and the parties were not given an opportunity to submit propositions of law." This contention is without the slightest warrant. The bill of exceptions fails to show that plaintiff ever submitted or asked to submit propositions of law or that the court denied it the right to oral argument. At the conclusion of the hearing the court made the following statement: "The Court: You may file your brief and your deductions from this testimony with me in ten days, ten days for his brief, ten days thereafter for yours,



groups during that time and took care of repairs to those groups that were outstanding." It appears that plaintiff made several efforts to have the contract renewed or modified in the spring of 1934, but defendant insisted that the contract was satisfactory to him and that he would not sign a new one. In plaintiff's letter to defendant, dated March 1, 1934, it is stated that plaintiff had failed to of the contract, it was no complaint that defendant had failed to perform under paragraph one. Defendant testified that in February or March, 1934, he offered to modify the royalties that were then owing him under the contract and defendant said "they were hard up, so he wouldn't settle them" when defendant. The contract provided that plaintiff desired "the exclusive right to manufacture and sell said Air Disinfectant Water Purifier in the territory of said plaintiff" as well as the exclusive right to manufacture and sell said purifier for the entire life of said patent. Plaintiff testified the contract as in full force and effect and notwithstanding that plaintiff offered no evidence tending to show that defendant failed to perform under the said paragraph of the contract or that it ever made any complaint to defendant in reference to the same. Plaintiff now contends that "the court did not find an opportunity to renew the contract as agreed to by the court, and the parties were not given an opportunity to modify the provisions of law." This contention is without the slightest merit. The bill of exceptions fails to show that plaintiff ever submitted or asked for modification of law or that the court decided it was right to give judgment. At the conclusion of the hearing the court made the following statement: "The Court: You may file your brief and your objections from this testimony with me in two days, ten days for the brief, ten days thereafter for your



and then he may have five days thereafter for reply, and then after I go over it we will hear you argue it orally if you wish." Defendant, in his brief, states that both sides filed briefs with the trial court and plaintiff, in its reply brief, does not question this statement but seeks to go outside the record in support of its contention that the court denied it an opportunity to argue the case orally and also denied it an opportunity to submit propositions of law.

On plaintiff's account stated it claimed \$2,226.08. Defendant frankly admitted that there was due on this account about \$1,600. Under the facts of the case we are unable to say that the trial court was wrong in sustaining defendant as to the amount due. Under the terms of the contract plaintiff was given the exclusive right to manufacture and sell the water pumps within the United States, the Dominion of Canada and South America. Paragraphs Four and Five of the contract read as follows:

**"FOUR:** The party of the second part hereby agrees at its own expense, to manufacture and sell not less than two hundred of said pumps during the year 1923; three hundred fifty of said pumps during the year 1924; five hundred of said pumps during the year 1925; seven hundred fifty of said pumps during the year 1926; and one thousand of said pumps during the year 1927; and a minimum of one thousand of said pumps each and every year thereafter for the life of this contract.

**"FIVE:** It is hereby mutually agreed by and between the parties hereto, that the said pumps are to be manufactured and sold by the second party at minimum prices, as follows:

Four inch pumps when included in system	\$ 70.00
Five inch pumps when included in system	105.00
Six inch pumps when included in system	140.00
Eight inch pumps when included in system	210.00

Said prices to be changed only upon the written consent and authority of the party of the first part."

Defendant claimed that he was never able to ascertain the exact number of pumps manufactured by plaintiff under the contract and the latter saw fit to offer no evidence upon this subject. Under the contract plaintiff agreed to pay defendant "for all of said

and then he may have the right to be heard, and then after  
I go over it we will hear you again it exactly it you wish. \* Beland-  
ant, in his brief, states that both sides filed briefs with the  
trial court and plaintiff, in his reply brief, does not question  
this statement but seeks to go outside the record in support of his  
contention that the court denied it an opportunity to argue the case  
exactly and also denied it an opportunity to submit propositions of  
law.

On plaintiff's account stated is claimed \$2,286.08.  
Defendant finally admitted that he was not his account right  
\$1,400. Under the facts of the case we are unable to say that the  
trial court was wrong in sustaining defendant as to the amount due.  
Under the terms of the contract plaintiff was given the exclusive  
right to manufacture and sell the water pump within the United  
States, the Dominion of Canada and South America. Repetitive how  
and five of the contract read as follows:

"Article 1: The party of the second part hereby agrees as its  
own account, to manufacture and sell and have sold the number  
of said pumps during the year 1934; seven hundred fifty of said  
pumps during the year 1935; five hundred of said pumps during  
the year 1936; seven hundred fifty of said pumps during the  
year 1937; and the balance of said pumps during the year 1938;  
and a balance of said pumps sold and every year  
hereafter for the life of the contract.

"Article 2: It is hereby mutually agreed by and between the  
parties hereto, that the said pumps are to be manufactured and  
sold by the second party at certain prices as follows:

Five inch pumps when included in system	\$ 75.00
Five inch pumps when included in system	100.00
Six inch pumps when included in system	140.00
Eight inch pumps when included in system	200.00

Said prices to be changed only upon the written consent and ap-  
proval of the party of the first part."

Defendant claimed that he was never able to ascertain the exact  
number of pumps manufactured by plaintiff under the contract and  
the latter saw fit to offer no evidence upon this subject. Under  
the contract plaintiff agreed to pay defendant "for all of said

water pumps manufactured and sold by the party of the second part thereafter during the life of this contract, to pay to the party of the first part ten per cent (10%) of the selling price as herein-after set forth, as a license fee for the manufacture and sale on each and every one of said water pumps containing features patented or to be patented at the time and times as hereinabove set forth in Section 3." Plaintiff further agreed to manufacture and sell, at its own expense, a minimum of 200 pumps in 1923 and 350 pumps in 1924, and as the minimum selling price of the pump was \$70, and as plaintiff paid defendant nothing on account of the amount due, it is clear that there was due from plaintiff to defendant at least \$3,850 for license fees for the manufacture and sale of water pumps during the years 1923 and 1924. The trial court deducted from the amount due defendant, \$3,850, the amount found to be due plaintiff on its claim, \$1,600, and entered judgment for defendant for the difference, \$2,250.

Two trial courts have heard this case and each has made a finding in favor of defendant on the set-off. The instant judgment is a just one and it should be and it is affirmed.

AFFIRMED.

Gridley and Barnes, JJ., concur.



water pump manufactured and sold by the party of the second part  
thereafter during the life of this contract, he pay to the party  
of the first part, ten per cent (10%) of the selling price as herein-  
after set forth, as a license fee for the manufacture and sale of  
each and every one of said water pumps containing features identical  
or to be patented at the time and place as hereinafter set forth,  
in Section 1. The said party of the first part agrees to pay to the party  
of the second part, a minimum of \$100 per pump in 1922 and \$200 per pump in  
1924, and as the minimum selling price of the pump was \$750, and as  
the said party of the first part agrees to pay to the party of the second part,  
as above that there was and is and shall be delivered at least  
\$2,250 for license fees for the manufacture and sale of water pumps  
during the years 1922 and 1924. The said party of the first part  
amount due defendant, \$2,250, the amount paid to be the plaintiff  
on the claim, \$1,000, and ordered judgment for defendant for the  
difference, \$1,250.

Two trial courts have found this case and each has  
made a finding in favor of defendant on the second. The finding  
therein is a fact one and it is not in dispute.

VERIFIED.

Griffith and Barnes, Pl., counsel.

34316

WALTER H. STARCZEWSKI,  
Plaintiff in Error,

v.

ROBERTS & OAKE, a corporation,  
Defendant in Error.

ERROR TO CIRCUIT

COURT, COOK COUNTY.

259 I.A. 656<sup>3</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Walter H. Starczewski, plaintiff, sued Roberts & Oake, a corporation, defendant, in case. There was a trial before the court, with a jury, and a verdict returned finding defendant not guilty. Judgment was entered on the verdict and plaintiff has sued out this writ of error.

Plaintiff's theory of fact was that defendant was engaged in conducting and operating a meat packing business and used and controlled a certain building in connection therewith; that plaintiff was an employee of his brother, who was engaged in the wholesale meat business; that on the day in question plaintiff was directed by his employer to go to defendant's packing house and get from defendant various pork products, and that while he was upon the premises of defendant, engaged in filling his order, and while he was in the exercise of due care for his own safety, as the proximate result of the negligence of defendant in the care, management and operation of its premises and a certain elevator and elevator shaft, he was injured by falling through an open and unguarded elevator shaft. Plaintiff also offered proof to the effect that defendant was guilty of a violation of the following ordinance of the City of Chicago:

WALTER H. STANLEY, Plaintiff in Error,

v.

ROBERT A. GALT, a Corporation, Defendant in Error.

WALTER H. STANLEY, Plaintiff in Error,

MR. JUSTICE LEWIS delivered the opinion of the court.

Walter H. Stanley, Plaintiff, and Robert A. Galt, a Corporation, Defendants, in error. There was a trial before the court, with a jury, and a verdict returned finding defendant not guilty. Judgment was entered on the verdict and plaintiff has moved for this writ of error.

Plaintiff's theory of fact was that defendant was engaged in conducting and operating a meat packing business and was and controlled a certain building in connection therewith; that plaintiff was an employee of his brother, who was engaged in the same business; that on the day in question plaintiff was directed by his employer to go to defendant's packing house and get from defendant various pork products, and that while he was upon the premises of defendant, engaged in filling his order, and while he was in the exercise of his duty for his own safety, as the premises owned by the defendant of defendant in the case, management and operation of the premises and a certain elevator and elevator shaft, he was injured by falling through an open and unguarded elevator shaft. Plaintiff also offered proof to the effect that defendant was guilty of a violation of the following ordinance of the City of Chicago:



"All hoistways, hatchways, elevator wells and wheel holes in any building, whether occupied or vacant, shall be securely fenced, enclosed or otherwise safely protected, and it shall be the duty of the owner, occupant or agent of any such building to keep all such means of protection closed at all times, except when it is necessary to have the same open in order that the said hatchways, elevators or hoisting apparatus may be used."

The theory of fact of defendant was that plaintiff, at the time he was injured, was on a part of defendant's premises in which he had no right to be, and that the mere fact that plaintiff was there under the direction of a certain agent or servant of defendant would avail plaintiff nothing, as such agent, in giving such direction, exceeded his authority and defendant was not bound thereby; that no servant of defendant had the authority to permit plaintiff to go to the place where the accident occurred. Defendant further claimed that plaintiff was guilty of contributory negligence.

Plaintiff strenuously contends that the verdict was against the manifest weight of the evidence. In the view that we have taken of this appeal, it is only necessary for us to say, in answer to this contention, that the case is, at least, close upon the material facts and a jury would have been authorized in finding a verdict for plaintiff. Under such a state of the evidence, it was necessary that the jury be accurately instructed as to the law applicable to the facts of the case.

Plaintiff contends that the court erred in giving to the jury defendant's instruction number ten, which reads as follows:

"10. The jury are instructed that in order for the plaintiff to recover in this case, he must prove not only negligence on the part of the defendant, but that at the time of the accident he was exercising due care and caution for his own safety, in other words, that he was not guilty of any negligence that contributed to the injury."

This instruction was clearly erroneous. Contributory negligence that will bar a recovery must be a proximate cause of the injury. This principle of law is clearly established, and it is unnecessary to cite authorities in support of it.

"All witnesses, including the plaintiff, should be sworn in any building, whether occupied or vacant, until he actually leaves, whether or otherwise actually protected, and it shall be the duty of the court, acting or acting at any such building to keep all such means of protection closed at all times, except when it is necessary to have the same open in order that the witnesses, including the plaintiff, may be used."

The theory of fact of defendant was that plaintiff, at the time he was injured, was on a part of defendant's premises in which he had no right to be, and that the mere fact that plaintiff was there under the direction of a certain agent or servant of defendant would avail plaintiff nothing, as such agent, in giving such direction, exceeded his authority and defendant was not bound thereby. It was no reason of defendant and the materiality of plaintiff to go to the place where the accident occurred. Defendant further claims that plaintiff was guilty of contributory negligence.

Plaintiff strenuously contends that the verdict was against the manifest weight of the evidence. In the view that we have taken of this appeal, it is only necessary for us to say, in answer to this contention, that the case is, of itself, clear upon the material facts and a jury could have been satisfied in finding a verdict for plaintiff. Since such a state of the evidence, it was necessary that the jury be instructed to find in the law applicable to the facts of the case.

Plaintiff contends that the court erred in giving to the jury defendant's instruction number two, which reads as follows:

"12. The jury are instructed that in order for the plaintiff to recover in this case, he must prove not only negligence on the part of the defendant, but that at the time of the accident he was exercising due care and caution for his own safety. In other words, that he was not guilty of any negligence that contributed to the injury."

This instruction was clearly erroneous. This instruction was clearly erroneous. That will bar a recovery must be a proximate cause of the injury. This principle of law is clearly established, and it is unnecessary to also authorities in support of it.



Plaintiff contends that the court erred in giving to the jury, at the request of defendant, the following instructions:

"1. The jury are instructed that the owner of premises owes no duty to exercise ordinary or reasonable care to keep his premises in a reasonably safe condition to persons who may be upon such premises without invitation, either express or implied.

"2. The jury are instructed that the law imposes no burden on owners or occupiers of property to place a watchman or a guard over the elevator shafts or hatchways which are open by reason of being used, and which are located in portions of their premises not intended for public use, and to which the public are not expressly or impliedly invited.

"4. The jury are instructed that it is the duty of an owner of property to exercise reasonable care for the safety of a person who has been invited, either expressly or impliedly, on the premises only while he is on that portion of the premises required for the purpose of his visit."

Plaintiff contends that these instructions contain only abstract propositions of law and that they tended to mislead the jury, to the prejudice of plaintiff. It is a general rule that "instructions should be framed with reference to the circumstances of the case on trial, and not be expressed in abstract and general terms, when such terms may mislead instead of enlightening a jury." (Chicago & Alton R. R. Co. v. Utley, 38 Ill. 411.) The giving of instructions of this character is not to be commended, and trial courts are justified, under our practice, in refusing the same, and while it is true that it has been held that the giving of such instructions does not constitute reversible error if they are not calculated to mislead the jury, nevertheless, it is a settled rule that the giving of instructions which merely state abstract propositions of law and which might have a tendency to mislead the jury, is error. In the late case of The People v. Parks, 321 Ill. 143, 151, the court gave to the jury, at the instance of The People, an instruction on circumstantial evidence, and in holding that this action of the trial court was error, the court said: "The above instruction contains simply abstract propositions of law and the instruction should not have been given for that reason. These abstract provisions of law are stated in a manner





very prejudicial to the defendant, and could not have any other effect except to mislead the jury." As we have heretofore said, the case is, at least, a close <sup>one</sup> upon the facts, and after a careful consideration of the instant contention, we have reached the conclusion that these three instructions were very apt to mislead the jury, to the prejudice of plaintiff. The jury may well have thought that the court, in giving them, was expressing opinions on vital and disputed questions of fact in the case. As to instruction number two, plaintiff further contends, and with warrant under the record, that there is no evidence that the doors of the shaft were open "by reason of being used." It is, of course, unnecessary to cite authorities to the effect that instructions must be based upon evidence in the case.

Plaintiff also contends that the court erred in giving several other instructions, at the instance of defendant, but we do not deem it necessary to pass upon this contention.

Defendant contends that the evidence of plaintiff shows that at the time of the accident and just prior thereto defendant was guilty of contributory negligence, as a matter of law, and that therefore the judgment must be sustained even though error was committed during the trial of the cause. After a careful consideration of the instant contention we have reached the conclusion that it is without merit.

For the reasons stated, the judgment of the Circuit Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley and Barnes, JJ., concur.



very prejudicial to the defendant, and would not have any other effect except to mislead the jury. As we have previously said, the case is, as I have, a close question of fact, and after a careful consideration of the instant contention, we have reached the conclusion also that these instructions were very apt to mislead the jury, to the prejudice of plaintiff. The jury may well have thought that the court, in giving them, was expressing opinions on vital and disputed questions of fact in the case. As to instruction number two, plaintiff further contends, and with warrant under the record, that there is no evidence that the facts of the death were open "by reason of being dead." It is, of course, unnecessary to cite authorities to the effect that instructions must be based upon evidence in the case.

Plaintiff also contends that the court erred in giving several other instructions, at the instance of defendant, but we do not deem it necessary to pass upon this contention. Defendant contends that the evidence of plaintiff shows that at the time of the accident and just prior thereto defendant was guilty of contributory negligence, as a matter of law, and that therefore the judgment must be sustained even though error was committed during the trial of the case. After a careful consideration of the instant contention we have reached the conclusion that it is without merit.

For the reasons stated, the judgment of the Circuit Court of Cook County is reversed and the case is remanded.

REVEREND JUSTICE

Chief and Justice, Ill., County.



34341

ALINE L. FRIEDBERG,  
Complainant, Appellee.

v.

FRANK FLOWER et al.,  
Defendants.

FRANK FLOWER,  
Defendant, Appellant.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

259 I.A. 656<sup>4</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Aline L. Friedberg filed her bill to foreclose a trust deed securing a principal note for \$5,500 and certain interest notes. Frank Flower, appellant, and a number of others were made defendants. The chancellor heard the cause without a reference to a master in chancery and entered a decree in favor of complainant. Defendant Frank Flower alone appeals. No certificate of evidence was filed in the case.

The bill was taken as confessed as to all defendants save appellant and Maggie McKimmon. The only defense set up in the answer of appellant is "that prior to the filing of said bill he offered to pay complainant's agent, who then had possession of said notes for collection, entire principal and interest due thereon, but said agent then and there stated that he would not accept such amount unless there was added thereto \$500 for solicitors' fees; that defendant Frank Flower is ready to pay said notes and interest thereon and now tenders \$5,326 for that purpose." As to this defense the decree finds "that no adequate or valid tender was at any time made by the defendant Frank Flower to the complainant Aline L. Friedberg of the amount due to the complainant under the provisions of the instruments sued on in this cause and that the

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[illegible]

was filed in the year . . . . .

The bill was taken as amended as to all references have  
appealed and legal settlement. The only defense set up in the  
answer of appellant is that prior to the filing of this bill he  
effected a pay commission's award, and that had payment of said  
notes for collection, while principal and interest was secured,  
but said award was not made until he could not comply with  
amount within time was about thirty days for collection; that  
this defense of time is only to pay said notes and interest  
thereon and not interest thereon for the purpose. In so this  
before the decree made "that no abatement or value tender was made  
and time was by the defendant to the complaint and

view the instruments used in this case and the

defendant Frank Flower never at any time offered to pay the complainant Aline L. Friedberg the amount that was due to the complainant under the instruments sued on at the time of any offer made by said defendant Frank Flower."

Appellant first contends that "it is error for the court to hear the cause and enter a decree without referring the cause to a Master in Chancery to state the account." This contention is without the slightest merit. The decree recites that when the cause came on to be heard "defendants Frank Flower and Maggie McKimmon appeared by their respective solicitors." No certificate of evidence was filed and there is nothing in the record to show any motion or request that the cause be referred to a master or that any objection was made to a hearing by the chancellor without a reference. We must presume, from the record, that appellant acquiesced in the hearing of the cause before the chancellor without a reference and that he participated in the proceeding. But appellant contends that "where the accounting covers as many items and as great a period of time as in the instant case, it is error for the court to hear the cause and enter a decree without referring the cause to a Master in Chancery to state the account," and that the decree, therefore, must be reversed, even if it appears that the hearing by the chancellor was by agreement of the parties. In support of his contention appellant cites Barnes v. Barnes, 292 Ill. 593, wherein the court said (p. 597): "Where the items in an account are few the court may state the account, but where the account consists of many items, covering a great length of time, and the testimony is conflicting, the court cannot proceed to an accounting until the account has been stated by a master and objections to the account settled by him. The duties of the court, the public interest and the rights of litigants forbid the examination by the court of intricate





and complex accounts. (Brockman v. Fulger, 12 Ill. 277; Gallee v. Morgan, 67 id. 376; Payne v. Newcomb, 100 id. 611; Beale v. Beale, 116 id. 292.) A complicated account cannot be stated by the court even by agreement of the parties. (Riner v. Tousslee, 62 Ill. 266; Mosier v. Horton, 83 id. 519; French v. Gibbs, 105 id. 523.) This case, in which the court heard a vast amount of evidence and considered a record of over 10,000 pages, illustrates the importance and necessity of adherence to the settled rule of chancery practice." We deem it entirely unnecessary to determine the point raised by appellee that appellant, because of his attitude in the trial court, is in no position to raise his present contention. The bill alleged that there was due and unpaid one principal note for \$5,500 and one interest note. Appellant, in his answer, did not dispute the indebtedness and his sole defense was tender of payment prior to the filing of the bill. It was a very simple matter for the chancellor to calculate the amount due upon these two notes and there were only two other items to be considered by him, viz., the amount paid the Chicago Title & Trust Company by complainant for an examination of title, \$142.20, and the item of complainant's solicitors' fees, which were fixed by the chancellor at \$250. It would have been a waste of time and money to have referred the cause to a master and defendant would have paid much larger costs if such a procedure had been followed. In reference to the instant contention appellee states in her brief: "To say that these items presented a complicated and intricate accounting merely indicates the extremities to which defendant is put in his endeavor to find something to discuss in this court, not with the hope, as we believe, of impressing this Court, but merely with the desire of concealing the real purpose of this appeal, which we think the entire argument shows to be simply for the purposes of delay and to further harass the complainant." We feel impelled to say that this statement of appellee is not without some merit.







Appellant next contends that "it was error to decree the payment of \$250 solicitors' fees to complainant because the evidence on which such allowance was made is not preserved, and it does not appear that complainant has paid out anything for solicitors' fees nor incurred as great a liability as \$250 therefor." In support of this contention appellant argues that "in the instant case complainant has not preserved the evidence on which the \$250 solicitors' fee was allowed to her, thereby making it impossible to determine whether the evidence taken on that point shows such amount to have been necessarily paid for the services of her solicitors or not." There are two ways of preserving the evidence, one is by a certificate of the evidence and the other is by the chancellor in the decree making a sufficient finding of facts to justify the relief granted. (Rybakowicz v. Rybakowicz, 290 Ill. 550, 554; Coleman v. Mulcahey, 334 Ill. 64, 65.) The trust deed provided for reasonable fees to complainant's solicitor in case of a foreclosure. The bill alleged that complainant was obliged to employ solicitors for the purpose of conducting the foreclosure suit, and that she is entitled to such sum as the court may decree to be reasonable for services of her solicitors. The decree found that complainant was obliged to employ solicitors in the foreclosure proceedings and that under the terms of the trust deed she is entitled to such sum as the court may determine and decree to be a reasonable sum for services rendered by her attorneys and solicitors in the suit, "and the court doth hereby further find that the sum of \$250 is a reasonable sum for services of the complainant's attorneys and solicitors in this cause." These findings were sufficient. A fee of \$250 for a foreclosure of a mortgage upon which \$6,240.10 was found to be due would certainly seem to be a reasonable one.

Appellant next contends that "it was error to decree the payment to complainant of money paid out on account of examination

Appellate Court concluded that "it was error to require the payment of \$2500 collection, fees as complainant because the collection on which such collection was made is not protected. The fact that appellant had collection fees paid out nothing for collection, fees was incurred as great a liability as \$2500 shown for." In support of this conclusion, appellant argues that the fact that such collection was not protected the evidence as to the \$2500 collection, fees was allowed to her, thereby making it impossible to determine whether the evidence bears on that point as to such amount to have been necessarily paid for the services of her collection of said. There are two ways of presenting the evidence, one is by a certificate of the evidence and the other is by the appellant in the answer making a sufficient showing of facts to justify the relief sought. Wheeler v. Wheeler, 200 Ill. 250, 254; Calman v. Mahoney, 224 Ill. 64, 65. The facts need provide for reasonable fees as complainant's collection in case of a revocation. The bill alleged that complainant was obliged to pay collection fees for the purpose of collecting the amount due, and that she is entitled to such sum as the court may deem to be reasonable for services of her collection. The facts show that complainant was obliged to pay collection fees in the amount of \$2500 and that such sum is due to her from the fact that she is entitled to such sum as the court may determine and decree to be a reasonable and the amount thereof of her collection and collection in the suit, and she court both hereby decree that the sum of \$2500 is a reasonable and the amount of the complainant's collection and collection in this suit. These findings were affirmed. 1-1-1937 for a resolution of a meeting upon which 11-11-1937 found to be the only reliable item to be a reasonable one. Appellate Court concluded that "it was error to require the payment of complainant of such fees and no amount of collection



of title because it does not appear that such expense was necessarily incurred, nor that it was the usual and customary or fair and reasonable charge for such an examination of title." In support of this contention appellant argues that "the evidence was not preserved and there is no finding in the decree as to what was covered by such examination of title or whether an expense of that amount was necessary, or whether it was the usual and customary or fair and reasonable charge for such an examination of title." There is no merit in this contention.

The trust deed provided that "in case of such default \* \* \* the legal holder of said notes \* \* \* may foreclose \* \* \* and out of the proceeds of any such sale \* \* \* there shall first be paid all the costs of suit \* \* \* cost of a complete abstract of title to said premises and for an examination of title for purpose of such foreclosure." The amendment to the bill alleged that for the purpose of the foreclosure complainant procured an examination of title to the premises to be made by the Chicago Title & Trust Company, of Chicago, Illinois, at a cost of \$158, which was paid by complainant, and that under the terms of the trust deed she is entitled to be reimbursed for such outlay. The decree finds "that for the purpose of this foreclosure suit the complainant procured an examination of title to the premises described in said trust deed \* \* \* at a cost to the complainant of \$158, which said sum complainant paid to said Chicago Title and Trust Company for said examination of title on November 7, 1929, and that under the terms and provisions of said trust deed said payment \* \* \* was a proper expenditure \* \* \* for the purpose of this \* \* \* suit; that a rebate or return of the sum of \$15.80 was had \* \* \* and that the net amount of \$142.20 so paid by said complainant for said examination of title is an additional indebtedness to complainant secured by said trust deed." It was not necessary to recite in the decree the evidence bearing upon this item. Sufficient



of title because it was not shown that such expense was incurred. It was also shown that it was the usual and customary of this and other companies to charge for such an examination of title. The expense of this examination was not shown. The evidence was not presented and there is no finding in the record as to what was covered by such examination of title or whether an expense of that amount was necessary. It is stated that it was the usual and customary of this and other companies to charge for such an examination of title. There is no finding in this connection.

The court then proceeds to say "in case of such title" and the legal holder of said notes "may foreclose" and the proceeds of the sale shall be paid to the holder of said notes "as a debt of said title to said promisee and for an examination of title for purpose of such title clause." The court then says that the purpose of the foreclosing complaint is to obtain an examination of title to the promisee to be made by the Chicago Title & Trust Company, of Chicago, Illinois, at a cost of \$100, which was paid by the promisee, and that under the terms of the deed and the mortgage it is entitled to be reimbursed for such selling. The court then says that for the purpose of this foreclosing sale the complaint states an examination of title to the promisee described in said deed and "as a debt to the promisee of \$100, which was the consideration paid to said Chicago Title and Trust Company for said examination of title on November 7, 1920, and that upon the terms and provisions of said deed said payment was a proper reimbursement" and the purpose of this "is to say that a rebate of \$100 of the sum of \$125.00 was made" and that the net amount of \$25.00 was paid by said company. The court then says that examination of title is an essential incident to completion of a sale of real estate. It was not necessary to make to the holder the balance owing upon this loan. The court

ultimate facts are found to support the allowance of the item in question.

The appellee strenuously contends that the points presented by appellant are frivolous and entirely without merit and that the present appeal was prosecuted merely for the purpose of delay, and she asks that she be allowed statutory damages. The sole defense interposed by appellant had for its object the prevention of an assessment of costs against him. The chancellor found against him on this issue, but appellant has not questioned in this court the propriety of that finding, nevertheless, he is still determined to avoid, if possible, the payment of any costs assessed against him. The costs of which he complains are common to foreclosure proceedings and the amounts allowed appear to be so reasonable that it is difficult to understand why any complaint should be made as to the same. However, after giving the instant question full consideration, we have decided to give appellant the benefit of the doubt as to his purpose in bringing the appeal and to deny the request of appellee for statutory damages.

The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Gridley and Barnes, JJ., concur.

Witnesses have been found to support the allegations of the item

is essential.

The applicant has submitted that the police

presented by applicant was false and entirely without merit  
and that the present charges were presented merely for the purpose

of delay, and the fact that she has already obtained a writ

The sole defense advanced by applicant has been that the

production of an affidavit of facts against him. The production

found against him on this issue, but applicant has not questioned

in this court the propriety of the finding, nevertheless, he is

will determine to avoid, if possible, the payment of any costs

assessments against him. The costs of which he complains are common

to previous proceedings and the amounts alleged appear to be

no reasonable cost it is difficult to understand why any complaint

should be made as to the same. However, after giving the instant

question full consideration, we have decided to give applicant

the benefit of the doubt as to his purpose in bringing the appeal

and to deny the award of expenses for attorney's fees.

The award of the Circuit Court of Cook County is

affirmed.

ATTORNEYS.

Delaney and Brown, 111, common.



34369

A. I. POLLAND, doing business  
as the NORTH AMERICAN CONSTRUCTION  
COMPANY,

Appellant,

v.

LESLIE A. WHITFIELD,

Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 657<sup>1</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, appellant, obtained a judgment by confession against defendant, appellee, for \$338. The judgment was opened and leave was given defendant to appear and make defense to the claim, the judgment to stand as security. The cause was tried before the court, without a jury, and there was a finding against plaintiff and a judgment entered vacating the judgment by confession, and "that plaintiff take nothing by his suit and that defendant recover from plaintiff his costs." Defendant has not filed a brief in this court.

Plaintiff's claim was for money due upon a written contract, which was signed by defendant and delivered to plaintiff. This contract provides for the erection of a garage by plaintiff in the rear of defendant's home, for the total sum of \$288, and specifies that defendant will pay the cost of the garage, \$288, in twenty-four ~~equal~~ consecutive monthly installments of \$12 each. It contains a judgment clause and provides that plaintiff shall be allowed \$50 for attorney's fees in case of a suit on the contract. It is admitted that plaintiff built the garage, but in defendant's affidavit of merits he avers that plaintiff failed to build the

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not sure if this is a copy of the  
original or not.

• **Lessons Learned:**

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THE UNITED STATES DEPARTMENT OF THE INTERIOR

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Plaintiff's claim was for money due upon a written contract, which was signed by defendant and delivered to plaintiff. This contract provided for the erection of a garage by plaintiff in the rear of defendant's house, for the total sum of \$2000, and specified that defendant will pay the cost of the garage, \$2000, in twenty-four equal consecutive monthly installments of \$125 each. It contains a judgment clause and provides that plaintiff shall be allowed \$50 for attorney's fees in case of a suit on the contract. It is admitted that plaintiff built the garage, but in defendant's affidavit it is said that he never paid plaintiff for building the



garage in accordance with the specifications contained in the contract; that the plan of the garage, which was contained in the contract, provided for a door at the south end of the east wall of the garage and a window in the north end of the east wall of the garage; "that the plaintiff without the consent of the defendant changed the plan of construction of said east wall by substituting a door in place of the window and a window in place of the door," and that the garage is of no value to defendant. The evidence shows that the garage was built in accordance with the contract save that there was a change in the placement of a window and door on one of the sides of the garage. Defendant gave his copy of the contract to one Weber and the latter, at the instance of defendant, was present every day while the garage was being constructed and watched the progress of the work. Plaintiff's carpenter who built the garage testified that he made the change in the placement of the door and window by order of Weber. While the latter denies that he gave this order, it clearly appears that he noted the change in the plans and did not stop the carpenter in his work. Defendant's home was on the front of the lot and he had full opportunity to observe the building of the garage. He testified that he complained to a representative of plaintiff that the small door and the window were not placed properly, but he, apparently, made no effort to stop the carpenter from going on with the work. The garage was completed and when plaintiff called on defendant to sign the notes provided for in the contract he refused to sign them unless plaintiff did certain work not called for by the contract. When defendant refused to sign the notes and the statement of completion of the job plaintiff offered to change the position of the door and window in question, but defendant refused this offer. He has refused to pay anything on account of the contract. After a careful consideration of the evidence bearing upon



garage in accordance with the specifications contained in the contract; that the plan of the garage, which was contained in the contract, provided for a door at the north end of the east wall of the garage and a window in the north end of the east wall of the garage; that the plaintiff, without the consent of the defendant, changed the plan of construction of said east wall by substituting a door in place of the window and a window in place of the door, and that the garage is of no value so defendant. The evidence shows that the garage was built in accordance with the contract save that there was a change in the placement of a window and door on one of the sides of the garage. Defendant gave his copy of the contract to the plaintiff and the latter, at the instance of defendant, was present every day while the garage was being constructed and advised the progress of the work. Plaintiff's complaint is that the garage built by him is not the garage in the placement of the door and window by order of court. While the latter claims that he gave this order, it clearly appears that he never gave the order in the first place and did not stop the construction in his mind. Defendant's home was on the front of the lot and he had full opportunity to observe the building of the garage. He testified that he considered it a representation of plaintiff that the garage was being built in accordance with the contract, but he, defendant, made no effort to stop the construction from going on with the work. The garage was completed and when plaintiff called on defendant to sign the notes provided for in the contract he refused to sign them unless plaintiff did certain work not called for by the contract. When defendant refused to sign the notes and the statement of completion of the job plaintiff refused to change the parties at the time the order is returned, but defendant returned this order. He has refused to pay anything on account of the contract. This is a material violation of the contract having been

the question, we are satisfied that the changes were made by order of the agent of defendant. The testimony of the carpenter who built the garage was that it made no difference to plaintiff whether the door and window in question were placed in accordance with the contract or in accordance with the orders of Weber, and that the only reason he made the change was to carry out the said orders. He further stated that Weber told him that he liked the way the garage in the next yard was built and that Weber ordered him to make the change so that the garage of defendant would be like that one. At the conclusion of the evidence the trial court stated that the window and door were not constructed in the places called for by the written contract, that plaintiff had no right to depart from the specifications of the contract and that until plaintiff finished the work in accordance with the contract he would have no right to a confession of judgment, and that therefore the judgment must be set aside and a finding made for defendant. The court further stated that he would not go into the question as to whether or not an agent of defendant ordered plaintiff to make the changes in question for the reason that "you cannot change a written contract," and that he was not "entering a finding on the merits."

The court, in holding that plaintiff was not entitled to recover anything until he had completed the garage in accordance with the specifications of the written contract, was in error. "Where a party has in good faith partially performed the terms and conditions of a contract on his part, and the other party has received the benefit of such partial performance, and does not or cannot restore to the other the fruits of such partial performance and place him in statu quo, then the consideration of the contract must be paid, less any damages suffered by reason of the failure to perform the



the question, we are satisfied that the answers were made by one of the agent of defendant. The testimony of the agent who called the garage was that it was in accordance with the witness the door and window in question were closed in accordance with the witness. He made the change was to carry out the said orders. He further stated that when he called him that he found the garage in the next year was closed and that when ordered him to make the change he found the garage of defendant would be like that now. The conclusion of the evidence the trial court stated that the window and door were not closed in the place called for by the witness. The witness testified that he went to the garage from the specifications of the contract and that when he called the garage he found it closed and with the witness he would have no right to a conclusion of fact. He stated that the witness was not with him at the time and a finding must be made. The court stated that he was not to make the change. The court stated that he was not to make the change into the question as to whether or not an agent of defendant called the witness to make the change in question for the reason that the witness cannot change a written contract, and that he was not making a finding in the matter.

The court, in finding that plaintiff was not entitled to recover, stated that he had accepted the garage in accordance with the specifications of the written contract, and in doing so, he was in good faith and without fault. The court stated that a contract on his part, and the other party was not to be held liable for breach of such partial performance, and that he was not to be held liable for breach of such partial performance and that he was in good faith. The court stated that the contract was not to be held liable for breach of such partial performance and that he was in good faith. The court stated that the contract was not to be held liable for breach of such partial performance and that he was in good faith.



contract." (Spiro v. Cable, 248 Ill. App. 343, 343, and cases cited therein.) "If the defendant can prove that the plaintiff abandoned the work without just cause and that he did not carry out the terms of the contract, and that the defendant has sustained damages by reason thereof, he has the right under the pleadings to recoup for all damages he has sustained thereby." (Ibid. 349.) Defendant failed to produce any evidence to show what damages, if any, he sustained. Even if it could be held, under the evidence, that plaintiff made the changes of his own volition, that fact would not prevent him from recovering anything in the present case and the theory of law of the trial court that plaintiff was obliged to build the garage in strict accordance with the written contract, even though an agent of defendant ordered him to make certain changes in the specifications, is, of course, an erroneous one. The finding in the instant case should have been for plaintiff, and for the amount stated in the judgment by confession.

The judgment of the Municipal Court of Chicago of February 5, 1930, finding the issues against plaintiff and vacating the judgment by confession and entering judgment against plaintiff for costs, is vacated and judgment will be entered here in favor of plaintiff and against defendant for the sum of \$338 and costs.

REVERSED WITH FINDING OF FACTS AND JUDGMENT HERE.

Gridley and Barnes, JJ., concur.



34369

**FINDING OF FACTS.**

We find as ultimate facts that plaintiff, A. I. Polland, doing business as the North American Construction Company, built the garage in accordance with the specifications of the written contract between plaintiff and defendant, Leslie A. Whitfield, save as the specifications were changed by mutual consent of the parties, and we further find that there is due plaintiff from defendant on the contract the sum of \$338.





34378

In Re ESTATE OF KATHERINE E.  
SWIFT, Deceased, D. L. HARMON,  
Executor,

Appellant,

v.

RAY SWIFT,

Appellee.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

259 I.A. 657<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The executor of the estate of Katherine E. Swift, deceased, appeals from a judgment allowing a claim of Ray Swift in the sum of \$5,250 against the estate. The case was heard by the court, without a jury.

The verified amended statement of claim reads as follows:

"That on or about March 6th, 1923, in Chicago, Cook County, Illinois, for a good and valuable consideration, to-wit, the waiver of claimant's rights as heir of Joseph Swift, Deceased, in and to certain real estate owned by the said Joseph Swift during his lifetime and which had allegedly been conveyed by the said Joseph Swift to the said Katherine E. Swift, said Katherine E. Swift promised to pay to the claimant herein the sum of \$5,850.00; that on part conformance with said promise said Katherine E. Swift, decedent as aforesaid, paid to said claimant on or about October, 1923, the sum of \$200.00 and again on or about February 1924 an additional \$200.00, and again on or about August 1924 a further additional sum of \$200.00, making a total of \$600.00 paid on account of said promise, and leaving due and owing said claimant herein, as aforesaid, the sum of \$5250.00, for which he files his claim."

Appellant has raised and strenuously argued five grounds why the instant judgment should be reversed. In the view that we have taken of this appeal it will be necessary to consider only one of these, viz., that appellee failed to make out a prima facie case. After a careful consideration of the entire record we are satisfied that this contention is a meritorious one. While it is true, as appellee contends, that proceedings like the instant one are not

34373

IN RE ESTATE OF KATHARINE E.  
WELLS, Deceased, et al., Appellants,  
Respondents.

v.

RAY WELLS,  
Appellee.

Appeals.

250 I.A. 657

NO. 10,000,000 FOR THE UNITED STATES OF AMERICA

The executor of the estate of Katharine E. Wells, deceased,  
appeals from a judgment allowing a claim of Ray Wells in the sum of  
\$3,375 against the estate. The case was heard by the court, without  
a jury.

The written evidence presented of claim reads as follows:

"I was on or about March 23rd, 1921, in Chicago, Cook  
County, Illinois, for a time and a certain consideration,  
to-wit: the value of Katharine's estate as set of her  
will, deceased, as was to be paid to her estate owned by the  
said Katharine Wells during her lifetime and after her death  
been conveyed by her will to her estate with the said  
K. Wells, said Katharine E. Wells promised to pay to the  
claimant herein the sum of \$3,375.00, that on said consideration  
with said Katharine said Katharine E. Wells, deceased, as above-  
said, will to said claimant on or about October, 1921, the  
sum of \$3,375.00 and again on or about January, 1922, an additional  
\$3,375.00, and again on or about March, 1922, a further additional  
sum of \$3,375.00, making a total of \$10,125.00, and on account of  
said promise, said Katharine and her estate paid claimant herein  
as aforesaid, the sum of \$10,125.00, the value of her estate."

It is to be noted that the written evidence shows five payments  
why the instant judgment should be reversed. In the view that we  
have taken of this appeal it will be necessary to consider only one  
of these, viz.: that appellee failed to make out a prima facie case.  
After a careful consideration of the entire record we are satisfied  
that this contention is a worthless one. While it is true, as  
appellee contends, that promissory note the instant one was not



governed by the technical rules which apply to suits at law and that written pleadings are not required, nevertheless, section 60 of the Administration Act, Callaghan's Ill. Rev. St., ch. 3, 1929 p. 60, provides that a claimant shall produce his claim in writing. His statement of claim is the basis of his right of action. In the instant case the claimant verified the statement of claim. Counsel for appellee made an opening statement to the court which shows clearly that the only claim of appellee against the estate of Katherine E. Swift was the one stated in the statement of claim. A careful examination of the evidence discloses that the claimant offered no proof that on or about March 6, 1923, he was an heir of Joseph A. Swift, or that Joseph A. Swift had any real estate in which claimant had any rights, or that claimant waived any interest in the property conveyed by Joseph A. Swift to Katherine E. Swift, or that he had any interest in said property. But even if the evidence had shown that he was an heir and that he waived his rights as an heir, there is absolutely no proof that he waived any rights of the reasonable value of \$5,250, the amount allowed him. There is no proof that Mrs. Swift ever agreed to pay claimant any specified amount for waiving his rights as an heir. Denning, whose first name is not given in the record, was the only witness who testified that Mrs. Swift mentioned any sum of money in the alleged conversations between her and the claimant. This witness, on direct examination, testified as follows: "Q. Can you tell us what conversation, if any, took place between Mrs. Katherine Swift and Ray Swift at that time? A. Well, in a general way I can. Q. Can you tell us in substance what it was? A. Yes, she asked Ray that if he wouldn't start any legal proceedings she would settle with him. Q. Legal proceedings about what? Did she say? A. Breaking a will. Q. Breaking a will? A. Yes. Q. Was there any





sum of money mentioned at that time? A. Well, yes, there was. Around fifty-eight hundred or six thousand dollars. The Court: You remember distinctly that conversation, do you? A. Yes, that sum was mentioned." It is clear that this testimony does not tend to support the instant claim. As the claim was contested the verified statement of claim is not evidence against the estate. (See Smythe v. Evans, 209 Ill. 376, 386; Kingan & Co. v. Burns, 104 Ill. App. 661, 662; Eat. of Bell, 210 Ill. App. 352, 355.) Appellee makes the surprising argument that the executor knew that Ray Swift was a brother and heir of Joseph A. Swift and that if he had in some way called attention to the absence of the necessary proof it would have been easy to supply it. The estate objected to the claim and therefore it devolved upon claimant to make out a prima facie case. Appellee further contends that the instant point raised by appellee amounts only to this, that there is a variance between the statement of claim and the proof and that as appellant did not raise the question of variance in the lower court he cannot raise it here. Appellant's contention does not raise a question of variance. His contention is that the claimant has failed to make out a prima facie case. Appellee further contends that the filing of the verified statement of claim made out a prima facie case. There is no merit in this contention. Under the statute, if no objection to the claim had been made by the executor the court might have allowed it without further evidence, but where the claim is disputed the statement of claim is not evidence against the estate. (Smythe v. Evans, *supra*, 386.) The reason for this rule is obvious. We feel impelled to add that the evidence offered by appellee in support of his claim is of a very unsatisfactory kind. Appellee insists that the fact that the estate failed to offer any evidence in rebuttal should play an important part in the determination of this appeal. There would be force in this argument if appellee had made out a prima facie case. However, it is not difficult



sum of money mentioned at that time. A. Bell, York, there was  
around fifty-eight hundred on his thousand dollars. The Court  
has remanded this case to the Commissioner, to York, A. Bell, there  
was the money. It is clear that this testimony does not tend  
to support the plaintiff's claim. As the claim was contested the  
verified statement of claim is not evidence against the estate.  
(See Wright v. Wright, 107 Ill. 375, 384; Wright v. Wright, 107  
Ill. 375, 384; Wright v. Wright, 107 Ill. 375, 384.) Appellee  
makes the verified statement that the executor made out a bill  
was a higher and better of course. It is clear that if he had in some  
way called attention to the nature of the property given to him  
have been very to verify it. The estate objected to the claim and  
therefore it is clear that claimant is made out a prima facie case.  
Appellee further contends that the instant point raised by appellee  
amounts only to this, that there is a variance between the statement  
of claim and the proof and that an objection will not raise the question  
of variance in the case that he cannot raise it here. Appellant's  
contention does not raise a question of variance. The contention in  
that the claimant has failed to make out a prima facie case. Appellee  
further contends that the nature of the verified statement of claim  
made out a prima facie case. There is no doubt in this connection.  
Under the statute, if an objection to the claim was made by the  
executor the court might have allowed it without further evidence,  
but where the claim is verified the statement of claim is not evidence  
against the estate. (Wright v. Wright, supra, 107 Ill. 375, 384.) The reason for  
this rule is obvious. As the verified statement is not evidence  
offered by appellee in support of the claim as of a very satisfactory  
kind. Appellee insists that the fact that the estate failed to offer  
any evidence to rebut the claim is sufficient proof in the matter.  
Dismissal of this appeal. There would be force in this argument if  
appellee had made out a prima facie case. However, it is not sufficient

to see why the estate was unable to meet the testimony of the witnesses for appellee. To illustrate: William H. McFadden was undoubtedly the strongest witness for appellee. He testified to an alleged talk he had with Mrs. Swift when no one else was present. It appears from the cross-examination of this witness that although Mrs. Swift was apparently a woman of property, McFadden filed a claim against her estate for \$6,060 for board and lodging furnished her for four years before her death. The testimony of the witness Penning does not support the statement of claim, and when it is considered in the light of the testimony of Mrs. Burr, who claims to have been present and to have heard the alleged conversation between Mrs. Swift and Penning, it rather tends to discredit the claim. The trial court first disallowed the claim on the ground that the evidence in support of the same was not of a satisfactory kind, but upon a reconsideration allowed it. The court justified his action in that regard upon the ground that the estate had offered no evidence in rebuttal. If the trial court had adhered to its first conclusion, we would have been obliged, under the record, to sustain his judgment. We have concluded, however, that justice would be best served if there were a retrial of this cause.

The judgment of the Circuit Court of Cook County is reversed and the cause is remanded.

REVEREND AND REMANDED.

Gridley and Barnes, JJ., concur.

to see why the estate was unable to meet the testimony of the witnesses for appellee. To illustrate: William H. McComb was undoubtedly the strongest witness for appellee. He testified to an alleged sale of the land to the appellee. It appears from the cross-examination of this witness that although Mrs. McComb was apparently a woman of property, McComb filed a claim against her estate for \$2,000 for board and lodging in which but for four years before her death. The testimony of the estate's leading witnesses not support the recovery of claim, and when it is considered in the light of the testimony of Mrs. McComb, the claim to have been proved and to have given the alleged compensation between Mrs. McComb and her husband, it rather tends to disprove the claim. The claimant's first witness testified that the estate had agreed to give in return of the same was not of a satisfactory kind, and upon a reconsideration allowed it. The court granted his motion in that regard upon the ground that the estate had agreed to do so in return in return. If the trial court had adhered to its first conclusion, it would have been wrong, and the issue, as therein his judgment. It may be concluded, however, that justice would be best served if there were a reversal of this decree.

The judgment of the circuit court of Cook County is reversed and the cause is remanded.

STANLEY and KASSER, JLL. JUDGES.



34414

FOREMAN-STATE SAVINGS BANK,  
a corporation, as guardian  
of the estate of MARY SOWA,  
a minor,

Appellee,

v.

JOSEPH L. LYNCH and  
EUGENE T. WILLIAMS,  
Defendants.

On appeal of JOSEPH L. LYNCH,  
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

259 I.A. 657<sup>3</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, appellee, brought an action in case against Joseph L. Lynch and Eugene T. Williams. The case was tried before the court with a jury and there was a verdict returned finding defendants guilty and assessing plaintiff's damages at \$15,000. Judgment was entered on the verdict and defendant Lynch has appealed.

Plaintiff, as guardian of the estate of Mary Sowa, a minor, sued to recover for personal injuries sustained by the minor when she was struck by an automobile driven by defendant Williams. The amended declaration consisted of seven counts but all save the seventh were withdrawn on motion of plaintiff. At the close of plaintiff's case an additional count was filed by leave of court. The seventh count alleged (inter alia) that prior to the time of the accident defendant Lynch owned and possessed an automobile and that in disregard of his duty he failed to provide it with good and sufficient brakes and permitted it to be equipped with defective and insufficient brakes and permitted it to come into the possession of defendant Williams and to be driven by the latter, and that as a result thereof, while the latter was driving the automobile it ran

20414

EXHIBIT - 1  
A copy of the  
of the State of New York  
a copy.

Exhibit

v.

JAMES E. WILSON  
JAMES E. WILSON

Defendant

An appeal of James E. Wilson  
appealed.

MR. JUSTICE WILSON delivered the opinion of the court.

Defendant, appellant, brought an action on cross appeal.

James E. Wilson and James E. Williams. The case was tried before

the court with a jury and there was a verdict returned finding

defendant guilty and assessing plaintiff's damages at \$10,000.

Judgment was entered on the verdict and defendant's cross appeal.

Defendant, on appeal, is entitled to a new trial.

First, as to the verdict for personal injuries sustained by the plaintiff.

When the case came on for trial the plaintiff was represented by defendant Williams.

The amended complaint contained no averment that the plaintiff

was injured on motion of plaintiff. At the close of

plaintiff's case an amended complaint was filed by leave of court.

The seventh count alleged (inter alia) that prior to the time of the

accident defendant owned and possessed an automobile and

that in disregard of his duty he failed to provide it with good

and sufficient brakes and permitted it to be equipped with defective

and insufficient brakes and permitted it to come into the possession

of defendant Williams and to be driven by the latter, and that as a

result thereof, while the latter was driving the automobile it was

into and struck Mary Gowa and thereby she was seriously injured. Both defendants pleaded the general issue to the amended declaration and Lynch also filed a special plea denying ownership, possession and operation of the automobile. An additional count alleged that at the time of the accident and prior thereto defendant Lynch owned and possessed an automobile and that it was his duty to have provided the said automobile with good and sufficient brakes while in use on a public highway, but that, in disregard of his said duty, he did not provide said automobile with good and sufficient brakes but permitted it to be equipped with bad, defective and insufficient brakes, all of which was then and there to him known or would have been known to him by the exercise of due care, and that he permitted said automobile to come into the possession of defendant Williams and to be driven by him on the public streets in the City of Chicago with such bad and insufficient brakes and that defendant Williams knew, or by the exercise of due care would have known, the condition of said brakes, yet he, while said brakes were in such condition, carelessly, negligently and improperly drove said automobile upon Southport Avenue and at such an excessive rate of speed that as the direct result of the said negligence of said defendants combining and concurring the said automobile with force and violence ran into and struck Mary Gowa and threw her upon the street and ground, etc. The pleas of defendants then on file were ordered to stand as pleas to the additional count.

Defendant has raised and argued ten grounds in support of his contention that the judgment should be reversed, but in the view that we have taken of this appeal it will be necessary for us to consider one only. Defendant contends and strenuously argues that plaintiff has failed to prove by a preponderance of the evidence that defendant Lynch owned the car at the time of the accident and that therefore plaintiff failed to prove a prima facie case, and the judg-



into and struck Mary down and thereby she was seriously injured.  
 John defendant pleaded the general issue to the amended declaration  
 and there was a special plea denying contributory negligence.  
 and operation of the automobile. In addition counsel alleged that  
 at the time of the accident and prior thereto defendant Lynch owned  
 and possessed an automobile and that it was the only one he provided  
 the said automobile with good and sufficient brakes while in use on  
 a public highway, but that, in disregard of this duty, he did not  
 provide said automobile with good and sufficient brakes but permitted  
 it to be equipped with bad, defective and inefficient brakes. All of  
 which was then and there so well known or would have been known to him  
 by the exercise of due care, and that he permitted said automobile to  
 come into the possession of defendant William and to be driven by  
 him on the public streets in the City of Chicago with such bad and  
 inefficient brakes and that defendant William knew, or by the  
 exercise of due care would have known, the condition of said brakes,  
 yet he, while said brakes were in such condition, negligently, unlawfully  
 and imprudently drove said automobile upon highway overman and  
 as such an excessive rate of speed that on the instant occasion of the  
 said negligence of said defendant causing and contributing the said  
 automobile with force and violence ran into and struck Mary down and  
 threw her upon the street and ground, etc. The place of defendant's  
 then on file were offered to stand as place of the additional count.  
 Defendant was trained and expert in driving in respect of  
 his contention that the defendant should be responsible, but in the view  
 that we have taken of this appeal it will be necessary for us to  
 consider one only. Defendant William and defendant Lynch that  
 plaintiff was killed as a result of a representation of the witness that  
 defendant Lynch owned the car at the time of the accident and that  
 therefore plaintiff failed to prove a prima facie case, and the jury

ment must be reversed. After a careful consideration of all the facts and circumstances that bear upon the instant contention we have reached the conclusion that this contention is a meritorious one. As the case may be tried again we refrain from analyzing and commenting upon the testimony. Plaintiff argues, however, that under the seventh count of the amended declaration the liability of defendant Lynch is not necessarily based upon his ownership of the automobile at the time of the accident; that this count alleges "that prior to the time of the happening of the accident Lynch was the owner of and possessed of an automobile; that in violation of his duty to provide the automobile with good and sufficient brakes, he permitted said automobile to be equipped with bad, defective and insufficient brakes and permitted the automobile with such brakes to come into the possession of and to be driven by Williams upon the public streets in the City of Chicago, and that while Williams was operating the said automobile as aforesaid, it seriously injured the plaintiff," and that "in the case at bar Lynch was liable for his failure to perform his duty to see that his car was equipped with good and sufficient brakes and the seventh count alleging that he permitted the automobile to come into the possession and to be driven by Williams upon the public streets with the brakes in such condition stated a good cause of action against Lynch." From the oral arguments we learn that plaintiff's instant contention, tersely stated, amounts to this, that even if Lynch had sold the car to Williams prior to the time of the accident he would still be liable to plaintiff if prior to the sale he had failed to provide the automobile with good and sufficient brakes and had permitted it to be equipped with bad, defective and insufficient brakes and had permitted it to come into the possession of defendant Williams and to be driven by him upon the public streets with such bad and insufficient brakes and that as a result thereof the automobile, while being operated by Williams, ran



... after a careful examination of all the  
facts and circumstances that bear upon the instant controversy we  
have reached the conclusion that this contention is a mere speculation  
and that the case may be tried again we retain from examining and  
commenting upon the testimony. Plaintiff argues, however, that  
under the seventh count of the amended declaration the liability of  
defendant is not necessarily fixed upon his negligence at the  
instant time of the time of the accident; that this would require  
"that prior to the time of the happening of the accident plaintiff  
the owner of and possessed of an automobile that in violation of  
his duty to provide the automobile with good and sufficient brakes,  
he permitted said automobile to be equipped with bad, defective and  
inadequate brakes and permitted the automobile with such brakes to  
come into the possession of and to be driven by William upon the  
public streets in the City of Chicago, and that while William was  
operating the said automobile as aforesaid, it negligently and  
carelessly, and that in the case of the instant was liable for the  
failure to provide his car with good and sufficient brakes  
good and sufficient brakes and the necessary count alleging that he  
permitted the automobile to come into the possession and to be driven  
by William upon the public streets with the brakes in such condition  
as to be a direct cause of action against defendant. From the oral arguments  
we know that plaintiff's instant contention, namely stated, amounts  
to this, that when it is shown that the car of William prior to the  
time of the accident was in such condition as to be liable to it prior  
to the time he had failed to provide the automobile with good and  
sufficient brakes and had permitted it to be equipped with bad,  
defective and inadequate brakes and had permitted it to come into  
the possession of defendant William and to be driven by him upon the  
public streets with such bad and inadequate brakes and that as a  
result thereof the automobile, while being operated by William, was



into Mary Bowa and injured her as charged. Plaintiff cites, in support of his contention, the following cases: Foster v. Farra, 243 Pac. 778; Palm v. Iverson, 117 Ill. App. 535; Flies v. Fox Bros. Buick Co., 218 N. W. 855; Saunders System Birmingham Co. v. Adams, 117 Southern 72. None of the cases cited applies to the facts of the instant one. In Foster v. Farra the defendant kept an automobile for the pleasure and convenience of himself and family and he was held liable in an action for personal injuries sustained while the automobile was negligently driven by his seventeen year old son while on family business. In Palm v. Iverson the declaration charged that the defendant negligently, etc., permitted his son, a boy of the age of twelve years, to have a shot gun and that the son negligently, etc., shot and injured the plaintiff. In Flies v. Fox Bros. Buick Co. the defendant was a keeper of a garage and it was a part of its business to repair automobiles and place them in proper condition to operate, and it appeared that after a car had been greatly damaged in a wreck the defendant bought it, took it into its garage and rebuilt it and sold it to one Johnson, representing to him that the car was equipped with all standard equipments and in proper operating condition for use upon the streets of LaCrosse. It further appears that at the time of the sale the car was equipped with inefficient brakes and that when Johnson took possession of it and had proceeded two blocks from the garage he approached a standing street car which was taking on and letting off passengers and that he then attempted to stop the automobile, when he discovered that the brakes were inefficient and would not stop the car, because of which he ran into plaintiff, causing her injuries. The court held that in the rebuilding of the car defendant's duty was analogous to that of a manufacturer of a new automobile and that this was especially true because of the representations made to Johnson at the time of the sale, and further held that it would have been an easy matter for it to





discover that the brakes were defective. The court's ruling was, apparently, based upon the principle that "the manufacturer of an article, not inherently dangerous, but which may become dangerous when put to the use for which it is intended, owes to the public the duty of employing care, skill, and diligence in its manufacture and of using reasonable diligence to see that it is reasonably fit for the purpose for which it was intended." In Saunders System Birmingham Co. v. Adams the defendant was engaged in letting automobiles for hire and it was held that one letting an automobile for hire must exercise reasonable diligence to know its condition. Plaintiff also cites Donovan v. Gargan, 200 N. Y. S. 253, but this is a nisi prius decision and need not be considered. Lynch was not a manufacturer, repairer or dealer in cars, nor a bailor for hire, and we are unable to sustain the contention of plaintiff that after Lynch had sold the second-hand car and parted with possession and control of the same he would be liable to a third person for injuries sustained by the latter, if it appeared that the brakes were defective at the time of the sale and that such condition continued until the time of the accident and was the proximate cause of the same. Even if plaintiff were correct in his contention as to the law, nevertheless, we would be obliged to hold that plaintiff did not prove by a preponderance of the evidence that the brakes were defective at the time Lynch sold the car and gave possession of it to Williams.

The judgment of the Superior Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley and Barnes, JJ., concur.





34459

GEORGE W. MURRAY,  
Appellee,

v.

CITY OF CHICAGO, a  
Municipal Corporation,  
Appellant.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

259 I.A. 657<sup>4</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

George W. Murray, plaintiff, sued City of Chicago, a municipal corporation, defendant, in an action of case. Plaintiff brought suit to recover damages for personal injuries sustained by him as the result of his stepping into a hole in a pavement on a public street in said city. There was a trial before the court, with a jury, and a verdict returned finding defendant guilty and assessing plaintiff's damages at \$7,000. Judgment was entered upon the verdict and defendant has appealed.

No point is made as to the pleadings. The accident happened on February 20, 1928, about 5:30 p. m., at the northwest corner of West Harrison and South Franklin streets in said city. Harrison street runs east and west and Franklin street north and south. Plaintiff was chief clerk in the car service department of the Chicago & Alton Railroad Company and his place of work was in a building located about one block west of Franklin and on the north side of Harrison street. When he left his place of work on the evening in question he walked east on the north sidewalk of Harrison street and was crossing Franklin street on the north crosswalk when he stepped into a hole that was located about two steps from the sidewalk at the northwest corner of the intersection and that was directly in the path of pedestrians crossing from the west to the east side of Franklin street. It was dark at the time

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1. NAME OF THE PARTY  
2. NAME OF THE PARTY  
3. NAME OF THE PARTY

100

520 A. I. 025

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-11-2010 BY 60322 UCBAW

George W. Wallace, Chairman, and Bill of Harts, Jr.,  
 President, and the Board of Directors, in an action of law.  
 brought suit for recovery of damages for personal injuries sustained by  
 him on the night of the explosion into a mine in a basement on a  
 basis stated in this bill. There was a fatal injury to the body,  
 with a laceration and a variety of injuries to the head and  
 neck, and a variety of injuries to the head and neck.

The point is made by the following. The evidence happened on February 2, 1938, about 11 p. m., at the northeast corner of East Harrison and North Franklin streets in this city. Harrison street runs east and west and Franklin street north and south. The witness was about 100 feet from the northeast corner of the Chicago & North Western Company and his place of work was in a building located about one block west of Franklin and on the north side of Harrison street. When he left his place of work on the evening in question he walked west on the north sidewalk of

[illegible]



and there were no street lights at the intersection save one on the southeast corner. There was snow on the street. The hole was about three feet in diameter and somewhere between five and eight inches in depth. Plaintiff had never seen the hole until after the accident. His usual course of travel from his place of work was to walk east on the north sidewalk of Harrison to Franklin and then north on the west side of Franklin to a station of the elevated road. On the morning of the accident he left a watch to be repaired at a place in the LaSalle street station, located to the east of the intersection in question, and at the time of the accident he was proceeding directly east across Franklin street in order to reach the place where he had left the watch. Plaintiff testified positively that he stepped into the hole and fell "when his foot went into it" and that he did not slip on any snow or ice before his foot went into the hole. There was no evidence to contradict this testimony of plaintiff. The hole had been there for at least two months and the city policeman located at the intersection knew that it was there. This policeman testified that the hole was about two feet in diameter and about six to eight inches deep and that he frequently saw it as he crossed the street. A witness testified that in December before the accident to plaintiff she had injured her ankle by stepping into the same hole. Plaintiff testified that he was certain that he had not crossed Franklin street at that point within two months before the accident, and there was no evidence to contradict this testimony. Plaintiff sustained serious injuries, but as defendant does not contend that the damages awarded are excessive it is unnecessary to detail the same.

Defendant contends that plaintiff was not in the exercise of ordinary care at the time of the accident. In support of this contention defendant first argues that the testimony of plaintiff that he had not crossed Franklin street at the place in question for two months before the accident is unbelievable. It is a sufficient





answer to this contention to say that the jury believed the testimony of plaintiff in that regard and we find nothing in the record that would warrant us in disbelieving it. Defendant next argues that plaintiff testified that he had to stand on the corner for a few seconds until an automobile crossed in front of him, and that as the hole was then only a few feet in front of him he would have seen it if he had exercised ordinary care. We find no merit in this contention. It was dark at the time and the street, including the portion of the same where the hole was located, was covered with snow. The evidence of plaintiff is that he stopped at the corner only momentarily until the automobile passed and that he then immediately stepped off the curb and had taken only two or three steps when he stepped into the hole. Franklin and Harrison streets are both busy thoroughfares and a cautious pedestrian crossing the street at that intersection would be obliged to observe the traffic. "There is no doubt but under the law the plaintiff was entitled to assume that the area of crosswalk on which she was going was in a reasonably safe condition for travel and that there was no special obligation upon her to look particularly at the surface of the street as she undertook to cross over." (Welch v. City of Chicago, 236 Ill. App. 520, 533.) This case was affirmed by the Supreme Court (Welch v. City of Chicago, 323 Ill. 498). In the Welch case the accident happened about 1:55 p. m.

Defendant contends that "the defendant was not guilty of any negligence." That such a contention should be made, in view of the fact that counsel for defendant conceded during the closing argument that defendant was guilty of negligence, is rather surprising. Defendant does not question the evidence in reference to the hole in the street and the length of time that it had been there, but it attempts to argue that the street was slippery and that this condition, and not the hole, was the proximate cause of the accident. It is a sufficient answer to this contention to say that there is no





evidence to justify the argument that plaintiff slipped on the ice or snow and that his foot went into the hole as the result of the slipping.

Defendant contends that the court erred in refusing to direct a verdict for defendant. What we have heretofore said as to defendant's first and second contentions disposes of the instant one, and adversely to defendant.

Defendant contends that the court erred in refusing to give its instruction number fifteen. There is no merit in this contention. The instruction is involved in phraseology and contradictory in its terms. Furthermore, defendant's given instructions eleven and twelve clearly and fully express the law that the refused instruction attempts to state.

Defendant next argues that the court erred in refusing to give defendant's instruction number sixteen, which reads as follows: "The court instructs the jury that the mere slipperiness of a street occasioned by ice or snow is not such a defect as will make the City liable for damages occasioned thereby. The City is only liable where there has been such an accumulation of snow or ice in uneven ridges or hillocks as to render passage dangerous if negligently permitted to remain." Plaintiff's declaration is predicated upon one theory, viz., that defendant negligently permitted the hole in question to remain in the street. His case was tried solely upon this theory and, as we have heretofore stated, there was no evidence in the record upon which to predicate a claim that plaintiff slipped upon the snow and because of the slipping his foot went into the hole. In support of its argument that the instant instruction should have been given, defendant states that "on cross-examination the plaintiff testified that this hole that he slipped in, was, I should judge, about three feet from the corner." We have carefully read the cross-examination of plaintiff and



evidence as to the fact that the witness did not see the man who was shot into the hole as the result of the explosion.

Between the time that the court began its hearing on the case and the time that the witness was called to the stand, the witness was not present in the courtroom.

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we find nothing in it to warrant this statement as to plaintiff's testimony. As we have heretofore stated, plaintiff testified positively that he did not slip on any snow or ice and that he stepped into the hole.

The verdict and judgment in this case meet with our approval. Defendant has had a fair and impartial trial and the judgment of the Superior Court of Cook County should be and it is affirmed.

AFFIRMED.

Gridley and Barnes, JJ., concur.



34051

EARL RAYNER,  
Defendant in Error,

v.

ARTHUR B. RANKIN, ELIZABETH  
RANKIN and HARRY L. O'CONNOR,  
Plaintiffs in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 657<sup>5</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

By this writ plaintiff in error Harry L. O'Connor seeks review of a judgment by confession entered against him and co-plaintiffs in error, upon a promissory note signed by him and them and also E. O. Rayner, and indorsed to Earl Rayner, without recourse. Earl Rayner and E. O. Rayner appear to be the same individual.

About a month after the entry of the judgment O'Connor made a motion, supported by affidavit, to vacate the same and it was overruled.

The affidavit sets up as grounds for the motion, fraud, no consideration, and a co-temporary "understanding and agreement." The averments in regard thereto are insufficient to support such a motion. They are mere conclusions. No facts are set out that constitute fraud, and it not only does not appear with whom the alleged understanding was had, but it is in conflict with the terms of the note by which he and the other makers make an absolute promise to pay.

The allegation as to the consideration and understanding is that money was obtained from the bank on the note and paid to the "other defendants (the Rankins) with the distinct understanding and agreement" that no action or suit would be brought against O'Connor, until an effort was made or suit brought to collect from the other defendants "who had received the money," without notice of the failure



EMILY L. BAKER, Plaintiff in Error,

v.

WILLIAM B. BAKER, WILLIAM B. BAKER and EMILY L. BAKER, Defendants in Error.

COURT OF CHANCERY  
CITY OF NEW YORK

IN SENATE, JANUARY 18, 1884.

By this were dissolved in error Henry L. O'Connor books review of a judgment by defendant entered against him and co-plaintiffs in error, upon a promissory note signed by him and them and also E. B. Baker, and interest on said note, without testimony. Both Henry and E. B. Baker appear as co-defendants in this.

Special a writ of certiorari of the judgment of the court made a motion, supported by affidavits, to vacate the same and it was granted.

The affidavits were up on grounds for the action, fraud, no consideration, and a so-called "understanding and agreement." The averments in regard thereto were immaterial to the issue of the note. They are mere conclusions. It is not the duty of the court to make a finding of fact, and it is not the duty of the court to make a finding of law, and it is not the duty of the court to make a finding of equity. The affidavits were up on grounds for the action, fraud, no consideration, and a so-called "understanding and agreement." The averments in regard thereto were immaterial to the issue of the note. They are mere conclusions. It is not the duty of the court to make a finding of fact, and it is not the duty of the court to make a finding of law, and it is not the duty of the court to make a finding of equity.

to collect from them, of all of which plaintiff had knowledge before becoming a holder of the note, and he never notified O'Connor that the note was not paid; that there was no consideration passing to him and he never received any of the money.

The alleged understanding is not only inconsistent with his absolute promise to pay but with the waiver in writing on the note of "notice of demand, protest, and non-payment," and with the authorization therein for confession of judgment "against us or any of us."

But if there was such an understanding it was unavailing. It did not affect O'Connor's liability on the note, or constitute a meritorious defense thereto. And, besides, it was inconsistent and incompatible with his obligation as an accommodation maker, as he manifestly was.

Under section 6 of the Negotiable Instrument Act plaintiff could bring the suit against any or all the makers, and though he also was an accommodation maker and holder for value he had a right of action against the others and was not obliged to include himself as a defendant, and O'Connor as an accommodation maker was liable to him as a holder for value. Under section 1 of the Act, O'Connor still has recourse against the Bankins for reimbursement should he be enforced on execution to pay the note.

The affidavit sets up no meritorious defense to the note and the motion was properly denied.

AFFIRMED.

Seanlan, P. J., and Gridley, J., concur.

to collect from them, of all of which I have had knowledge before becoming a partner of the firm, and he never mentioned to me that the debt was not paid; that there was no consideration passing to him and he never received any of the money.

The alleged understanding is not only inconsistent with his absolute promise to pay but also the nature of the evidence in the case of 'motion of January, 1902, and non-payment', and also the testimony of the witness for defendant at the trial, 'against me at my trial'. But it must be noted that the understanding is not absolute. It is not stated 'I promise' liability on the part of defendant and no consideration between them. But, however, it was intended and inadvisable that the plaintiff as an accommodation matter, as he honestly was.

Under section 4 of the Negotiable Instruments Act plaintiff could bring the suit against me at all the times, and though he also was an accommodation matter and though the value he had a right of action against the others and was not obliged to include himself as a defendant, and I cannot as an accommodation matter was liable to him as a joint debtor. Under section 1 of the Act, 'where still has no consideration against the others for reimbursement should he be entitled to recover to pay the debt. The plaintiff set up no consideration between us the wife and the action was properly barred.

Respectfully,  
J. L. Smith, Jr., Attorney.



34051

EARL RAYNER,  
Defendant in Error,

v.

ARTHUR S. RANKIN, ELIZABETH  
RANKIN and HARRY L. O'CONNOR,  
Plaintiffs in Error.

ERROR TO MUNICIPAL

COURT OF CHIC GO.

259 I.A. 657<sup>SA</sup>

ADDITIONAL OPINION UPON PETITION FOR REHEARING.

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error, in their petition for rehearing,  
have made the following points:

"I. The plaintiff below, Earl Rayner, was also one  
of the makers of the note sued on and when he took over the  
note the note was extinguished and he was not entitled to  
judgment on such extinguished note.

"III. An accommodation maker is only liable to a  
co-accommodation maker for his pro rata share of the amount  
the co-accommodation maker pays for the note, and such  
liability is not based on the note but on the liability  
between the parties as co-guarantors or co-sureties."

Neither of these points was made by the plaintiffs in error in their  
original brief and, therefore, we cannot now consider the same. The  
petition for rehearing will be denied.

PETITION FOR REHEARING DENIED.

Gridley, J., concurs.



34232

152

DAMONIA MAGNETIC MINERAL COMPANY,  
Appellee,

v.

WILLIAM A. McNEILL et al.,  
Defendants,

MARGARET McNEILL AYERS,  
Appellant.

7

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

259 I.A. 658<sup>1</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a chancery proceeding in which a decree for complainant is appealed from by one of the defendants only.

The decree overruled exceptions to the master's report and in substance confirms and validates all acts and proceedings of the stockholders and directors of complainant company in and about the reorganization of said company and the execution of a contract with Edmund E. Cummings, a defendant, and its execution of a so-called mineral lease to the Texas Exploration Company, and decreeing that said Cummings is entitled to continue to receive from complainant one-half of all royalties received by it under said lease, and that complainant execute an assignment to Cummings of a one-half interest in and to said lease.

The decree is in accordance with the findings of the master and the allegations and prayer of the bill.

There is practically no material controversy of fact. The material facts are as follows:

Complainant is an Illinois corporation first organized August 30, 1882, for the purpose of excavating, preparing and selling a magnetic material called "Damonis". Its capital stock



These findings of "anomalous" behavior indicated a possible

was \$1,000,000, divided into 100,000 shares of the par value of \$10 each. It acquired title to 604 acres of land in Texas, which was placed in Richard S. Tuthill, as Trustee. Its business was carried on until 1892 with indifferent success, when it disposed of all its assets except mines, minerals or earth having medical, chemical, commercial or mechanical value, and springs of water having mineral or chemical property on said Texas real estate. One Mary Cornelia Bullen, became the owner of her husband's 50,015 shares, a majority of complainant's capital stock. Edmund S. Cummings was her attorney in closing her husband's estate in the Probate court in 1912. Said stock was then deemed of no particular value.

In the early part of 1916, a lawyer from Texas called on Cummings in Chicago as the attorney for the Bullen Estate and disclosed to him that there was a possibility of oil being discovered on the Texas property and of litigation by adverse claimants. Cummings saw Mrs. Bullen and on her compliance with his suggestion to pay his expenses he went to Texas to make an investigation, and with no agreement with any one, other than that Mrs. Bullen should pay his expenses, he visited various parties and cities. He learned that one Noel was seeking to enforce a claim of ownership to the land under an alleged lost deed purporting to be from complainant through Mr. Bullen, its then president, and that Malcolm McNeill, its vice president, and the widow of the former secretary of complainant, and one Harris, a stockholder of the company, were prepared to support Noel in his contention, and later learned that a suit by Noel, asserting such claim, was begun in the State of Texas, to which said Tuthill as trustee was made a party, but not complainant or any of its stock-

was 1,000,000, divided into 100,000 shares at the par value of \$10 each. It was organized in 1884 under the laws of Texas. The stock was placed in Richard S. Turrell, as Treasurer. His business was carried on until 1888 with indifferent success, when it disposed of all its assets except mining, minerals or earth having historical, chemical, commercial or mechanical value, and springs of water having mineral or chemical property or value. Texas coal estate. The Texas Coal Estate, became the owner of her husband's 50,000 shares, a majority of complainant's capital stock. Richard S. Cummings was her attorney in closing her husband's estate in the Probate court in 1911. This stock was then deemed as no particular value.

In the early part of 1922, a letter from Texas called on Cummings in Chicago as the attorney for the Dallas Estate and disclosed to him that there was a possibility of oil being discovered on the Texas property and of litigation of various character. Cummings saw Mrs. Turrell and on her complaint with his suggestion to pay his expenses he went to Texas to make an investigation, and with no agreement with any one, other than that Mrs. Turrell should pay his expenses, he visited various parties and cities. He learned that one Hook was seeking to acquire a claim of ownership of the land under an alleged lease deed purporting to be from complainant through Mr. Turrell, the then president, and that Malcolm McNeill, the vice president, and the widow of the former secretary of complainant, and one Harris, a shareholder of the company, were prepared to support Hook in his contention, and later learned that a suit by Hook, asserting such claim, was begun in the State of Texas, to which suit Turrell as trustee was made a party, but not complainant or any of the stock-



holders. Cummings on his own responsibility employed an attorney in Texas paying him a retainer of \$250 of his own money to represent the interests of Mrs. Bullen and returned to Chicago to search for evidence to overcome the Noel claim, and found contracts and letters that seemed to controvert it. He also ascertained that there was another claim of ownership to the entire property made by the estate of B. H. Wisdom, based upon the claim that there was no original reservation of rights to the Damonia Company of mineral oils but only a reservation of mineral earth for medicinal purposes, a question that went to the very foundation of complainant's rights and as to the force of which Cummings himself entertained much doubt. He also learned that one W. S. Herndon claimed an undivided one-fourth interest in the property by virtue of a settlement agreement made with said Richard Tuthill in 1901. While Cummings did not think the claim had legal merit, it was vigorously asserted, and he thought it would become necessary for complainant to intervene in the Noel suit for the protection of its rights. Accordingly Cummings returned to Chicago and endeavored to locate the files, records and stockholders of the Damonia Company, which had been defunct as a corporation since 1892. He found that some of its officers had left the State, some were dead, and undertook to locate its books and records and ascertain who were its stockholders. As the result of inquiries, letter writing and advertising by him he brought together on November 18, 1910, such persons as he found were interested as officers and stockholders of the Company, among them Malcolm McNeill, its last vice president and a stockholder, who turned over to Cummings as an "active organizer" of the company the only stock record in existence, which ran down to 1901, and what

believe Cummings in his own responsibility engaged an attorney  
in 1900 to pay him a retainer of \$250 of his own money to represent  
the interests of Mrs. Miller and returned to Chicago to search for  
evidence to overturn the Will of John, and found contracts and letters  
that seemed to corroborate it. He also ascertained that there was  
another claim of ownership in the estate property made by the  
estate of J. E. Miller, based upon the claim that there was no  
original retention of title in the Danville Company of mineral  
rights but only a reservation of mineral rights for marketing purposes,  
a question that went to the very foundation of Cummings' rights  
and as to the issue of which Cummings himself entertained much  
doubt. He also learned that Mrs. J. E. Miller claimed an undivided  
one-fourth interest in the property by virtue of a settlement agree-  
ment made with John Miller in 1901. Mrs. Cummings did not  
think the claim was legal matter, it was obviously settled, and he  
thought it would become necessary for Cummings to interview  
in the West and for the protection of his rights. Accordingly  
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records and stockholders of the Danville Company, which had been  
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interested as officers and stockholders of the Company, among them  
Malcolm McNeill, its last vice president and a stockholder, who  
learned that the company was an "active organization" of the company  
the only stock record in existence, which was dated in 1901, and that



purported to be the minutes of previous meetings of the stockholders, and also a stock ledger. It was stated at the meeting that in view of the prospect of oil being discovered on the property in Texas it was desirable that the company be reorganized, and a board of directors was elected and authorized to take measures looking to the reinstatement of the company as an active corporation. Later, on January 12, 1917, at the adjourned meeting of the stockholders a new board of directors was elected, which on January 26, 1917, elected officers and adopted by-laws.

Up to that time Cummings did not purport to have and did not have authority to act for the Damonia Company, and except as he volunteered services was acting in the interest of Mrs. Bullen, a stockholder. In the meantime representatives of the various claimants in Texas had prepared a proposed compromise agreement by which the mineral rights were to be leased to the Texas Exploration Company on a royalty basis that was to be paid in certain proportions to the several claimants. The draft of the agreement unsigned was presented to the board of directors at said January meeting for consideration, and also a letter from Cummings addressed to the company stating in detail all that he had done and learned as aforesaid and presenting a proposal to engage him as its attorney.

The proposal was in the form of an agreement providing in substance that Cummings turn over to the board of directors for its consideration and the use and benefit of the company the proposed and prepared lease to the Texas Exploration Company, and various documents and evidence in his possession that might be available for use to defeat adverse claims to the Texas property. By its terms Cummings would undertake to defend the company's claim and to defeat said adverse claims and intervene in the Texas law suit, if necessary, for that purpose, and that he would pay the fees of all attorneys he might employ to assist him, including for services already rendered at his solicitation, and the Damonia Company should assign to



purported to be the minutes of previous meetings of the stock-  
holders, and also a stock ledger. It was stated at the meeting  
that in view of the proposed sale of the property it was believed  
properly in Texas it was believed that the company is entitled  
and a board of directors was elected and authorized to take measures  
looking to the rehabilitation of the company as an active corporation.  
In January 11, 1917, at the adjourned meeting of the stock-  
holders a new board of directors was elected, which on January 20,  
1917, elected officers and adopted by-laws.

Up to that time Benjamin did not appear to have any dis-  
tinct authority as yet for the Texas Electric Company, and might as he  
voluntarily withdrew was acting in the interest of Mrs. Wilson, a  
stockholder. In the meantime representatives of the various  
claimants in Texas had proposed a proposed corporation organized by  
which the mineral rights were to be leased to the Texas Exploration  
Company on a royalty basis that was to be paid in certain proportions  
in the several claimants. The draft of the agreement mentioned  
was presented to the board of directors at said January meeting for  
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use to defeat adverse claims to the Texas property. By its terms  
Cummings would undertake to defend the company's claim and to defend  
said adverse claims and intervene in the Texas law suit, if necessary,  
for that purpose, and that he would pay the fees of all attorneys he  
might employ to assist him, including for services already rendered  
at his solicitation, and the Benjamin Company should render to

him one-half of all its interest in and to said lease, and one-half of all the money that may become due and payable under it, and if nothing was recovered he should receive nothing for his services or the moneys disbursed by him.

At said meeting, against the protest of two of the directors who regarded the compensation for Cummings on that basis as excessive, a resolution authorizing the acceptance of Cummings proposal was passed, and also a resolution to execute said lease. Later, as some of the claimants refused to sign the lease, the Noel suit was set down for hearing, and complainant intervened. The parties then accepted the compromise agreement, the lease was signed and a decree was entered in the Noel suit establishing their respective interests and percentages <sup>as</sup> provided in said lease. Cummings, acting through and advising with the Texas attorney, paid him for his services \$2750. He has received from complainant \$10,743.12, one half of royalties paid to the Damonia Company up to the date of this suit.

The bill was filed May 22, 1928. The only defendant filing an answer was appellant. Her answer was to the effect that she was not fully advised as to the present assets and rights of complainant and called for strict proof of such matters. No evidence was introduced in her behalf except three affidavits and the certificates of stock evidencing her interests, one for 10,000 and one for 500 shares, issued to Malcolm McNeill in December, 1885, and by him assigned to Wm. A. McNeill, and by the latter assigned to appellant.

The affidavits were presumably received by agreement in lieu of testimony by the affiants, though the record does not so show. However, they do not appear to have been objected to. One affidavit was by appellant, another by her husband, and the third by Wm. A. McNeill, appellant's assignor as aforesaid. The purport







of her affidavit and that of her husband is that they never knew or received notice of the stockholders meeting in November, 1916, or of the meeting in January, 1917, and never acquired any knowledge of the contract with Cummings until about nine years after it was executed and never consented to the same. The affidavit of Wm. A. McNeill states that he purchased said shares of stock from Malcolm McNeill in 1885, and transferred them to appellant some time before November, 1916; that he learned that a stockholders meeting was to be held in November, 1916, and asked his friend Richard Fitzgerald to go to the meeting, which the latter attended "as his friend but really in the interest of Margaret H. Myers" (appellant); that neither he nor appellant gave Fitzgerald power of attorney or proxy, and that he had no notice of the stockholders meeting held in January, 1917; and that neither he nor appellant had any notice of said meetings or of the proceedings taken thereat until sometime in the year 1926. It appears, however, that Fitzgerald appeared as proxy for him and voted his stock at the November, 1916, meeting, and that Malcolm McNeill appeared in person at the November meetings and voted certain other stock standing in his name, and that the January meeting was held pursuant to an adjournment from the last November meeting.

From this state of facts it is the contention of appellant that the contract was exacted by Cummings as a lawyer from his client under circumstances that cannot lawfully be sustained. She relies upon the well established law that the burden is on the attorney to show perfect fairness, adequacy of consideration and equity in a transaction between him and his client, and, if he fails to make such proof, a court of equity will treat the case as one of constructive fraud (Warner v. Flack, 278 Ill. 308; Willin v. Burdette, 172 Ill. 117; Elmore v. Johnson, 143 Ill. 513.), and the principle that

of her affidavit and that of her husband is that they never knew  
of receipt notice of the acknowledgment meeting in November, 1916,  
or at the meeting in January, 1917, and never received any knowledge  
of the contract with Cummings until about nine years after it was  
executed and never connected to the same. The affidavit of Wm.  
A. Howell states that he purchased said shares of stock from  
William Howell in 1911, and immediately thereafter in April of 1911  
before November, 1911; that he learned that a stockholder's meeting  
was to be held in November, 1916, and called his friend Richard  
Witzgall to go to the meeting, which the latter attended "as his  
friend was unable to be present in the interest of William A. Howell";  
that neither he nor Witzgall gave Witzgall power of attorney or  
proxy, and that he had no notice of the stockholders' meeting held in  
January, 1917, and that neither he nor Witzgall had any notice of  
said meeting or of the proceedings taken thereat until sometime in  
the year 1924. It appears, however, that Witzgall appeared as  
proxy for him and voted his stock at the November, 1916, meeting,  
and that William Howell appeared in person at the November meeting  
and voted certain other stock standing in his name, and that the  
January meeting was held pursuant to an adjournment from the last  
November meeting.

From this state of facts it is the conclusion of the court  
that the contract was executed by Cummings as a lawyer from his client  
under circumstances that cannot lawfully be sustained. The relief  
upon the well-verified law that the burden is on the attorney to  
show perfect fairness, absence of favoritism and equity in a  
transaction between him and his client, and it is held to be such  
that a court of equity will grant the same on the basis of the  
facts stated above. Wm. A. Howell vs. Wm. A. Howell, et al.  
117: 117-118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



transactions between an attorney and his client whereby the title to land involved in litigation passes to the attorney are "voidable at the election of the client, irrespective of the fairness or unfairness of the contract, provided such election is exercised within a reasonable time," citing the Elmore case, supra.

As to the application of the latter principle that such a contract is voidable at the election of the client it will be noted that here the client is not complaining of the contract. On the contrary, it seeks to have it confirmed. In fact, the relation of attorney and client did not exist between complainant and Cummings until said contract was signed. Prior to that time he was acting for his former client, Mrs. Bullen, or as a volunteer. While as her attorney and by voluntary efforts he had developed valuable information that might be used for the benefit of the company, he had no relation with the company, until the making of said contract, that obligated either him to give it the benefit of his labors and expense or the company to compensate him therefor. Having voluntarily at his own expense brought matters to the point where in the pending litigation in Texas it became necessary for the company to intervene to protect its rights and to defeat adverse claimants or make some compromise or adjustment, and the company being without money or assets, there was no legal impediment to his entering into a contract for contingent compensation for future services to be rendered at his expense (except such as is required by law to be paid by the client) and using the information he had so acquired. Complainant's claim was more or less uncertain, if contested, and if maintained was of uncertain value and of a speculative character. Complainant was free to accept or reject the proposal. Up to this time no contractual relation existed between the parties. There is no claim of actual fraud, and of course there could be no basis for the claim of constructive fraud before the



transmission between an attorney and his client whereby the title  
to land involved in litigation passes to the attorney who "voluntarily"  
at the election of the client, irrespective of the fairness or un-  
fairness of the contract, provided such election is expressed within  
a reasonable time, after the transfer of title.  
As to the application of the latter principle to the case  
a contract is voidable at the election of the client it will be noted  
that here the client is not complaining of the contract. On the  
contrary, it seems to have it confirmed. In fact, the relation of  
attorney and client did not exist between complainant and defendant  
until said contract was signed. Prior to that time he was acting for  
his former client, Mrs. Wilson, as an agent. This is her own  
word and by voluntary action he had developed valuable information that  
might be used for the benefit of the company. He had no relation with  
the company until the making of said contract, and it is alleged that  
he gave to the benefit of his labor and expense to the company  
to compensate him therefor. Having voluntarily at his own expense  
procured matters in the point where in the pending litigation is taken  
it became necessary for the company to intervene to protect its rights  
and so defend against claimants or who were defendants or plaintiffs,  
and the company being without money or assets, there was no legal  
impediment to its entering into a contract for confidential representation  
for future services to be rendered at his expense (except such as is  
required by law to be paid by the client) and taking the information  
he had so acquired. Complainant's claim was more or less uncertain,  
it contested, and it maintained was of uncertain value and of a  
speculative character. Complainant was free to accept or reject  
the proposal. Up to this time no contractual relation existed between  
the parties. There is no claim of actual fraud, and of course there  
could be no basis for the claim of constructive fraud before the

relation of attorney and client existed. If complainant itself was seeking to set aside the contract instead of confirming it, we fail to see any basis for the claim of constructive fraud, and if there was, that there was anything unfair or inequitable in the contract, or under the circumstances and uncertainties an inadequacy of consideration.

But, as before stated, if any such grounds exist for setting aside the contract it could be only at the election of complainant and exercised within a reasonable time. Appellant was in no position to question the validity of the contract. Its approval was an act intra vires within the power and discretion of the directors, and it is unquestioned law that in the absence of fraud such an act cannot be questioned by a single stockholder. (2 Cook on Corp. Sec. 684.)

Nor was appellant entitled to notice of the stockholders meetings. The assignors of her stock, than whom she had no greater rights, did have notice thereof. The stock under which she claims stood in the name of Malcolm McNeill and he alone was entitled to vote it at a stockholders meeting. (Sec. 44, Ch. 49, Cahill's Ill. Stats.) Not only was he present and voted at the November meeting, but W. A. McNeill, appellant's assignor, also participated therein by proxy, and the January meeting was held pursuant to adjournment from the November meeting at which they were so represented. As appellant acquired no greater rights than her assignor she cannot complain of transactions with the corporation done or assented to by him. (Babcock v. Farwell, 245 Ill. 14, 41.) The assignor is the legal owner of the stock until the transfer is made (People ex rel. Matthiessen et al. v. Lihms, 269 Ill. 351; Bilhuber v. Bilhuber-Wawak Co., 245 Ill. App. 552, 565.), and the transferee of corporation stock is not recognized as a stockholder until the transfer is made on the books of the corporation, or a contractual relation between







him and the corporation is otherwise established. (Marks v. Brenner, 204 Ill. App. 366.)

Not only, therefore, has appellant no standing in law or in equity to question the validity of complainant's acts in the premises, but as she had no greater rights than her assignors she had in fact through them and cannot question notice of the meetings in which they participated.

The fact dwelt upon by appellant that when the Cummings contract was approved the board of directors gave it consideration before considering and approving the lease to the Texas Exploration Company, has no material bearing on the merits of the question of its validity.

Appellant contends it does not lie in Cummings' mouth to say that complainant does not question the contract but is standing by its terms because when it was made and ever since he has had actual control of the company. This statement is evidently based upon the fact that Cummings' client, Mrs. Bullen, represented the majority of the stock and was able to name the directors, several of whom were suggested by Cummings. But Cummings was not a director and never acted as a stockholder. Mrs. Bullen appeared by her brother as her proxy at the stockholders meetings and not by Cummings, and the protest against the contract made by only two of the nine directors was on the ground that Cummings might receive excessive compensation should there be large returns from the lease. While Cummings suggested the selection of a majority of the directors there is nothing to evidence a fraudulent purpose in his so doing, or on their part. In fact, whether anything of value would come to the company from the lease was entirely speculative at the time it was made and the evidence shows that much of the work done by the exploring companies at great cost has been at a loss, and that royalties have been diminishing.

We are unable to say that the decree is not warranted by the evidence.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

him and the corporation is otherwise established. (Exhibit A.)

Exhibit B: 111, 112, 113.

Not only, therefore, but appearing as standing in law

or in equity to question the validity of corporation's acts in

the premises, but as who had no greater rights than her constituents

she had in fact through them and cannot question acts of the

meeting in which they participated.

The fact that upon my application that when the corporation

contract was approved the board of directors gave it consideration

before considering and approving the issue is the fact that the

company, has no material bearing on the merits of the question of

its validity.

Exhibit C contains it does not lie in Cummings' mouth to

say that corporation does not question the contract but is standing

by its terms because when it was made and ever since he has had

actual control of the company. This statement is obviously based

upon the fact that Cummings, agent, was called, represented the

majority of the stock and was able to name the directors, several

of whom were suggested by Cummings. But Cummings was not a director

and never acted as a stockholder. His action appeared by her

position as her proxy at the stockholders meeting and not by

himself, and the protest against the contract made by only two of

the nine directors was on the ground that Cummings might receive

excessive compensation should there be change between from the loan.

This Cummings suggested the collection of a majority of the directors

there is nothing to evidence a fraudulent purpose in this regard,

or on their part. In fact, whether anything of value would come to

the company from the loan was entirely speculative as the fact is

not made and the evidence shows that much of the loan was for the

acquisition of a small amount of stock and had been at a loan, and that

repaid has been declining.

It was made to say that the decree is not warranted by

the evidence.

Respectfully, J. L. ...



34260

EMMA KOFL,  
Appellee,

v.

GLOBE LIFE INSURANCE  
COMPANY OF ILLINOIS,  
a corporation,  
Appellant.

153 7  
APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 658<sup>2m</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was instituted by appellee as beneficiary under five insurance policies aggregating \$3,720 and interest, issued by the Globe Mutual Life Insurance Company and assumed by appellant, to which the premiums were subsequently paid. Copies of the policies are attached to the statement of claim and marked A, B, C, D and E, respectively.

The sole issue raised is whether paragraphs 4 and 7 of defendant's second amended affidavit of merits, which were stricken on plaintiff's motion, set up, as a matter of law, a sufficient defense to policies referred to as A and B, the former for \$500, and the latter for \$1,000 insurance on the life of plaintiff's decedent. Defendant having been defaulted for want of a good and sufficient affidavit of merits as to said policies A and B after said paragraphs were so stricken, and having waived assessment of damages by a jury, the court assessed them at \$1,558.03 including interest, and ordered the cause to proceed to trial as to the balance of the claim.

The policies were alike in form and substance and each contained a copy of the application therefor, which is made a part of the policy. Question 23 of the application asks: "Are you insured? If so, give name of company or companies, date of policy and amount of insurance." This question was unanswered in the application for policy A, and was answered by only "Yes" in the application for policy B.



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U. S. DEPARTMENT OF JUSTICE  
WASHINGTON, D. C.

850 I.A. 658

MR. J. E. HARRIS, ATTORNEY AT LAW, CHICAGO, ILL.

Dear Sir: This letter is in response to your letter of April 10, 1934.

Five insurance policies aggregating \$5,700 and interest, issued by the State Mutual Life Insurance Company and assumed by appellants, to which the premiums were subsequently paid. Copies of the policies are attached to the statement of claim and marked A, B, C, D and E, respectively.

The note issue raised in another paragraph 4 and 5 of Respondent's second amended affidavit of merits, which were taken on Plaintiff's motion, set up, as a matter of law, a deficiency balance to policies returned to as a and B, the former for \$500, and the latter for \$1,500 insurance on the life of Plaintiff's deceased.

Respondent having admitted the want of a good and sufficient affidavit of merits as to both policies A and B after said paragraphs were so attached, and having waived assessment of damages by a jury, the court entered an order of \$1,500.00 including interest, and entered the cause as pressed to trial as to the balance of the claim.

The policies were alike in form and substance and each contained a copy of the application thereto, which is made a part of the policy. Pursuant to the application made "and was insured by" it set, give name of company or companies, date of policy and amount of insurance. This question was answered in the application for policy A. and was answered by only "Yes" in the application for policy B.

The defense to policy A was set forth in said stricken paragraph 4, and that to Policy B in paragraph 7. In both the defense is predicated upon fraud. The charge thereof in the former is that by returning no answer to question 23, the insured "indicated and intended to convey to defendant company the information that his life was not then insured," and that defendant company so understood, and that at said time he was insured by said Globe Mutual Insurance Company and another insurance company and therefore he was "guilty of fraud and intentional evasion and concealment of facts inquired about." In that language the charge is merely an inference or conclusion of the pleader. The fact that the applicant failed to answer the question is equally consistent with a mere oversight. Fraud will not be presumed. There must be facts set forth on which it may reasonably be predicated. It would be the height of absurdity to hold that the mere failure to answer the question implies fraudulent intent. The purpose of the questions and answers in the application is to afford information on which the inquirer may determine whether it will issue the policy, and if the company elected to issue it without an answer to the question it unquestionably waived the answer. (Peterson v. Manhattan Life Ins. Co., 244 Ill. 329, 342-3, and cases there cited.) That was there said of an evasive answer is appropriate here - "if the answer was good enough when the company desired to collect premiums from the applicant, it ought to be good enough when the company is called upon to pay." (p. 343.)

The ground of fraud in paragraph 7 was likewise waived by acceptance of the application. It is alleged therein that "in connection" with the issuance of policy B there was a so-called "preliminary application" in which the insured in answer to the question, "Is said life insured in this Association? If so, give policy number," the applicant answered, naming three other policies (on which this suit is brought), but omitted to mention the policy herein referred to



The release is being made in order to

paragraph 4, and that in policy 5 in paragraph 7. In both the

document is provided upon terms. The change shown in the former

is that by removing no answer to question 5, the answer "Indicated

and indicated as convey to defendant company the information that his

life was not then insured," and that defendant company is indicated,

and that at some time he was insured by said Globe Mutual Insurance

company and another insurance company and defendant is not "Indicated

of term and indicated status and defendant at issue indicated

above." In such language the change is merely an inference of the

status of the plaintiff. The fact that the plaintiff failed to answer

the question is equally consistent with a more favorable. There will

not be presumed. There will be taken as fact in which is way reason-

ably be provided. It could be the right of plaintiff to take the

the more favorable to answer the question implied throughout income. The

purpose of the plaintiff and answer in the application is to afford

information on which the insurer may determine whether it will issue

the policy, and if the company declines to issue it is not an answer

to the question it necessarily solved the answer. (Paragraph 7)

Paragraph 4, and some have stated that the plaintiff is not

that was stated of an evasive answer is appropriate here - "If the

answer was given when the company desired to collect premium

from the plaintiff, it ought to be good enough when the company is

indicated upon the fact." (p. 142)

The ground of term in paragraph 7 was likewise waived by

recognition of the application. It is alleged therein that "in

connection" with the issuance of policy 5 there was a so-called

"promissory application" in which the insured in answer to the question,

"Is said life insured in this respect?" It is given policy number 5.

The applicant answered, naming three other policies in which this

was in breach, but omitted to mention the policy herein referred to



as A, and therefore the pleader charges that the answer was fraudulent and intended to deceive, and that defendant relying upon the same was "thereby deceived and led to believe by said insured that the answer "Yes" in the application referred to in the insurance policy sued upon refers to answer in said preliminary application. This inference seems quite as farfetched and untenable as that drawn from said paragraph 4. The intent to deceive is no more inferable from the facts pleaded than a mere oversight or forgetfulness. Passing on an incomplete answer in an application for insurance, the court, in Triple Link Mutual Ind. Ass'n. v. Froebe, 90 Ill. 299, said that the omission in the answer showed (as it does here) "a partial answer to the question, not that the answer so far as it goes is false." The court also said, what is true here, that the answer being correct as far as it went, the company, by issuing the policy, waived further answer and could not successfully defend on the ground the assured did not fully answer. If, however, the answer in the application, which is made a part of the contract of insurance, is susceptible of two interpretations, that one will be adopted which is most favorable to the insured. (Forest City Ins. Co. v. Hardesty, 182 Ill. 39.)

Nor does it appear from reference to a copy of Exhibit B, made a part of plaintiff's pleading, that the so-called preliminary application is a part of the contract of insurance. If not, the alleged "connection" between it and the application that is made a part of the policy is not apparent or such as furnishes a legitimate basis for the charge of fraud in making the contract.

According to undenied allegations in the statement of claim defendant was receiving premiums on all these policies it had issued to the insured for about eight years. It, therefore, must be deemed chargeable with actual knowledge of them and cannot reasonably claim to have been misled or deceived by the omission to mention policy A in the preliminary application. With such knowledge it will

as it and therefore the answer stands that the answer was found-  
sions and intended to deceive, and that defendant relying upon the  
same was "thereby deceived and led to believe by said insured that  
the answer "Yes" in the application referred to in the insurance  
policy and upon return to answer in said preliminary application.  
This inference seems quite an established and undeniable one that drawn  
from this paragraph 4. The intent to deceive is an more inferable  
from the facts pleaded than a mere oversight or forgetfulness. Pleading  
on an incomplete answer in an application for insurance, the name, in  
Little Rock Mutual Ins. Co. v. People, 30 Ill. 299, said that the  
omission in the answer showed (as it does here) "a partial answer to  
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far as it went, the company, by issuing the policy, waived further  
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claim defendant was receiving premiums on all three policies it had  
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deemed amenable with actual knowledge of them and cannot reasonably  
claim to have been misled or deceived by the omission to mention  
policy A in the preliminary application. With such knowledge it will



not be permitted to assert such a claim. In fact, such knowledge furnishes additional proof of waiver. These claims of fraud and deceit will not stand a logical analysis of the pleadings.

In another paragraph is the general allegation that the company's agent who procured these policies conspired with the applicant to conceal and withhold information as to the correct amount of insurance held by the insured, and that the agent thereby ceased to be the company's agent and became the acting agent of the insured. Construing this paragraph with paragraphs 4 and 7, it is contended it was error to strike the latter two. But if the alleged fraud in said stricken paragraph falls of its own weight then the alleged conspiracy to consummate it must fall with it. But notice to the agent, at the time of the application for insurance, of facts material to the risk, is notice to the insured and will prevent it from insisting upon a forfeiture for causes within such agent's knowledge. (Guter v. Security Benefit Ass'n, 335 Ill. 174, 180; The Security Trust Co. v. Tarpey, 182 Ill. 52, 59.) In the Tarpey case the court said, upon somewhat similar facts, it would be inequitable to permit the company to say that the policies were obtained by fraud and deception.

But in fact the policies contained a clause that after three years they shall be incontestable, except for fraud, nonpayment of premiums, etc. The exceptions do not include or cover a conspiracy to defraud. The purpose of the provision is to fix a limited time in which the insurer could ascertain the truth of the representations. (Weil v. Federal Life Ins. Co., 264 Ill. 425, 434.) But defendant has received premiums on these policies for five years after the expiration of such limitation.

We think the order to strike was proper and the ensuing judgment should be affirmed.  
AFFIRMED.  
Scanlan, P. J., and Gridley, J., concur.



not be permitted to enter such a claim. The fact, which knowledge  
 furnished essential proof of waiver. These claims of fraud and  
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 The matter pending is the general allegation that the  
 company's agent who procured these policies conspired with the  
 applicants to conceal and withhold information as to the correct  
 amount of insurance held by the insured, and that the agent thereby  
 caused to be the company's agent and became the acting agent of the  
 insured. Concerning this paragraph with paragraphs 4 and 7, it is  
 contended it was error to strike the latter two. And in the alleged  
 fraud in withholding paragraph 4 of its own writing from the  
 alleged conspiracy to conceal the same from the insured. The notice  
 to the agent, at the time of the application for insurance, of facts  
 material to the risk, is noted to be known and will prove to be  
 from insuring upon a factitious for concealment with such agent's  
 knowledge. (Guaranty v. Security Benefit Ass'n, 224 Ill. 174, 1907  
101 Ill. App. 2d 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

34287

JOURDAN PACKING COMPANY,  
a corporation,  
Appellant,

v.

C. K. KLIAUGA, CHARLES BROSS  
and PETER GALLANIS, copartners,  
doing business as Green Parrot  
Restaurant,

C. K. KLIAUGA,  
Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

259 I.A. 658<sup>3</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order vacating a judgment for \$535.54 against the above named defendants, upon the petition of appellee filed for equitable relief under Section 21 of the Municipal Court Act.

The petition sets forth that after service of summons upon appellee in the suit brought against all of the defendants as co-partners doing business as Green Parrot Restaurant, he called on plaintiff's attorney and told him that he was not a co-partner of the other defendants, that he never had been, and had no interest in their business; that thereupon said attorney requested that he give him the summons and copy of statement of claim served on him, and then doing so said attorney then stated to him that he would not take any action on said summons or suit papers; that petitioner believing said representation did nothing in said cause; that the first notice he had of the judgment was when execution on the judgment was served on him; and that he was thus defrauded of his day in court.

In answer to the sworn petition appellant filed an affidavit of plaintiff's attorney denying making any such representations, but admitting the summons and suit papers were left with him, though not

78187

LEONARD E. BROWN COMPANY,  
a corporation,  
Plaintiff,

v.

C. E. KILMER, CHARLES E. BROWN  
and JOHN WILLIAMS, Defendants,  
Respondents in the above entitled  
cause.

C. E. KILMER,  
Respondent.

Appealed.

APPEAL FROM JUDICIAL

COURT OF CHIEF

25211.038

RE. JUDICIAL REVIEW OF THE DECISION OF THE COURT.

There is an appeal from an order vacating a judgment for

\$252.00 against the above named defendants, upon the decision of

appealed filed for review in the Circuit Court of the District

Court.

The decision was made after review of numerous cases

appealed in the past brought against all of the defendants as co-

defendants being claimed as their joint defendant, he called on

plaintiff's attorney and said that he was not a co-defendant of

the other defendants, that he never had heard, and had no interest in

their business, that defendant said attorney requested that he give

him the money and that he intended to claim money on him, and the

on said he said attorney then asked to him that he would not take

any action to call account of said general joint defendant believing

only responsibility for money to call account that the first action

he had of the defendant was when execution on the judgment was issued

on said and that he was then released of his day in court.

It appears in the record judicial appeal filed on appeal

of plaintiff's attorney defendant asked for such representation, and

advising the persons and said reports were left with him, though not



at his request, and also affidavits of two employes of plaintiff claiming to have had conversations with Kliauga and one of the other defendants, tending to show admissions that Kliauga was at one time a co-partner in the business of said restaurant, on plaintiff's sale to which the cause of action arose.

The petition is not one in the nature of a suit coram nobis, to which the authorities cited by plaintiff would be applicable, but one invoking the equitable power conferred upon the Municipal Court by said Section 21. The basis of the petition is not error of fact but fraud, and we cannot say that there was not sufficient basis for the claim set up in the petition to justify granting it.

While plaintiff's attorney denied the statement on which the charge of fraud is predicated, yet he had no occasion to keep appellee's papers, and the fact that he did, without giving any satisfactory explanation in his affidavit for such an unusual course, may properly have been considered by the court sufficient ground for its order.

The affidavits tending to show admissions by appellee of prior connection with the firm are not of such evidentiary value as to require the court to disregard the fact of the positive and sworn statements of appellee to the contrary.

While the petition was not filed until about three weeks after appellee received notice of the judgment, during which he sought legal advice and services, yet in the absence of any special damage or injury to appellant we do not think it such a lack of diligence as precluded appellee from asking for the opportunity to establish the charge of fraud. We think there was sufficient equity in the petition to warrant the court's order. And we cannot but observe that had plaintiff gone to a new trial on the simple questions of fact the case, in all probability, would have been concluded on the real merits of the case before action could have been had on an appeal that at best presents a debateable question.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

at his request, and also otherwise as two employees of plaintiff claiming to have had conversations with Klamm and one of the other defendants, tending to show admissions that Klamm was at one time a co-partner in the business of said defendants, on plaintiff's case in which the record is in favor of plaintiff.

The position is not one in the nature of a mere legal right, for since the defendant's case by plaintiff would be inadmissible, and one involving the exercise of power conferred upon the Municipal Court by said Section 21. The basis of the position is not error of fact but law, and no amount of proof that there was not sufficient basis for the claim set up in the position is justly grounds for it.

While plaintiff's attorney denied the statement on which the charge of fraud is based, yet he has no reason to deny appellee's papers, and the fact that he did, without giving any satisfactory explanation in his affidavit for such an unusual course, may properly have been considered by the court sufficient ground for the order.

The appellee tending to show admissions by appellee of prior conversations with the firm was not of such evidentiary value as to require the court to disregard the fact of the positive and sworn statements of appellee in the contrary.

While the position was not filed until about three weeks after appellee received notice of the judgment, during which he sought legal advice and services, yet in the absence of any special damage or injury to appellee we do not think it such a lack of diligence as precluded appellee from seeking for the opportunity to withdraw the charge of fraud. In such there was sufficient cause in the position to prevent the court's order. And we cannot but believe that had plaintiff come to a new trial on the single question of fact the case in all probability would have been decided on the real merits of the case before there would have been an appeal that it was necessary to be made.



34308

1554  
FOREMAN TRUST & SAVINGS BANK,  
Administrator of the Estate  
of Mary Ponczek, deceased,  
Appellee,

v.

PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a corporation,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 658<sup>4</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$356 and costs in favor of plaintiff in a suit brought upon an insurance policy on the life of Mary Ponczek, who died July 21, 1926. The case was tried without a jury.

The policy was issued March 5, 1923. It provided that if the policy lapsed for non-payment of premium or premiums after premiums have been duly paid for three full years or more, the insured would become entitled to extended insurance as therein provided. If the policy had lapsed prior to March 3, 1926, as claimed by defendant, the judgment cannot stand. The sole question, therefore, presented by the record, is, whether any payment was made on the policy after that time.

Appellant contends that the finding of the court was against the preponderance of the evidence as to that fact. It depends, principally, upon whether a receipt for \$6.75, given by defendant for premiums on Mrs. Ponczek's policies, was given March 17, 1925, or March 17, 1926. The last figure of the year has admittedly been changed, and as the receipt was offered in evidence to sustain plaintiff's claim it required a satisfactory explanation of the alteration to entitle admission of the receipt in evidence. (Gage v. City of Chicago, 225 Ill. 213.)



THOMAS L. ...  
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2501 A. 638

IN TESTIMONY WHEREOF I HAVE SET MY HAND AND SEAL AT THE CITY OF NEW YORK, THIS ... DAY OF ... 19...

This report is from a judgment for ... and costs in  
favor of plaintiff in a suit brought upon an insurance policy on  
the life of Mary Thomas, who died July 21, 1925. The case was  
tried without a jury.

The policy was issued March 2, 1925. It provided that  
if the policy lapsed for non-payment of premium or premium after  
premiums have been paid for three full years or more, the  
lapsed would become entitled to extended insurance as therein  
provided. It also policy had lapsed prior to March 2, 1926, as  
claimed by defendant, the judgment cannot stand. The sole question,  
therefore, presented by the record, is, whether any payment was made  
on the policy after that time.

Witnesses testified that the filing of the suit was against  
the representatives of the estate as to that fact. It appears,  
however, upon review of the receipt for \$5.00, given by defendant for  
premium on Mrs. Thomas's policy, was given March 17, 1926, or  
March 18, 1926. The last figure of the year has undoubtedly been  
changed, and as the receipt was offered in evidence to sustain  
plaintiff's claim it contains a materiality omission of the  
figure in the receipt in evidence. (Exhibit A, page 10.)

In plaintiff's behalf, Ponczek, the husband of the insured, testified that he made the payment to the company's agent, an "Italian," and that the receipt therefor was given to him and on it was the figure "6" as indicating the year when it was delivered to him. The receipt of the company bears the signature of its agent, one Dewing, who testified that the receipt was in his handwriting, made out at the time he received the money, that he made no change on it, and that the figure "6" in the year is not in his handwriting; that he signed the receipt, and that the money given thereon was not given to him by Mr. Ponczek, but by a woman in March, 1925, and that he never saw Mr. Ponczek until he saw him in the court room. The receipt reads: "Received from Mrs. Ponczek Six - 75/100 Dollars in payment of 3 weeks' premiums on Polic - Revival - Dewing." Dewing testified that the word "Revival" meant that the policy was reinstated at that time. He distinctly remembered it was in March, 1925, that he gave the receipt, as he was assigned to this work that month and was never at Ponczek's house, where the money was paid, except in that month.

Another witness for defendant, Angelo B. Bunsalow, (the Italian referred to by Ponczek) a collector for defendant on this policy in 1925, testified that he never collected from Ponczek but such collections as he made were from Ponczek's mother-in-law, living next door, with whom Ponczek left the money. He collected for defendant in that territory and called there as often as four times a week. He identified defendant's Exhibit 1 from defendant's collection book, which showed collections made on eight Ponczek policies for three weeks of December, 1925, amounting to \$1.40, and testified that he made those collections. The exhibit showed no subsequent payments. Plaintiff introduced in evidence a receipt without date, reading: "Received from Ponczek \$2.25 1 week Bunsalow." While Bunsalow was unable to give the precise date of that payment he said he never collected any



in plaintiff's behalf, Tennessee, the husband of the deceased, testified that he made the payment to the company's agent, an "Italian," and that the receipt number was given to him and on it was the figure "2" as indicating the year when it was delivered to him. The receipt of the company bears the signature of its agent, one Bowling, who testified that the receipt was in his handwriting, and on it the time he received the money, that he made no change on it, and that the figure "2" in the year is not in his handwriting; that he signed the receipt, and that the money given thereon was not given to him by Mr. Tennessee, but by a woman in March, 1932, and that he never saw Mr. Tennessee until he saw him in the court room. The receipt reads: "Received from Mrs. Tennessee six - 75/100 Dollars in payment of 3 weeks' premium on policy - Revival - Bowling." Bowling testified that the word "Revival" means that the policy was reinstated at that time. He distinctly remembered it was in March, 1932, that he gave the receipt, as he was assigned to this work that month and was never at Tennessee's home, where the money was paid, except in that month.

Another witness for defendant, Angelo M. Bunnellaw, (the Italian referred to by Tennessee) a collector for defendant on this policy in 1932, testified that he never collected from Tennessee but such collections as he made were from Tennessee's mother-in-law, living next door, with whom Tennessee left the money. He collected for defendant in that territory and called there as often as four times a week. He identified defendant's Exhibit 1 from defendant's collection book, which showed collections made on eight Tennessee policies for three weeks of December, 1931, amounting to \$1.42, and testified that he made three collections. The exhibit shows no payment for Tennessee. Plaintiff introduced in evidence a receipt without date, reading: "Received from Tennessee \$2.25 a week Bunnellaw." "While Bunnellaw was unable to give the precise date of that payment he said he never collected any



money on the Ponczek policies after December, 1925. The only proof as to the time of the payment was Ponczek's general statement that it was "after" the payment of the \$6.75. If the latter was made in March, 1925, both Ponczek's and Bunsalow's testimony is consistent with the payment of the \$2.25 in the year 1925.

It appears that after Mrs. Ponczek died defendant paid on some of her unexpired policies and for that purpose her receipt book, which Ponczek testified was lost, was taken up by the company, but returned with the payment check. Bunsalow, accompanied by Ponczek, as he testified and not denied by Ponczek, took the check to the undertaker to pay the latter's bills and gave the receipt book back to Ponczek. The receipt book not being produced at the trial, the said receipts and the sheet from defendant's collection book constituted the only documentary evidence as to payments of premiums.

To support the claim that the alteration on the receipt of March 13 had been made when it was received, Wesolowski, who claimed to live at that time in the same building the Ponczek's lived, testified that Ponczek showed him the receipt and that it was in the same condition, with the figure "6" thereon, when he showed it to him. He said: "Think it was the third month and the 16th or 17th, if I am not mistaken; in 1926." He testified that he lived there about three months, a little over three years before the trial. He testified that he never talked to Ponczek or anyone previous to his testimony about the case. Both he and Ponczek were illiterate. He could read and write a little in Polish. Ponczek finally had to testify through an interpreter. Testifying with reference to the receipt for \$6.75, Ponczek said: "I went downstairs to the man (Wesolowski) and told him I paid for three months. Did not have the receipt with me. Left it at home, just told this man about it. Josephine was there that night." Nevertheless, Wesolowski testified that the receipt was shown



to him and that Josephine was not there, and three years after the occasion he claimed to have a clear memory of seeing the figure "6" and the "date of '16th or 17th'" on the receipt. Disregarding their conflicting testimony, it seems too preposterous for credibility that these two illiterate men should have such a distinct memory of the precise figures on this receipt at a time when to them they possessed no particular significance. Not only did Ponczek testify that the money was paid to Bunsalow, although the receipt bears the signature of Dewing, who testified it was his, and the payment was made to him by a woman, but both Bunsalow and Dewing testified positively that neither of them ever collected any money from Ponczek.

Our conclusion is that the finding of the court was against the great preponderance of the evidence to the effect that the last payment made on the policies was in the year 1925, and therefore the policy had lapsed before the expiration of three years from its date and was not in force as extended insurance at the time of Mrs. Ponczek's death.

The trial having been before the court the judgment will be reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

Seanlan, P. J., and Gridley, J., concur.





34308

FINDINGS OF FACT.

We find that the premiums for \$6.75 and \$2.25 were paid during the year 1925, that the last premium paid on the policy in question was paid before March 5, 1926, and that the policy had lapsed for nonpayment of premiums before that time, which was the expiration of three full years after the date of its issuance, and that no premium on the policy was paid thereafter.

24325

STATEMENT OF FACTS

At the time the premises for \$5.75 and \$2.25 were paid during the year 1922, that the first premium paid on the policy in question was paid before 2, 1922, and that the policy had expired for nonpayment of premium before that date, which was the expiration of three full years after the date of its issuance, and that no premium on the policy was

paid thereafter.



34363

DONALD L. OLCHSE,  
Appellee.

v.

WILLIAM T. FRITTS et al.,  
Defendants.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

On appeal of D. H. FRITTS  
& COMPANY, a corporation,  
Appellant.

259 I.A. 659'

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a creditor's bill filed under section 49 of the Chancery Act to compel the discovery of any property, money or thing in action due to William T. Fritts, or held in trust for him, and to subject the same to the payment of a judgment against him for \$5,437.20 and costs of suit, in favor of complainant entered April 28, 1928, on which an execution was issued August 30, 1928, and returned by the sheriff November 30, 1928, "No part satisfied." The bill was filed March 4, 1929, and on March 6, the summons was served upon said Fritts, and the president of appellant. William T. Fritts was appellant's treasurer and general manager at a salary of \$7,500 a year, payable in monthly installments of \$625, each on the first of the following month.

May 24, 1929, the judgment debtor filed his answer, and on July 15, 1929, he and appellant filed their joint and several answer to the effect that neither had possession or control of any money, \* \* \* or other choses in action belonging to William T. Fritts.

September 25, 1929, a receiver was appointed on the pleadings, with the usual powers in such a case, and on February 17, 1930, upon a hearing had in open court a decree was entered finding

1215

WILLIAM T. WILSON, JR.  
Appellant.

v.

WILLIAM T. WILSON, JR.  
Respondent.

In appeal of W. T. WILSON, JR.  
A writ of habeas corpus.  
Appellant.

WILLIAM T. WILSON, JR.  
Respondent.

259 T.A. 659

W. T. WILSON, JR. vs. W. T. WILSON, JR.

There is a question as to the validity of the

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the facts as above stated, and that after the filing of the bill of complaint and after the service of summons appellant paid over to William T. Fritts salary to the amount of \$1250 for the months of March and April, 1929, said payments having been made on April 1 and May 1, 1929, respectively; that no salary has been paid by appellant to William T. Fritts since May 1, 1929; that on July 15, 1929, the president and vice president of appellant, and William T. Fritts as its treasurer, mutually agreed to waive the payment of salary by the company for the balance of the year; that the judgment debtor was entitled out of said salary of \$1250 to an exemption of \$135, and that complainant is entitled to recover from appellant \$1115, the balance of the salary so paid to William T. Fritts for the months of March and April, 1929.

Other provisions of the decree need not be noted as the appeal presents as the controlling question whether the unearned salary of the judgment debtor is a chose or thing in action or property upon which a lien is given by the filing of a creditor's bill under said statute. If not, then the salary earned after the filing of the bill and so paid could not be reached under said bill.

The general law upon the subject is stated in 15 C. J. 1407, as follows:

"Salary completely earned before the filing of the bill by performance of all services required to entitle the debtor thereto may be subject to the payment of his debts, although not payable when the bill is filed. But unearned salary is not reachable, since neither the creditor nor the court could compel the debtor to work out his part of the contract and earn the salary for the use of the creditor."

Citing this statement of the law and applying these principles in Fumy v. Mayer, 289 Ill. 458, where it was sought under a creditor's bill to reach as a chose in action unearned commissions of an employe under a contract whereby he was to be paid a percentage on orders for merchandise sold by or through him, the court said that the judgment creditor could not subject to his claim any right which the judgment



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Specialist to William T. White since May 1, 1967; died on July 10, 1968. The specialist was also assistant to William T.

the balance of the salary so paid is \$11,000. This is the  
and that complaint is entitled to recover from appellant \$11,000,  
was entitled and is entitled to an exemption of \$11,000,  
by the company for the balance of the year; that the judgment entered  
against the Treasurer, mutually agreed to waive the payment of salary  
to the appellant for the year 1900.

1. The purpose of the present study was to determine the effect of the use of the word "and" in the title of a paper on the number of citations it receives. The study was conducted by analyzing the titles of 100 papers published in the Journal of the American Psychological Association between 1960 and 1970. The results showed that papers with the word "and" in the title received significantly more citations than papers without it. This suggests that the use of the word "and" in the title of a paper may be a useful strategy for increasing its visibility and impact.

REVISED as of 1981

[illegible]

It is not subject to his claim any right which the Indians sold by or through him, the court said that the judgment was correct where he was to be paid a percentage on orders for merchandise which he placed in action through commission of an employee under a Y. Meyer, 233 Ill. 488, where it was sought under a contract to sell to the defendant the defendant's claim in this case of the law and applying these principles to the

debtor "would acquire in the future," and that "an unearned commission" could not be subjected to the creditor's claim because neither the court nor the creditor could compel the debtor to render his personal services and earn commissions for the use of the creditor. Defining a chose in action such as may be reached by a creditor's bill under said section 49, the court said:

"A thing in action is property distinguished from a thing of which the owner has the actual or constructive possession but for which an action may be brought to reduce it to possession. It is commonly termed a chose in action and is a personal right to demand money or property by an action; but a present right of action is not necessary, and the evidence of the right to the money or property may be a note or contract, provided it is absolute."

But the right to a salary is not absolute until it is earned, and the debtor could not be compelled to render personal services to earn it. The court went on to say:

"Manifestly, a creditor can have no greater right to money or property than the debtor would have, and to constitute a thing in action there must be a fixed present right of the owner to recover the money or property in an action in his own name. (Bonte v. Cooper, 90 Ill. 440.)"

This rule is followed in other jurisdictions. (Baird & Sons v. Dietz, 11 Ky. L. 759; Browning v. Pettis & Garrow, 3 Paige (N. Y.) 568; Tompers v. Tompers, 159 N. Y. S. 817.) In Bonte v. Cooper, 90 Ill. 440, cited in the Yumy case, it is said:

"A creditor by filing a creditor's bill merely acquires a lien upon the assets of the debtor existing when the bill is filed, and if such assets consist of accounts due or choses in action, if the debtor himself could not maintain an action for a recovery of the same, we are aware of no principle upon which a judgment creditor could maintain a bill."

Tested by these principles it is apparent that when the bill was filed, to-wit, March 4, 1920, no salary for that month or any subsequent period was due to or earned by the judgment debtor and as he could not maintain an action therefor his creditor could not. It is only an earned salary that is reachable by such a bill, and as stated in said authorities, the lien of a creditor's bill attaches only to the assets of the debtor existing when the bill is







filed and does not embrace subsequently acquired property.

The fact urged that one may assign salary to be earned in the future does not affect the question for the assignment would be ineffective if the salary was never earned. It is essential to a lien by a creditor's bill that it be completely earned at the filing of the bill.

Appellee has assigned cross errors but as they are predicated upon the claim of right to reach unearned salary and no right to deduct said exemption it becomes unnecessary, in view of the conclusions we have reached, to discuss them.

So far as the decree gives a lien upon the judgment debtor's salary that became due or accrued after the filing of the bill and decreeing that he pay the receiver all unpaid salary, whether earned before or after the latter's appointment, and refers the cause to a master to take proof of the amount of salary earned after the filing of the bill or the appointment of the receiver in order to have the same applied on the judgment, it will be reversed.

REVERSED.

Scanlan, P. J., and Gridley, J., concur.

Yield and loss not known exactly according to quantity.  
The fact that the yield is not known exactly is due to the fact  
in the present case not being the quantity in the statement  
would be sufficient if the yield was known exactly. It is  
essential as a kind of a condition that it be completely  
known as the yield of the yield.

Yield is the amount of yield which is known exactly and  
proportionally upon the yield of yield in yield statement and  
no yield is known with condition it becomes unnecessary. In view  
of the statement as above stated, it is known that  
as far as the amount of yield is known the statement  
of yield is known exactly and is known exactly the yield of  
the yield and statement is known exactly the yield of yield  
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in order to have the yield of the yield, it will be

known.

Yield, P. 1. and Yield, P. 1. Yield.

34383

IRVING E. PAGELS,  
Appellant,

v.

J. H. CLINE,  
Appellee.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 659<sup>2</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action to recover rent upon a written lease. The defendant pleaded constructive eviction. The case was heard without a jury and from a finding and judgment for defendant this appeal was taken.

The lease was from plaintiff to defendant for a term beginning May 1, 1928, and ending April 30, 1930. The rent sued for was for the month of October, 1929, up to which time defendant paid the rent. Defendant vacated the premises September 30, 1929, relying upon certain acts hereinafter referred to as constructive eviction. The premises in question was an apartment on the second floor of a three-story building. The landlord occupied the apartment on the third floor.

The main acts and circumstances of which defendant complained to plaintiff consisted of conduct on the part of plaintiff's wife claimed to have been done with his permission or acquiescence. These several acts consisted of her going to the door of defendant's apartment and rapping loudly thereon and either demanding the right to enter, for one purpose or another, or by then asserting in a manner that carried the innuendo of some



THE STATE OF NEW YORK  
County of New York

v.

J. M. CARR, Plaintiff,

-vs-  
J. M. CARR, Defendant.

STATE OF NEW YORK

COUNTY OF NEW YORK

3531A.653

IN SENATE, JANUARY 1, 1935.

That is an action to recover rent upon a written lease. The defendant pleaded constructive eviction. The case was heard without a jury and from a finding and judgment for defendant this appeal was taken.

The lease was from plaintiff to defendant for a term beginning May 1, 1933, and ending April 30, 1935. The rent was for the month of October, 1933, up to which time defendant paid the rent. Defendant vacated the premises September 30, 1933, claiming upon certain facts hereinafter referred to an constructive eviction. The premises in question was an apartment on the second floor of a three-story building. The building occupied the apartment on the third floor.

The main facts and circumstances of which defendant complained to plaintiff consisted of conduct on the part of plaintiff's wife claimed to have been done with his permission or acquiescence. These several facts consisted of her going to the room of defendant's apartment and keeping jewelry thereon and other demanding the right to enter, for one purpose or another, or by then asserting in a manner that carried the innuendo of some

impropriety that defendant's wife had a man in the apartment and on other occasions by disturbing and annoying defendant and inmates of his apartment in talking through a tube to the tenant on the first floor in a loud voice about defendant's wife, and on other occasions of her using obscene language that could be heard in defendant's apartment.

With the exception of the incident occurring about the middle of September, 1929, all of the occurrences relied upon as amounting to constructive eviction occurred from a year to three or four months previous to the time defendant vacated the premises. But there can be no constructive eviction unless the tenant abandons the premises on account of the acts or circumstances claimed to operate as such, however much he may be disturbed in the beneficial enjoyment of the premises. (36 C. J. 990, Barrett v. Boddie, 158 Ill. 479; Keating v. Springer, 146 Ill. 481, 496.) If the tenant continues to occupy the premises after commission of acts which would justify him in abandoning them he will be deemed to have waived his right to abandon them and he cannot sustain his plea of eviction by showing that there were circumstances which would justify him in leaving the premises. (Keating case, supra, p. 496.) As defendant continued to occupy the premises in question and to pay the rent after these several acts and circumstances occurring in and prior to June, 1929, he is in no position to assert the right of eviction, even if they were such as would have constituted it had he abandoned the premises in consequence thereof within a reasonable time thereafter. We shall not, therefore, undertake to review the evidence as to these several acts and circumstances, but shall

inquiries and defendant's wife had a man in the apartment and on other occasions by disturbing and annoying defendant and inmates of his apartment in talking through a tube in the tenant on the first floor in a loud voice about defendant's wife, and on other occasions of her using obscene language that could be heard in defendant's apartment.

In the exception of the incident occurring about the middle of September, 1927, all of the occurrences relied upon as amounting to constructive eviction occurred from a year to three or four months previous to the time defendant vacated the premises. But there can be no constructive eviction unless the tenant abandons the premises on account of the acts or omissions alleged to operate as such, however much he may be disturbed in the beneficial enjoyment of the premises. (28 U. S. 280, Harrell v. Hodge, 128 Ill. 475; Keating v. Foxworth, 146 Ill. 481, 485.) If the tenant continues to occupy the premises after commission of acts which would justify him in abandoning them he will be deemed to have waived his right to abandon them and he cannot succeed in his plea of eviction by showing that there were circumstances which would justify him in leaving the premises.

(Harrell case, supra, p. 475.) As defendant continued to occupy the premises in question and to pay the rent after there several acts and circumstances occurring in and prior to June, 1927, he is in no position to assert the right of eviction, even if they were such as would have constituted it had he abandoned the premises in consequence thereof within a reasonable time thereafter. We shall now, therefore, undertake to review the evidence as to these several acts and circumstances, but shall



merely consider the only other incident, that of September, 1929.

At that time, pursuant to an arrangement with the defendant, Mr. Frank Gardner, acting for the administrator of the estate of Mrs. Cline's mother, called at defendant's apartment with reference thereto and for the purpose of having Mrs. Cline take him to certain property belonging to the estate. After he had been talking with Mrs. Cline with respect to the business in hand for about twenty minutes Mrs. Pagels knocked on the hall door and in a loud voice said to Mrs. Cline when she came to the door, "You got a man in there and I won't stand that in my flat." Defendant testified that he called up plaintiff on the telephone with regard to the incident and told him that that was something he could not tolerate; that it had gotten on his wife's nerves and that she was in such a condition they could not live in the building with these continued annoyances, and that Pagels said, "My wife understands what is going on in the building; she has a right to do what she thinks is best." From that time on defendant did not stay in the building and moved out his furniture September 30, and sent the keys for delivery to plaintiff.

Pagels denied stating as testified to by defendant that Mrs. Pagels had the running of the building, and what she did in running the same was all right with him, and his version of the conversation of the September incident differed from defendant's. He said that Cline asked him, "What went on in that apartment yesterday?" and did not attempt to tell plaintiff what went on; that Mrs. Pagels, who was present, answered that she would tell him if he brought Mrs. Cline up to their apartment; that Cline did not say that he was not going to stand for his wife and her

merely consider the fact that the date of September, 1934.  
 At that time, pursuant to an arrangement with the  
 defendant, Mr. Frank Gardner, acting for the administrator of the  
 estate of Mrs. Elmer, called at defendant's apartment  
 with reference thereto and for the purpose of having Mrs. Elmer  
 bring him to certain property belonging to the estate. After he  
 had been talking with Mrs. Elmer with respect to the business in  
 hand for about twenty minutes Mrs. Elmer knocked on the hall door  
 and in a loud voice said to Mrs. Elmer when she came to the door,  
 "You got a man in there and I won't stand that in my flat." Before  
 and testified that he called up plaintiff on the telephone with  
 regard to the incident and told him that there was something he  
 could not tolerate; that it had gotten on his wife's nerves and that  
 she was in such a condition they could not live in the building  
 with these continued annoyances, and that Elmer said, "My wife  
 understands what is going on in the building; she has a right to do  
 what she thinks is best." From that time on defendant did not  
 stay in the building and moved out his furniture September 25,  
 and sent the keys for delivery to plaintiff.  
 Elmer denied stating as testified to by defendant that  
 Mrs. Elmer had the running of the building, and when she did in  
 running the same was all right with him, and his version of the  
 conversation of the September incident differed from defendant's.  
 He said that Elmer asked him, "What would be in that apartment  
 yesterday?" and did not attempt to tell plaintiff what went on  
 that Mrs. Elmer, who was present, accused and she would tell  
 him it he brought Mrs. Elmer up to their apartment and Elmer  
 did not say that he was not going to stand for his wife and her



guests being insulted.

What Mrs. Pagels said when said administrator was calling on Mrs. Cline is not controverted. Insulting as it was in its slanderous innuendoes, we are not prepared to hold that it constituted constructive eviction even if plaintiff knew and approved of the same, which he expressly denied, and which there is hardly sufficient proof to support. He does not appear, except by general inference from the testimony of defendant, to have approved of this particular incident.

In view of defendant's waiver of any right to act on the previous incidents relied upon, his claim of constructive eviction rests entirely upon the effect to be given to said September incident.

As said in Auto Supply Co. v. Scene-in-Action Corp., 340 Ill. 196:

"Not every act of a landlord in violation of his covenants or of the tenant's enjoyment of the premises under the lease will amount to a constructive eviction. Some acts of interference may be mere acts of trespass to which the term 'eviction' is not applicable. To constitute an eviction there must be something of a grave and permanent character done by the landlord clearly indicating the intention of the landlord to deprive the tenant of the longer beneficial enjoyment of the premises in accordance with the terms of the lease." (Citing authorities.)

This principle is so clearly established as not to require the analysis of cases applying it. It is said in 3 C. J. P. 267, that a constructive eviction may arise from the improper conduct of the landlord in interfering with the beneficial enjoyment of the premises "such as threats of expulsion, attempts to lease to others, unreasonable demands, insults or assaults," but that such matters in order to constitute constructive eviction, "must substantially interfere with the tenant's beneficial enjoyment of the premises, and the interference must be of a permanent nature." One of the cases referred to is Lawrence v. Rapaport, 213 Mich. 358, where the court said:



but I am now acquainted with him and his wife and family.

on Mrs. Olin is not substantiated. According to it was in the  
-standards immediately, we are not prepared to hold that it was  
admitted conclusive evidence even if admitted that was not  
of the same, which is equally certain, and which there is nothing  
admitted to support. We are not prepared to accept by general  
inference from the testimony of Olin, to have approved of this  
admission.

and no one else is to be involved in this matter. The only person who is to be involved is the person who is to be involved in this matter. The only person who is to be involved is the person who is to be involved in this matter.

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1. The first of the three is the "General" or "Overall" view, which is a broad, general statement of the situation, covering the entire field of activity. It is the most important and the most difficult to formulate, as it must encompass all the details of the situation, while at the same time being concise and clear. It is the foundation upon which the other two views are built.

This document is not to be released to the public.

2. 1. 1. p. 247. That a conclusive evidence may make from the  
 results the analysis of cases applying it. It is said in 2

and the Government of the United States to receive the  
benefit of the same as if the same had been received by the  
Government of the United States.

\* a number of persons, who are at present, no longer

to be a part of the same.

CONFIDENTIAL - SECURITY INFORMATION

with the same's conviction of the present, and the

Information was not obtained from the above sources.

referred to in paragraph 7. [REDACTED], 212 14th St., where the [REDACTED] [REDACTED]

"Here words, no matter how offensive, and unwarranted demands cannot constitute an eviction, because the interference with the beneficial enjoyment of the premises must be something of a more permanent nature than a personal altercation between landlord and tenant."

In view of the authorities cited we do not think the evidence is sufficient to show a substantial interference with the tenant's beneficial enjoyment of the premises or that the interference was of a permanent nature. Whatever remedy defendant may have therefor we do not think the only incident he is in a position to rely upon as amounting to a constructive eviction can be so construed either as a matter of fact or as a matter of law. Consequently the judgment in his favor must be reversed and a judgment will be entered here for the installment of rent due and sued for of \$140, with interest at five per cent per annum from October 1, 1929, to date. In view of this conclusion it is unnecessary to construe alleged errors in the court's rulings on the submitted propositions of law. The court should have granted plaintiff's motion for judgment in his favor.

REVERSED WITH A FINDING OF FACT  
AND JUDGMENT HERE FOR \$148.55.

Scanlan, P. J., and Gridley, J., concur.

"With words, no matter how effective, and unimpaired demands cannot constitute an evasion, because the intention with the beneficial enjoyment of the proceeds must be something of a more permanent nature than a personal distinction between

landlord and tenant."

In view of the authorities cited we do not think the evidence is sufficient to show a substantial difference with the tenant's beneficial enjoyment of the premises or that the intention was of a permanent nature. However, it is not necessary to say that we do not think the only incident in the case is that upon an assumption of a constructive eviction can be so construed either as a matter of fact or as a matter of law. Consequently, the judgment in his favor must be reversed and a judgment will be entered here for the landlord of rent due and owed for of \$140, with interest at five per cent per annum from October 1, 1901, to date. In view of this conclusion it is unnecessary to discuss either party in the tenant's value or the estimated appreciation of land. The court should have granted plaintiff's motion for judgment in his favor.

RECORDED WITH A VIEW TO PAY  
AND RETURNED TO THE  
\$148.55.

Witness, J. L. and Friday, J. J. common.



FINDING OF FACT.

We find that none of the occurrences relied upon as a defense to this cause of action amounted as a matter of fact or of law to a constructive eviction.

THEY WERE

They had come to the conclusion that the  
of the matter was not a matter of  
of fact or of law but a matter of  
evidence.

34398

158  
WILLIAM G. WURN and  
ANNA J. WURN,  
Appellees,

v.

JOSEPH M. BERKSON et al.,  
Appellants.

7  
APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

259 I.A. 659<sup>3</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree in chancery entered upon a third remandment of the cause to the trial court. The history of the litigation is as follows:

The original bill was brought by appellee William G. Wurn as sole complainant, and sought specific performance by defendants of their written agreement to lease certain premises for a garage. The agreement purported to be between appellant Morris H. Berkson as first party, and said Wurn as second party, but was signed also by Anna J. Wurn, the wife of said Wurn. A cross-bill was filed by defendants to which Anna J. Wurn was made a party defendant, alleging that without her as a party complainant specific performance could not be enforced by William G. Wurn. Answering the cross-bill separately the Wurns denied that said agreement purported to give her any interest in the premises, but that William G. Wurn had a right and interest therein as set forth in his bill of complaint. On issues joined and a hearing had a decree was entered awarding specific performance of the agreement and dismissing the cross-bill for want of equity. On appeal to this court that decree was reversed and the cause remanded with directions to dismiss the bill and grant relief under the cross-bill. (223 Ill. App. 86.) The case then went to the Supreme Court on writ of error, which reversed the decree of this court and affirmed the decree of the Superior



24329

WILLIAM G. TURNER and  
ANNA J. TURNER,  
Appellants,

v.

JOSEPH A. TURNER et al.,  
Appellees.

THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF COLUMBIA.

This is an appeal from a decree in divorce entered upon

a third remandment of the cause to the trial court. The history

of the litigation is as follows:

The original bill was brought by appellee William G. Turner

as sole complainant, and sought specific performance by defendant

of their written agreement to issue certain premises for a house.

The agreement purported to be between appellee Maria E. Beckman

as first party, and said Turner as second party, but was signed also

by Anna J. Turner, the wife of said Turner. A cross-bill was filed by

defendants to which Anna J. Turner was made a party defendant, alleging

that William G. Turner was a party complainant specific performance could

not be enforced by William G. Turner. Answering the cross-bill

separately the defendants denied said agreement purported to give

her any interest in the premises, but that William G. Turner had a

right and interest therein as set forth in his bill of complaint.

An issue joined and a hearing had a decree was entered according

specific performance of the agreement and dissolving the cross-bill.

For want of equity. On appeal to this court that decree was reversed

and the cause remanded with directions to dismiss the bill and

grant relief under the cross-bill. (222 Ill. App. 2d.) The

case then came to the Supreme Court on writ of error, which reversed

the decree of this court and affirmed the decree of the Superior

Court with directions for its modification. (Wurn v. Barkson, 305 Ill. 231.) On modification made by the lower court the cause was taken direct to the Supreme Court by writ of error, which then on its own motion reconsidered its former decision, and, consolidating the causes on the two writs, reversed both the decree of this court and that of the Superior Court and remanded the cause to the latter court, "with leave to the parties to amend their pleadings if they be so advised, and for further proceedings not inconsistent with the views herein expressed." (309 Ill. 520.) On its remandment pursuant thereto the pleadings were amended making Anna J. Wurn an additional party complainant and cross-defendant, and complainants filed a second amended supplemental bill of complaint, setting forth that in the meantime, while the suit was pending, the term of the lease contracted for, including the period of renewal provided for, had expired. Reference to a master having been had and exceptions to his report overruled, the chancellor held that while the time for specific performance of the contract had expired, as alleged in the second amended supplemental bill, the court had power to enter a judgment at law for damages for nonperformance of the contract, found to be \$18,710, and it accordingly entered a decree for that amount in favor of complainants against defendants, and this appeal followed.

It appears that pursuant to said agreement the five defendants to the bill and the complainants herein met March 17, 1916, and all, including Mrs. Wurn, signed in duplicate a lease as agreed upon. The agreement provided for the deposit of \$1,000 "to be applied on the first part of the lease term," and also recited that a deposit of \$500 had been made by the second party as earnest money "to apply as good faith," and, on occupation of the garage, "to apply as rental." After the lease in duplicate had been executed as aforesaid but not delivered, a disagreement arose as to the construction of the agree-



Court with directions for its modification. (W. V. Barker, 202  
 111. 221.) On modification made by the lower court the cause was  
 taken along to the Supreme Court by writ of error, which then on  
 its own motion reconsidered its former decision, and, consolidating  
 the causes on the two writs, reversed both the decree of this court  
 and that of the Supreme Court and remanded the cause to the latter  
 court, "with leave to the parties to amend their pleadings if they  
 be so advised, and for further proceedings not inconsistent with the  
 views herein expressed." (202 Ill. 220.) On the remandment pursuant  
 thereto the plaintiffs were amended making them 3, with an additional  
 party complainant and cross-defendant, and complainants filed a second  
 amended supplemental bill of complaint, setting forth that in the  
 meantime, while the writ was pending, the term of the lease contracted  
 for, including the period of renewal provided for, had expired, and  
 reference to a master having been had and decisions to his report  
 overruled, the defendant held that while the two parties had  
 termination of the contract had expired, as alleged in the second amended  
 supplemental bill, the court had power to enter a judgment as in law for  
 damages for nonperformance of the contract, found to be \$15,000, and  
 accordingly entered a decree for that amount in favor of complain-  
 ants against defendants, and this appeal followed.  
 It appears that pursuant to said agreement the first delin-  
 quency to the bill and the defendants herein met March 17, 1916, and  
 all, including Mrs. Wynn, signed in duplicate a lease as agreed upon.  
 The agreement provided for the deposit of \$1,000 to be applied on the  
 first part of the lease term, and also provided that a deposit of  
 \$500 had been made by the second party on account money "to apply on  
 good faith," and, on completion of the term, "to apply as rental."  
 After the lease in duplicate had been executed as aforesaid but not  
 delivered, a disagreement arose as to the completion of the agree-



ment, whether it required an additional deposit on execution of the lease of \$1,000, as claimed by defendants, or only \$500, as contended by Wurn. Wurn tendered \$500 and defendants refused to accept the tender or to deliver a copy of the lease signed by them unless \$1,000 additional was paid. This disagreement over \$500 led to this ensuing lengthy litigation.

The Supreme Court's reconsideration of its former decision of the case was due apparently to the fact it was only upon the record of the second writ of error that it was brought to the court's attention that Mrs. Wurn's answer to the Berksons' cross-bill disavowed any interest in the agreement for the lease, and she then filed her consent in the Supreme Court to be bound thereby. In its previous decision the court had held that to obtain relief of specific performance she was a necessary party to the bill, either as a complainant or defendant, and held in both opinions that all parties considered her as one of the parties to the contract but that her name was unintentionally omitted from the body thereof. The court clearly indicated, if it did not in effect hold, that had she been made a joint complainant relief by way of specific performance, on the state of facts before it, would have been warranted, it saying "that such contract, when considered in connection with the lease signed, is of sufficient certainty to warrant, under proper pleading and proof, (italics ours) its enforcement by specific performance." (309 Ill. 523.) While it also held that the Berksons were not entitled to have the contract removed as a cloud upon their title it said that in view of the disclosed attitude of Anna J. Wurn in her answer to the cross-bill and her maintaining it until she filed in the Supreme Court her consent to be bound by the contract in question, "the Berksons should be given an opportunity to show, if they can, in what manner, if any, the attitude of Mrs. Wurn subsequent





to the disagreement of the parties on March 17, 1916, justified refusal on their part to execute the lease in question in so far as that matter relates to the question of damages." (Italics ours.) From these rulings and the character of the remanding order it would seem that the remandment contemplated just such an amendment to the pleadings as has been made and a decree in conformity with said rulings unless defendants could show such damage by reason of Mrs. Wurn's attitude as justified their refusal to execute the lease. On that subject, however, defendants have offered no specific proof, nor is there any additional proof tending to show a change of facts from those upon which said rulings were based. It does not appear that Mrs. Wurn's disclaimer in her former pleadings either misled or caused appellants to change their position in any way to their financial detriment. They have continued, as before, in the possession and use of the property for their own benefit and profit.

But notwithstanding the record discloses no change of facts from those so considered by the Supreme Court, except that the time for specific performance has in the meantime expired, thus necessitating a change in the character of the relief decreed, counsel for appellants has re-argued the rulings so made by the Supreme Court, contending that they are mere dicta because of the change of pleadings as aforesaid. There being no material change of facts, however, to which those rulings apply we cannot entertain such assumption. The Supreme Court having held on substantially the same proof that the agreement and signed lease constituted a contract that was enforceable by the Wurns jointly against appellants under proper pleadings, and the pleadings having been amended to conform to its expressed views, and there being no new proof having any legitimate tendency to change those views, we fail to see any occasion for a re-discussion of them, or, in the absence of any additional proof that would justify appellants' refusal to sign the lease, any reason



in the disbursement of the money on March 17, 1918, justified  
 refusal on their part to execute the lease in question in as far  
 as that matter related to the question of damages." (Exhibit 100.)  
 From these rulings and the character of the testimony it would  
 seem that the respondents contemplated that upon an amendment to the  
 pleadings as has been made and a decree in conformity with said  
 rulings unless defendants could show such damages by reason of the  
 respondents' refusal to execute the lease.  
 On that subject, however, defendants have offered no specific proof,  
 nor is there any additional proof tending to show a change of facts  
 from those upon which this ruling was based. It does not appear  
 that Mrs. Wirt's testimony in her former pleadings either misled or  
 caused respondents to change their position in any way in their  
 financial statement. They have continued, as before, in the possession  
 and use of the property for their own benefit and profit.  
 The respondents in their pleadings no change of facts  
 from those as testified by the Supreme Court, except that the time  
 for specific performance has in the meantime expired, thus necessitating  
 taking a change in the character of the relief demanded, counsel for  
 respondents have re-assigned the ruling as made by the Supreme Court,  
 contending that they are now denied because of the change of circumstances  
 from an absolute. Their claim is without support of facts, however,  
 to which there are no answers and no material evidence in support of their  
 The Supreme Court having held as substantially the same facts that  
 the respondents and leased lands constituted a contract that was  
 enforceable by the respondents against respondents under proper  
 pleadings, and the respondents having been minded to comply to the  
 expressed views, and there being no new facts having any legal effect  
 tending to change those views, we fail to see any occasion for a  
 re-disposition of them. In the absence of any additional proof  
 that would justify respondents' refusal to sign the lease, any reason

why the decree is not entirely consistent with them. In fact, as the remandment contemplated no new issue of fact, except the effect of Mrs. Wurn's change of attitude as aforesaid, in the absence of any proof on that subject the trial court may well on amendment of the bill and of the supplemental bill have declined to re-open the case for any other proof than that necessary to support complainant's claim of damages. Otherwise it could have entered a decree in accordance with the decision of the Supreme Court as aforesaid. (Noble v. Tipton, 222 Ill. 639, 647; Tribune Co. v. Emery Motor Livery Co., 338 Ill. 537.)

The point is made that the trial court could not assess damages and that defendants were entitled to a jury trial on that question. The court did not lose jurisdiction by the lapse of time within which specific performance could be decreed, and having properly acquired jurisdiction to give equitable relief it properly retained it to give such relief as would settle the whole matter. (Griffin v. Griffin, 163 Ill. 216.)

The damages were assessed on the theory that their measure is the difference between the rent reserved in the lease and the reasonable rental value of the premises from time to time and year to year during the term the lease was to run, namely, ten years, timely notice having been given to exercise the option of renewal. Appellants urge that the measure of damages is the value of the leasehold on the open market at the time of the breach, or the difference between the rent reserved and the actual rental value of the premises at the time of the breach, citing cases where the action was one at law for breach of contract.

But the Wurns had a choice of remedies, one at law for breach of the contract, and the other in equity for specific performance. Filing the bill herein was an election for the latter



any proof on that subject the trial court may well on remand find the bill and of the respondents will have declined to respond in case for any other proof than that necessary to support respondents' claim of damages. Otherwise it could have entered a decree in favor and with the decision of the Supreme Court as respondent. (Harris v. Harmon, 221 U.S. 297, 299, 210 F.2d 1011, 1012, 1013, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1331, 1332, 1333, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1425, 1426, 1427, 1428, 1429, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1437, 1438, 1439, 1440, 1441, 1442, 1443, 1444, 1445, 1446, 1447, 1448, 1449, 1450, 1451, 1452, 1453, 1454, 1455, 1456, 1457, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1519, 1520, 1521, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 167

[illegible]

The damages were assessed on the theory that the difference in the difference between the value received in the lease and the reasonable rental value of the premises from time to time and that in paying the term the lease was for two years, the years, timely notice having been given to exercise the option of renewal. Appellants urge that the measure of damages is the value of the leasehold on the open market at the time of the breach, as the difference between the rent reserved and the actual rental value of the premises at the time of the breach, citing cases where the option was one or two years broken at contract.

Tennessee. With the bill before an election for the House  
 of Representatives, and the other in equity for specific per-  
 sons. The bill was passed by a vote of 100 to 0.



remedy. It did not seek damages for breach of the contract but sought to keep it alive. This complainants had the right to do. (Roebeling Sons Co. v. Lock Stitch Fence Co., 130 Ill. 660; Kadiash et al. v. Young et al., 108 Ill. 170; Sluka v. Bielicki, 335 Ill. 202.) It was only when the lapse of time during the pendency of the cause rendered specific performance impossible that complainants had recourse to the alternative remedy for damages, not however on the theory of a breach at the time of defendants' refusal to perform, but on the theory that complainants being entitled to the lease and possession and use of the premises under it a court of equity, considering as done that which ought to be done, would regard defendants in the same position as though they had delivered the lease but refused to surrender possession of the premises and continued to occupy and enjoy the use thereof for their own benefit and profit. Defendants having refused to produce their books under a subpoena duces tecum to show what profit and use they had made from keeping, operating and maintaining a garage on the premises, and complainants being unable in consequence thereof to prove what defendants actually received from the property in the way of profits or rentals, resorted to proof of what they should have received as reasonable rental value thereof over said period of ten years during which complainants were entitled to and deprived of their use of the premises, and from such value deducted therefrom the rent reserved in the lease. In the following cases of specific performance where damages were passed upon because of failure in one way or another to enforce specific performance practically the same rule was observed, and we think it is applicable in the instant case. (Worrall v. Munn, 38 N. Y. 137; Beattick v. Beach et al., 103 N. Y. 414, 423; Cochrane v. Justice Mining Co., 35 Pac. 752; Heinlen v. Martin, 53 Cal. 231; Fayar v. Riverview Park, 144 Ill. App. 86, 90.)

The only remaining new contention of appellants is that





complainants' right to the remedy sought was lost by laches. This claim is predicated upon the contention that the right of the complainants to the relief sought must be determined as of and from "the date of the filing of the second amended and supplemental bill," to-wit, June 2, 1925, and not from the date of the original bill, namely, March 22, 1916. This was evidently not the theory of the Supreme Court when the cause was sent back for amendment of the pleadings. Appellants' counsel says that assuming that complainants' theory of the measure of damages is correct, the position of defendants during the years of litigation was changing from time to time and they might become liable for a greater amount of damages according as the rental value on the open market fluctuated in the interim, hence it was incumbent upon Anna J. Burn to press her claim at once. As said in Neidhardt v. Frank, 325 Ill. 596, and to the same effect in Simons v. Morris, 333 Ill. 183: "In an equitable proceeding it is only when by delay or neglect to assert a right the adverse party is lulled into doing that which he would not have done or into omitting to do that which he would have done in reference to the property had the right been properly asserted that the defense of laches can be considered." (Troyer v. Erdman, 320 Ill. 140; Compton v. Johnson, 240 id. 621.) It seems sufficient to say in answer to the contention of laches that defendants were given an opportunity to prove any financial detriment by reason of the change of Mrs. Burn's attitude and whether they were induced to change their position thereby from which they suffered financial injury, and they made no such proof.

Accordingly we think the decree should be affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.





34418

1597  
MINNA SCHWAB and AUSTIN L. WYMAN  
as Executors of the last will and  
testament of JACOB SCHWAB, deceased,  
and AUSTIN L. WYMAN, individually,  
Appellants,

v.

ERICK AKLAND and JULIA AKLAND,  
his wife,  
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

259 I.A. 659<sup>4</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This bill was filed by appellants seeking the return of moneys paid to appellees on a contract for the sale of real estate, and asking that the forfeiture of said moneys be set aside and an accounting be had of the same. The bill does not question the right to forfeit the contract but is based upon the claim that the money paid thereon, which the contract provided should in the event of a breach thereof be forfeited, was merely to be retained as security for payment of the balance of the purchase price, and that the amount so retained, upwards of \$11,000, is grossly disproportionate to the actual damages sustained and that it is grossly unjust, inequitable and unconscionable that defendants should be allowed to retain all of said sum as liquidated damages. After answer by appellees they filed a cross-bill praying to have the recording of the contract removed as a cloud on their title to the real estate in question, and that the forfeiture be declared valid and lawful.

On the issues joined reference was had to a master in chancery whose report found the equities for complainants on the theory of the bill as aforesaid, and that defendants were entitled to retain only their actual damages, which were found to be \$1,239, and the master recommended a decree against the defendants for

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MINNIE THOMAS and JOHN L. THOMAS  
as Executors of the last will and  
testament of JAMES L. THOMAS, deceased,  
and ABRAHAM L. THOMAS, individually,  
Testators.

ABRAHAM L. THOMAS  
LIVING CO. CO.  
CO. CO. CO.

JOHN L. THOMAS and ABRAHAM L. THOMAS  
his wife,

Testators.

250.1.033

IN TESTAMENTARY TRUST FOR THE ESTATE OF JAMES L. THOMAS.

This will was filed by application entered the return of  
monies paid to appellants on a contract for the sale of real estate,  
and asking that the testimony of said monies be set aside and an  
accounting be had of the same. The bill does not question the  
right to forfeit the contract but is based upon the claim that the  
money paid thereon, which the contract provided should be the value  
of a house located on lot 12, was never to be retained as  
security for payment of the balance of the purchase price, and that  
the money so retained, pursuant to E.L. 100, is legally disposable  
as to the actual damages sustained and that it is properly subject  
to appellants and respondents that respondents should be allowed to  
retain all of said sum as liquidated damages. After answer by appellants  
they filed a cross-bill praying to have the recording of the contract  
removed as a cloud on their title in the real estate in question, and  
that the testimony be excluded and set aside.  
In the former bill respondents were held to a master in  
chancery whose report found the equities for respondents in the  
theory of the bill as stated, and that respondents were entitled  
to retain only their actual damages, which were found to be E.L. 100,  
and the master recommended a decree granting the respondents the



\$9,495, and a decree as prayed for by the cross-bill.

After defendants' objections to the master's report were overruled, they stood as the exceptions thereto and were sustained, the chancellor finding that the contract was rightly forfeited and that cross-complainants were entitled to the relief prayed by the cross-bill, and entered a decree dismissing the bill for want of equity and granting the relief asked for in the cross-bill.

It is admitted that there is no real dispute of fact, except as to the value of the land from the time of defaulting upon the contract up to the declaration of its forfeiture.

The material facts on which the controversy rests are:

On January 16, 1926, Axland and his wife, defendants to the bill and cross-complainants, entered into a contract with one Shekleton as purchaser of their farm of 92.36 acres in DuPage County, Illinois, for \$59,800 subject to adjustment as to acreage, payable \$1,500 on execution, \$9,500 on May 1, 1926, \$23,800 December 1, 1926, and the balance by mortgage. The contract contained a clause that in the event of failure of the purchaser to make either of the payments or any other thereof, the contract should, at the seller's option, be forfeited and determined, and the purchaser should forfeit all payments, which should be retained by the seller as liquidated damages.

The payment of \$1,500 was made on the execution of the contract, as required. Before May 1, Shekleton decided he would make no more payments and assigned the contract to complainant Wyman, between whom and Jacob Schwab (a real estate broker who brought about the contract), a verbal arrangement was entered into to make the rest of the payments called for by the Shekleton contract. The Axlands were not parties to the arrangement. While Wyman claimed that Axland knew of Schwab's interest shortly after their arrangement, Axland denied having any knowledge of it until





after Schwab's death the following January, and after the Axlands had given notice of forfeiture of the contract. After said arrangement, about May 1, 1926, Wyman paid Axland the sum of \$9,734, then due on the contract, Schwab, it appears, contributing about half of it. No further sum was ever paid on the contract.

It appears that Wyman took the assignment as a matter of speculation, in which Schwab was to have some share. In the meantime, there was a slump in the real estate market and his and Schwab's efforts to effect a sale of the property were unavailing. Thereupon Wyman, in October, 1926, made known to Axland the difficulty of completing the contract, but the interview resulted in no modification of it or any agreement for its extension. The payment due under it December 1, not having been made the Axlands, on January 24, 1927, gave notice to Shekleton, and Wyman as his assignee, that unless the amount due December 1, 1926, was paid on or before January 15, 1927, they would exercise the option provided in the contract to declare the same forfeited and determined and all payments made thereon forfeited. Shortly after January 4, Schwab, who had been working with Lyman and had received a proposal of purchase from one Lipman, died, and on January 31, Wyman wrote the Axlands, referring to his death, and reciting the interest of Schwab with himself and made certain proposals for an extension of the contract, in view of a prospective sale to Lipman. The deal with the latter, however, having fallen through, the Axlands, on March 5, again addressed a notice to Shekleton and Wyman forfeiting the contract as aforesaid, and all payments made thereon. A few days later the Axlands' attorney wrote to Wyman requesting that he execute a proper release of the contract, which contrary to a provision therein, had been placed of record. This Wyman, on May 11, offered to do on return of the moneys paid. This suit followed.

While Wyman said that in the October interview with



after Oswald's death the following January, and after the Alaska  
had given notice of termination of the contract. After this Oswald  
went, about May 1, 1963, when he paid Alaska the sum of \$9,750, then  
dro on the contract, Oswald, is apparent, contributing about half of  
it. No further sum was ever paid on the contract.  
It appears that there has been the assignment as a matter of  
speculation, in which Oswald was to have some share. In the same  
time, there was a change in the real estate market and his and Oswald's  
efforts to effect a sale of the property were unavailing. Thereupon  
Oswald, in October, 1963, made known to Oswald the difficulty of  
completing the contract, but the interview resulted in no realization  
of it or any agreement for the extension. The payment was made in  
October 1, not having been made the Alaska, on January 1, 1964.  
Oswald called to Oswald, and Oswald as his assignee, then Oswald the  
contract the January 1, 1964, was paid on or before January 15, 1964.  
They would exercise the option provided in the contract to extend  
the same extended and determined and all payments made thereon for-  
feited. Shortly after January 4, Oswald, who had been working with  
Oswald and had received a proposal of purchase from one Lillian, died,  
and on January 31, Oswald wrote the Alaska, referring to his death,  
and stating the intent of Oswald with himself and wife to extend  
proposition for an extension of the contract, in view of a prospective  
sale to Lillian. The deal with the latter, however, having fallen  
through, the Alaska, on March 8, again expressed a notice to Oswald  
and Oswald terminating the contract as extended, and all payments made  
thereon. A few days later the Alaska's attorney wrote to Oswald re-  
stating that he executed a proper release of the contract, which  
constituted a provision therein, had been placed on record. This Oswald  
on May 11, after he had received the money paid. This was  
followed.  
While Oswald said that in the October interview with

Axland he referred to Schwab's interest and Axland denied knowledge of it until advised thereof by letter after Schwab's death, yet there is no pretense of any assignment of the contract having been made to Schwab, nor was there any recognition by the Axlands of anyone other than Wyman as the assignee thereof. All of the correspondence between Wyman and the Axlands relative to the assignment and the request for an extension treat Wyman only as the assignee of the contract. It is apparent, therefore, from the above stated facts that there was no privity of contract between Schwab and the Axlands, and, therefore, that the executors of his estate were not proper parties to this proceeding. Inasmuch, therefore, as neither he nor his estate had any legal or equitable right it could enforce against the Axlands the bill was properly dismissed as to the executors for want of equity.

As Wyman individually has not appealed from the decree it is hardly necessary to dilate upon the points made by counsel for the executors. Counsel for appellants admit that the contract was rightfully terminated but complain of the retention of the moneys paid thereon on the theory that the provision for forfeiture thereof should be considered as <sup>a</sup>penalty and not as liquidated damages. If the theory be correct, it is only Wyman individually who could assert the claim. But we do not think it is tenable. It was said in Giesecke v. Cullerton, 280 Ill. 515, and in Advance Amusement Co. v. Franks, 268 Ill. 581, that "no branch of the law is involved in more obscurity by contradictory decisions than whether a sum named in an agreement to secure performance will be treated as liquidated damages or as a penalty." As to the rule to be applied when the sum agreed to be forfeited is treated as a penalty, no question arises. But when, as here, the sum is a part of the consideration named in the contract and not a sum deposited as security for its performance, nor



Alford he referred to Edward's interest and retained knowledge of it until advised thereof by latter after Edward's death. Yet there is no pretense of any assignment of the contract having been made to Edward, nor was there any recognition by the Almonds of anyone other than Wynne as the assignee thereof. All of the correspondence between Wynne and the Almonds relative to the assignment and the payment for an extension treaty Wynne only as the assignee of the contract. It is apparent, therefore, from the above stated facts that there was no privity of contract between Edward and the Almonds, and, therefore, that the executor of his estate was not proper parties to this proceeding. Inasmuch, therefore, as neither he nor his estate had any legal or equitable right it could enforce against the Almonds the bill was properly dismissed as to the executor for want of equity.

As Wynne later in life had not appeared from the decree it is hardly necessary to dilate upon the points made by counsel for the executor. Counsel for appellants admit that the contract was rightfully terminated but complain of the retention of the money paid thereon on the theory that the provision for forfeiture thereof should be considered as <sup>a</sup> penalty and not as liquidated damages. If the theory be correct, it is only Wynne individually who could assert the claim. But we do not think it is tenable. It was said in

Wynne v. Alford, 220 Ill. 515, and in Advance Investment Co. v. Wynne, 225 Ill. 521, that "no branch of the law is involved in

more especially by contradictory decisions than whether a sum named in an agreement to secure performance will be treated as liquidated damages or as a penalty." As to the rule to be applied when the sum agreed to be forfeited is treated as a penalty, no question arises. But when, as here, the sum is a part of the consideration named in the contract and not a sum deposited as security for the performance, not



a collateral contract for security, like a bond, circumstances are presented for making a distinction between a penalty and liquidated damages. It was said in Bryson v. Crawford, 68 Ill. 362, 365, discussing the question when the purchaser of real estate may and may not be entitled to recover back the money he has paid on a contract of purchase: "But when the contract has been declared forfeited \* \* \* pursuant to its own terms, on account of the default of the purchaser in making further payments, he is not entitled to recover back what he has paid." (Citing authorities.) Recognizing this as the rule in most jurisdictions it is said in R. C. L., par. 379, that it is especially true where the contract provides that he may retain the deposit or part payment as a forfeiture in the nature of liquidated damages for the failure of the purchaser to complete the contract. And again in 28 R. C. L., par. 125, it is said that "the cases distinguishing between a penalty and liquidated damages do not apply to a pecuniary deposit, which is, in reality, not a pledge but a payment in part of the purchase money." The reasons for such a rule are sufficiently stated in Steele et al. v. Biggs et al., 22 Ill. 651; Gobble v. Linder, 76 Ill. 159, 160, and Gibb v. Merrill, 234 Ill. App. 267, 274.

We think the decree is correct.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

a collateral contract for warranty, like a bank, etc., etc.,  
 are presented for making a distinction between a warranty and  
 a collateral contract. It was said in Hyman v. Greenberg, 20 Ill.  
 382, 383, discussing the question when the purchase of real  
 estate may and may not be entitled to recover back the money he  
 has paid on a contract of purchase; "That when the contract has  
 been declared forfeited as a purchase to its own terms, an account  
 of the details of the purchase in making further payments, he is  
 not entitled to recover back what he has paid." (Omitting quotation.)  
 Recognizing this as the rule in most jurisdictions it is said in  
 N. G. L., par. 378, that it is especially true where the contract  
 provides that no way retain the deposit or part payment as a for-  
 feiture in the nature of liquidated damages for the failure of the  
 purchaser to complete the contract, and again in N. G. L., par.  
 382, it is said that "the same distinction between a warranty  
 and liquidated damages do not apply to a pecuniary deposit, which  
 is, in reality, not a pledge but a payment in part of the purchase  
 money." The reason for such a rule is not finally stated in  
Hyman v. Greenberg, 20 Ill. 382, 383; Hyman v. Greenberg, 20  
 Ill. 382, 383, and Hyman v. Greenberg, 20 Ill. 382, 383.  
 We think the above is correct.

ATTORNEYS.

Respectfully, J. L. and Elizabeth J. L. L.

34426

JOSEPH SKAT,  
Appellant,

v.

MILWAUKEE MECHANICS'  
INSURANCE CO., a corporation,  
Appellee.

160 7  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 659<sup>5</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This action was brought for the recovery of \$2,000 under a fire insurance policy covering sundry grocery articles and fixtures in plaintiff's store.

The grounds urged for reversal are that the verdict is against the weight of the evidence, that defendant failed to establish its defenses, that plaintiff did not have a fair trial, and errors in the instructions.

Several defenses based on the terms of the policy were pleaded but only three are argued or were relied upon at the trial, (1) that the direct cause of the fire was an explosion that limited liability, (2) that the policy was voided by plaintiff's false swearing as to the value of some of the goods covered by the insurance, and, (3), plaintiff failed to furnish duplicate bills and invoices as requested by defendant and required by the policy.

The first defense relied upon is that the damage was caused by explosion and not directly by fire. The policy provides that the company shall not be liable for loss caused directly or indirectly by explosion of any kind unless fire ensues, and in that event, for the damages by fire only. In its amended affidavit of merits defendants denied that plaintiff suffered "a direct loss by fire to his property" and that the alleged loss and damage was caused by fire.



JOHN W. ...  
Applicant

ALFRED ...  
Applicant

MR. JUSTICE ...

This action was brought for the recovery of ...  
a life insurance policy covering ...  
insurance in plaintiff's estate.

The plaintiff alleged that the ...  
against the weight of the evidence, ...  
the defendant, that plaintiff did not have a fair trial, and ...  
the instructions.

Several witnesses named on the return of the policy were  
produced but only three were called upon at the trial.  
(1) That the direct cause of the fire was an explosion that limited  
liability. (2) That the policy was voided by plaintiff's false  
statements as to the value of some of the goods covered by the insur-  
ance, and, (3) Plaintiff failed to furnish adequate bills and in-  
voices as requested by defendant and required by the policy.

The first defense relied upon is that the damage was  
caused by explosion and not directly by fire. The policy provides  
that the company shall not be liable for loss caused directly or in-  
directly by explosion of any kind unless fire caused, and in that  
event, for the damages by fire only. In the amended affidavit of  
Merita defendant denied that plaintiff's evidence "a direct loss by  
fire to his property" and that the alleged loss and damage was  
caused by fire.

That there was a fire and the insured property completely destroyed is not questioned. While there was some evidence introduced by defendant tending to show an explosion, there is absolutely none from which it can reasonably be said that the explosion, if any, preceded the fire.

In the instructions given for defendant the jury were told in effect that if they believed from the evidence there was an explosion and after it the fire ensued, defendant's liability was limited to the actual damage from the fire after the explosion; and if they believed from the evidence there was an explosion that preceded the fire and caused damage to the property and the plaintiff has failed to prove by a preponderance of evidence the part of the loss and damage which was caused by the fire, then their verdict should be for the defendant.

These instructions are predicated on the theory that there was evidence tending to show the fire ensued from an explosion preceding the fire. But the only logical inference from the evidence is that the cause of the fire was unknown, and it reveals no circumstances whereby it can reasonably be said an explosion preceded the fire, and, if so, that there was any damage not attributable to the fire. For aught that appears to the contrary, the entire loss was caused directly by the fire. The fire took place about 1 a. m. No one appears to have been present when it started. One of plaintiff's witnesses and one of defendant's slept within seventy feet of plaintiff's store. The latter said he was aroused from his sleep by a noise that "sounded like a cannon" and "was not so very loud," that it threw him out of bed, and going to the window he saw that plaintiff's store was on fire. Plaintiff's witness testified that he was aroused from his bed by the shouting of "fire", and saw the flames coming out of the store windows and heard glass breaking



That there was a fire and the incense properly completely destroyed is not questioned. (This there was some evidence indicated by testimony leading to what an explosion. There is absolutely none from which it can reasonably be said that the explosion, if any, preceded the fire.

In the investigation given for defendant the jury was told in effect that it was believed that the evidence there was an explosion and also if the fire caused defendant's liability was limited to the actual damage from the fire after the explosion; and it was believed from the evidence there was an explosion that preceded the fire and caused damage to the property and the liability was failed to prove by a preponderance of evidence the part of the loss and damage which was caused by the fire, then their verdict should be for the defendant.

These instructions are predicated on the theory that there was evidence tending to show the fire caused from an explosion preceding the fire. But the only logical inference from the evidence is that the cause of the fire was unknown, and it reveals no circumstances whereby it can reasonably be said an explosion preceded the fire, and, if so, that there was any damage not attributable to the fire. But what that appears to the contrary, the entire loss was caused directly by the fire. The fire took place about 1 a. m. He appears to have been present when it started, but of plaintiff's story. The latter said he was awakened from his sleep by a noise that "sounded like a cannon" and "was not as very loud," that it threw him out of bed, and going to the window he saw that; plaintiff's story was on fire. Plaintiff's witness testified that he was aroused from his bed by the shouting of "fire", and saw the flames coming out of the stove window and heard glass breaking



and cans "popping in there." He heard no explosion and saw no evidences of one. Another witness for plaintiff, who lived within about sixty feet of the building, heard the fire alarm and went over to the fire. He said it was on the inside of the building, and the firemen were breaking in the windows. He heard no explosion and saw no evidences of any. Two of defendant's witnesses who visited the scene the next day testified to seeing fruit and glass lying across the street 75 feet from the store. One of the firemen testified that there was glass and fruit lying around on the sidewalk, that the fire shot out across the sidewalk, but he did not know what caused the glass to be broken. While, as we think, he was erroneously permitted to express his opinion that it was blown out by an explosion, he admitted that if fire is confined and there is no ventilation "it naturally would blow out." One of the firemen testified for plaintiff that he broke the "jagged glass" in the front window, that they tried to ascertain the cause of the fire, and that it was reported as "unknown."

All of the proof regarding the explosion was entirely compatible with one ensuing from the fire, and had no legal tendency to negative plaintiff's prima facie case that the entire loss was caused by fire, or to support the defense that it was directly caused by an explosion. In this state of the record, therefore, it was error to submit the case to the jury on the theory that there was evidence from which they might determine whether there was an explosion preceding the fire, and to direct a verdict for defendant on plaintiff's failure to separate the loss caused by an explosion from that caused by fire. There was not sufficient evidence to warrant such an instruction, and if the jury believed therefrom that there was an explosion which preceded the fire, then the verdict was manifestly against the weight of the evidence.

This conclusion necessitates a reversal and remandment of

and came "poping in there". He heard no explosion and saw no evidence of one. Another witness for plaintiff, who lived within about fifty feet of the building, heard the fire alarm and went over to the fire. He said it was on the inside of the building, and the firemen were working in the windows. He heard no explosion and saw no evidence of any. Two of defendant's witnesses who visited the scene the next day testified to seeing fruit and glass lying across the street 75 feet from the store. One of the firemen testified that there was glass and fruit lying around on the sidewalk, that the firemen did not know the glass was there, but he did not know what caused the glass to be broken. While, as we think, he was erroneously permitted to express his opinion that it was blown out by an explosion, he admitted that it is uncertain and there is no indication it is naturally would also not. One of the firemen testified for plaintiff that he heard the "jagged glass" in the front window, that they tried to ascertain the cause of the fire, and that it was reported as "unknown".

All of the facts regarding the explosion was entirely compatible with one coming from the fire, and had no legal tendency to negative plaintiff's theory. It is also true that the entire loss was caused by fire, as is reported the fact that it was directly caused by an explosion. In this case at the time, therefore, it was error to permit the case to the jury on the theory that there was evidence from which they might believe that there was an explosion preceding the fire, and so direct a verdict for defendant on plaintiff's theory is correct. The loss caused by an explosion from that caused by fire. There was not sufficient evidence to sustain such an instruction, and it the jury believed that there was an explosion which preceded the fire, then the verdict was manifestly against the weight of the evidence.

This conclusion necessitates a reversal and remandment of

the cause for a new trial. We shall not, therefore, analyze the evidence on which defendant relies to support the claim of fraud and false swearing with regard to the value of certain articles destroyed by fire, nor that pertaining to the contention that plaintiff failed to furnish duplicate bills and invoices. As to these contentions the evidence, while conflicting, is not so strong as to lead us to believe the jury rested its verdict on either one of them, and if it did, we think the verdict as to each is against the weight of the evidence.

Other points ~~discussed~~ for reversal, which may not arise on another trial, need not be discussed.

REVERSED AND REMANDED.

Scanlan, P. J., and Gridley, J., concur.





34435

REUBEN LEVINE,  
Appellee,

v.

JOSEPH SEIGEL,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 660'

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$100 and costs entered against defendant in an action for damages caused by an automobile collision at about one o'clock in the morning.

Plaintiff's automobile came from the east on 64th street and turned south into Halsted street; defendant's from the north on the latter street and ran into plaintiff's at a point south of the crossing, 100 feet, according to plaintiff's testimony, 50 to 75 feet, according to defendant's - a difference that has no bearing on the question of negligence.

Plaintiff testified that when he approached Halsted street he stopped, looked, saw no vehicle, and had reached a point about 100 feet south on Halsted street, when defendant's car struck his, the handles on the left-hand doors of defendant's car cutting the doors on the right-hand side of plaintiff's car, causing damage to the two doors, front and rear fenders, running board, shock absorber, steering wheel, the battery, and glass in front.

Defendant's own testimony was substantially the same as to the manner of the accident and the nature of injuries. He did not dispute running into plaintiff's car, as aforesaid, but simply said he had six young ladies in the car and did not see plaintiff's until he hit it. That under such circumstances he did not see plaintiff's car does not seem improbable but it did not excuse

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34435

MR. J. J. ...

This appeal is from a judgment for \$100 and costs entered against defendant in an action for damages caused by an automobile collision at about one o'clock in the morning.

Plaintiff's automobile came from the east on both streets and turned south into ... street. Defendant's car came from the north on the latter street and ran into plaintiff's at a point south of the crosswalk. ... test, according to plaintiff's testimony, ... test, according to defendant's - a little over that was in fact ... ing on the question of negligence.

Plaintiff testified that when he approached ... street he stopped, looked, saw no vehicle, and had reached a point about 100 feet south on ... street, when defendant's car struck him. The ... on the left-hand side of defendant's car striking the door on the right-hand side of plaintiff's car, causing damage to the two doors, front and rear fenders, running boards, shock absorber, steering wheel, the battery, and some in ... defendant's own testimony was substantially the same as to the manner of the accident and the nature of injuries. He did not dispute turning into plaintiff's car, as necessary, but simply said he had six young ladies in the car and did not see plaintiff's until he hit it. That under even circumstances he did not see plaintiff's car does not seem improbable but it did not excuse



him from negligence. His counsel makes no attempt to excuse his clear negligence under such undisputed circumstances other than claiming defendant had the right of way, which manifestly cannot be invoked under such circumstances, and that plaintiff "cut across" into Halsted street, as testified to by defendant. Even if he did, that would not excuse defendant from driving into plaintiff's car after it had reached a point at 50 to 100 feet south of the crossing. There is no room in the record for questioning defendant's negligence or plaintiff's lack of negligence. Plaintiff testified that at the time of the accident defendant said it was his fault, and defendant did not deny that he said so.

Because defendant said at the same time, as testified to by plaintiff, that his insurance company would pay the bill, his counsel argues as a ground for reversal that the reference to the insurance company was prejudicial. The trial having been before the court without a jury, the point is frivolous.

As to the amount of damages, plaintiff testified that he paid \$20 for repairing the battery, \$10.85 for repairing the shock absorber, and \$70 for the rest of the repairs, and presented paid bills therefor, except for the \$20, and these costs were testified to as reasonable and their reasonableness was not questioned. The only objections to the proof were that a bill for the \$20 was not presented before the court, and that the bill for \$70 was not itemized. These objections were frivolous.

Plaintiff testified that he had received an estimate of \$180 as the cost of repairs, and deeming it too high, had the repairs made at the cost aforesaid. The failure to strike out the testimony as to such estimate is urged as error. As the court's finding and judgment were manifestly based on the actual, unquestioned cost of repairs and not on the estimate, and as no question is raised

him from negligence. His counsel makes no attempt to excuse his  
 other negligence under this anticipated circumstances other than  
 claiming defense had the right of way, which would not be  
 involved under this circumstance, and that plaintiff's own  
 negligence caused the accident, as testified to by defendant. Even if he did,  
 that would not excuse defendant from liability. It is said  
 after it had reached a point at 80 to 100 feet south of the crossing.  
 There is no room in the record for questioning defendant's negligence  
 or plaintiff's lack of negligence. Plaintiff testified that at the  
 time of the accident defendant was in his family, and defendant  
 did not say that he said so.

Defendant's counsel at the same time, as testified to  
 by plaintiff, that the defendant would pay the bill. His  
 counsel argued as a matter of fact that the defendant had the  
 insurance company was prejudicial. The trial having been before  
 the court alone, a jury, the point is irrelevant.

As to the amount of damages, plaintiff testified that  
 he paid \$300 for repairs and losses, \$100 for repairs to the  
 truck, and \$100 for the cost of the repairs, and provided  
 said bill for repairs, except for the \$100, and that was not  
 testified to as reasonable and that the defendant was not  
 liable. The only question is the proper way to bill for the  
 \$300 was not presented before the court, and that the bill for the  
 was not reasonable. These objections were overruled.

Plaintiff testified that he had received an estimate of  
 \$100 as the cost of repairs, and testified to the bill, and the  
 repairs were at the same estimate. The bill was not the  
 testimony as to what plaintiff is owed as stated. As the court's  
 finding and judgment were manifestly based on the evidence, notwithstanding  
 cost of repairs and not on the estimate, and as no question is raised

as to the character of the injuries nor as to the reasonableness of the amount of damages proven we cannot but regard the claims for reversal on such grounds as so frivolous as to indicate that the appeal was taken for delay. The judgment will be affirmed, adding thereto the costs of ten per cent to the amount of the judgment, as provided in section 23, ch. 33, R. S. of Illinois, relating to costs.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.



as to the character of the injuries sustained by the respondents  
of the amount of damages payable as compensation for the injuries  
for reversal of such awards as an exception to the rule that  
the award was made for relief. The judgment will be affirmed.  
Adding further the state of law has been the means of the  
judgment, as provided in section 12, ch. 22, § 2 of Illinois.

Reversed in part.

ATTORNEYS.

Reversed in part. 11. and Grady, 11. and Grady.

34447

CHARLES HORN, doing business, etc.,  
Appellee.

vs.

C. A. PALTZER LUMBER COMPANY,  
a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 660<sup>2</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action to recover \$169.94 as the balance due from the sale of lumber from plaintiff to defendant. Defendant did not question the amount of the purchase price but claimed it should be credited with a cash discount of \$30, and that it was entitled to a set-off, which together would equal plaintiff's claim. This appeal is from a judgment for the amount claimed by plaintiff.

Plaintiff's acknowledgment of the order, dated April 5, 1928, called for delivery of the lumber F. O. B. Chicago, at price \$2,059.40, "Terms 2% - 10, or 60 days net." Within ten days after the shipment arrived defendant paid \$1,500. It is 2% of that amount defendant claims as discount. It made another payment July 3 of \$193.76 by check. On July 14, plaintiff sent defendant a statement of the account crediting defendant with said two payments, the freight charges and "2% on \$1,500" giving the balance due as \$139.94, thus recognizing by his own construction of the terms that defendant was entitled to the discount of \$30.

The terms "2% - 10 or 60 days net," in the absence of testimony elucidating them, are somewhat ambiguous as to whether it was intended to give 2% on cash payments made within ten days or only, as plaintiff now construes them, in case the entire bill was paid within that time. If the latter, then the purchaser apparently had nothing to gain by paying the \$1,500 before the end of the sixty days. But plaintiff having put a construction upon it in harmony with defendant's understanding by crediting defendant in said

CHAMBERS, JAMES, JR.,

Defendant.

vs.

O. A. FARMER, INC.,

Plaintiff.

Case No. 100.

IN SENATE

BY SENATE

2531A.600

IN SENATE

This is an action to recover \$100.00 as the balance due from the sale of lumber from plaintiff to defendant. Defendant did not pay the amount of the purchase price but claimed it should be credited with a cash discount of \$20, and that it was entitled to a set-off, which defendant would claim plaintiff's claim. This claim is from a judgment for the amount claimed by plaintiff.

Plaintiff's acknowledgment of the order, dated April 2, 1935, called for delivery of the lumber to O. A. Farmer, Jr. at price \$2,000.00. "Terms 20 - 10, net 30 days after." Plaintiff did not deliver the shipment until defendant paid \$1,800. It is \$20 of that amount defendant claims as discount. It was not paid until July 2 at \$180.75 by check. On July 14, defendant sent defendant a check of the amount of the discount which defendant with said two payments, the freight charges and "20 or 10, net 30" giving the balance due as \$180.75. Thus recognizing by his own acknowledgment of the terms that defendant was entitled to the discount of 10%.

The terms "20 - 10 or 30 days net," in the absence of any timely classification from the payment schedule as to whether it was intended to give 20 on cash payments made within ten days or only on payments not within ten days, in case the entire bill was paid within ten days. If the latter, then the defendant apparently had nothing to gain by paying the \$1,800 before the end of the thirty days. But plaintiff having put a construction upon it in harmony with defendant's interpretation by crediting defendant in full



statement with the discount before any controversy arose, it seems unnecessary for us to determine the meaning of the terms.

The additional claim of set-off is based on another transaction in which plaintiff acknowledged an order from defendant for a certain quantity of maple flooring to be "3' and longer," according to verbal agreement and as described in plaintiff's acknowledgment. The order was made by defendant for sale to a construction company. When the flooring was unloaded the construction company discovered that much of it was less than 3' and objected to taking it.

This led to conferences with regard to the matter and finally to an agreement for the return of all flooring under 33 inches, the rules of the maple flooring manufacturers' association, under which the sale was made, allowing a "spread" of 3 inches. The shipment involved about 63000 feet and about 1600 feet were replaced. In its set-off defendant claims credit for \$12 paid for cartage of the returned flooring and that replacing it, the freight charges on the same, \$12.30, and \$3 paid for loading the truck. The rest of the credit is for the cost of labor in sorting out the defective flooring from the rest of it. While plaintiff and the milling company that manufactured the lumber, claimed there was no liability on their part to replace the alleged defective flooring, to effect a compromise the arrangement for such replacements was made. Plaintiff testified that he said to Mr. Paltzer: "If you purpose to stand arbitrarily and technically on the Association rules then we should allow you a little handling, a reasonable handling bill on the stock that is shorter than 33 inches." The agreement thus to replace the alleged defective flooring and to bear the expense of "handling" the same, implied an understanding, we think, to pay for the aforesaid freight and truck charges. But as sorting out the defective material involved little if any additional labor

statement with the record before me and the evidence. It seems unnecessary for me to determine the meaning of the terms.

The additional claim of subject is found in another provision in which defendant admitted an order from defendant for a certain quantity of whole flooring to be "8' and longer," and the in verbal agreement and as described in plaintiff's acknowledgment. The order was made by defendant for sale to a construction company. When the flooring was delivered the construction company

discovered that some of it was less than 8' and refused to receive it. This led to controversy with regard to the matter and finally

to an agreement for the return of all flooring which it had, and to the return of the whole flooring construction company, which with the sale was made, amounting to 10,000 feet. The amount

involved about 2500 feet and about 1500 feet were returned. In the contract between the parties for the sale the contract of the return of flooring and the return of it, the flooring company on the same, 10,000, and 15,000 feet for the return of the flooring. The cost of the flooring is for the cost of labor in setting out the defective

flooring from the rest of it. While plaintiff and the flooring company have conducted the matter, certain facts are as follows on their part to replace the alleged defective flooring, to effect a compromise the arrangement for such replacement was made. Plaintiff testified that he said to Mr. Walker: "If you refuse to

stand satisfactorily and reasonably on the replacement of the flooring, I will give you a 10,000-foot, a 15,000-foot, and the same that is shorter than 10 inches." The agreement then to replace the alleged defective flooring and to bear the expense of "installing" the same, testified as satisfactorily, as it is for the flooring itself and the same. The agreement and the defective material involved is to be replaced by

when the contractor took from the bundles what was to be used, we do not think a credit for time spent in sorting should be allowed.

If, therefore, plaintiff will within ten days make a remittitur for the \$30 he had previously credited as discount, and for \$27.30 freight and truck charges, a total of \$57.30, the judgment will be affirmed for the difference, to-wit, \$112.64. Otherwise the judgment will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR FOR \$112.64.

Seanlan, P. J., and Gridley, J., concur.





34462

ANNA G. HIXSON,  
Appellee,

v.

THE GREAT ATLANTIC &  
PACIFIC TEA COMPANY, a  
corporation,  
Appellant.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

259 I.A. 660<sup>3</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$7,500 entered upon a verdict assessing damages in that amount against defendant in an action to recover damages for personal injuries.

While plaintiff as a customer in defendant's grocery store was walking in the same to a place therein to pay for a purchase she had made there, she tripped on a tin strip protruding from the floor and fell on her knees, striking her left knee on an iron-head register, from which she suffered certain injuries.

The declaration is predicated on two counts, one charging negligence in permitting the protrusion of said strip, and the other, in not having sufficient light to render the store safe for customers.

That the accident took place as charged and defendant would be responsible for any injury caused thereby without plaintiff's fault are not questioned. The principal error complained of is that the damages are excessive and that they may be attributed to some remarks of plaintiff's counsel in his closing argument, calculated to arouse prejudice in the minds of the jury. Only one of the remarks complained of - which was more or less trivial - was objected to, so that defendant is hardly in a position to avail itself of error in permitting the others. We have, however, considered

AMMA O. WILSON,  
Appellee,

v.

THE GREAT ATLANTIC &  
PACIFIC TEA COMPANY, a  
corporation,  
Appellant.

STATE OF NEW YORK, COUNTY OF NEW YORK.

IN SENATE.

259 I.A. 680

IN SENATE, JANUARY 17, 1911.

This appeal is from a judgment of the Court of Appeals in the case of AMMA O. WILSON, Appellee, against THE GREAT ATLANTIC & PACIFIC TEA COMPANY, Appellant.

The judgment of the Court of Appeals is that the defendant is liable to recover damages for personal injuries.

While plaintiff was a customer in defendant's grocery store was working in the same as a glass chaise to get for a

purchase and was injured, and slipped on a slip provided from the floor and fell on her knees, striking her left knee on an

iron-bound register, from which she suffered certain injuries.

The evidence is presented on two counts, one charging

negligence in providing the provision of said slip, and the other, in not having sufficient light to render the place safe for customers.

That the accident took place as charged and defendant

would be responsible for any injury caused thereby without fault

plaintiff's fault and not questioned. The principal error complained

of is that the court was mistaken and that they may be attributed

to some members of plaintiff's counsel in his closing argument.

Only one of the remarks complained of - which was made on June twelfth -

was objected to, so that defendant is hardly in a position to avail

itself of error in presenting the others. It must, however, be considered



them all with regard to their probable effect and while not all of them were strictly legitimate argument, we do not think they were such as can reasonably be said to have the effect ascribed to them.

Plaintiff was about fifty years old. The accident took place in February, 1928. She apparently walked home and discovered there that her left knee was bruised. She suffered some pain and for about three weeks she bathed and applied hot cloths to it. She then called Dr. Earle who advised her to rub salve on the kneecap and bandage it tight. The knee was somewhat swollen and she went to the doctor about once a month for nearly a year who does not appear to have prescribed any different treatment. He testified that when she came to him he found acute synovitis, that is, an inflammation of the sac around the knee joint, that it had some limited motion and was swollen. During the treatment some fluid found in the knee was absorbed and there was a thickening of the synovial sac as a result of the chronic inflammation. He thought there was a permanent disability in the joint.

One of her expert witnesses, Dr. Scott, made a clinical and physical examination of plaintiff's knee joint in December, 1928. He noticed a swelling in the left knee and a restricted motion "in full flexion of within about twenty five degrees of normal." X-rays showed some roughening along the top of the shin bone and indications of "a low grade of inflammatory condition, and a deposit of new bone within the joint."

Another expert who examined plaintiff in January, 1930, - a few weeks before the trial - testified that he found a soft mass alongside the kneecap, that the kneecap itself was displaced externally, that the measurement showed it to be a little larger than the corresponding area of the right knee, that there was a hardness of muscles about the outer aspect of the knee, that the X-ray films

them all with regard to their probable effect and while not all of them were entirely legitimate arguments, we do not think they were such an even reasonably be said to have the effect mentioned to them. Plaintiff was about fifty years old. The accident took place in February, 1938. The apparently welled knee and discovered there that her left knee was broken. She suffered some pain and for about three weeks she bathed and applied hot cloths to it. She then called Dr. Korte who advised her to rub olive oil on the knee and bandage it tightly. The knee was somewhat swollen and she went to the doctor about once a month for nearly a year who does not appear to have prescribed any different treatment. He testified that when she came to him he found acute synovitis, that is, an inflammation of the sac around the knee joint, that it had some limited motion and was swollen. During the treatment some fluid found in the knee was absorbed and there was a subsiding of the synovitis and as a result of the chronic inflammation. He thought there was a permanent disability in the joint.

One of her expert witnesses, Dr. Korte, made a clinical and physical examination of Plaintiff's knee joint in January, 1942. He noticed a swelling in the left knee and a restricted motion "in full flexion of within about twenty five degrees of normal." X-rays showed some irregularity along the top of the shin bone and indicated of "a low grade of inflammatory condition, and a degree of not done within the joint."

Another expert witness testified in January, 1942, - a few weeks before the trial - testified that he found a well marked synovitis of the knee, that the knee itself was displaced externally, that the movement showed it to be a little larger than the corresponding area of the right knee. That there was a rupture of muscles about the outer aspect of the knee, that the A-P films

showed an irregular bony deposit along the lower portion of the thigh bone and evidence of fluid accumulation. He stated that she had suffered a sprained left ankle and a sprain and tearing of her ligamentous attachments about the knee.

The only other elements of damage testified to was the expense of \$100 for a doctor's bill.

Plaintiff was a housewife. It is inferable from the testimony that she had no hospital or nurses' bills nor any expense in consequence of any loss of service or inability to perform her customary duties, and was not handicapped in their performance otherwise than by said restricted motion of her knee.

She suffered no broken bones, no lacerations, cuts or permanent disfigurement, and suffers only slight and periodical pain. She testified that at the time of the trial she had no pain in the left knee joint except when she bent it and that she no longer had any trouble with her ankle.

In view of these facts we think the damages assessed were excessive and that unless there is a remittitur of \$3,500 within ten days the judgment must for that reason be reversed and remanded. If the remittitur is made it will be affirmed for \$4,000.

AFFIRMED ON REMITTITUR OF \$4,000;  
OTHERWISE REVERSED AND REMANDED.

Seanlan, P. J., and Gridley, J., concur.



showed an irregular break across the lower portion of the  
 thigh bone and evidence of fluid accumulation. He stated that  
 she had suffered a sprained left ankle and a sprain and tearing  
 of her ligaments around the knee.

The only other elements of damage testified to was the

expense of \$100 for a doctor's bill.

Witness was a doctor. He is inflexible from the

testimony that she had no physical or mental bill nor any

expense in connection with any loss of service or inability to

perform her ordinary duties, and was not handicapped in their

performance of them by any physical action of any kind.

The subject no longer wears, no longer wears, and is

permanent disfigurement, and suffers only slight and periodic

pain. The fact that at the time of the trial she had no pain

in the left knee joint except when she went to and from the

doctor had any trouble with her ankle.

In view of these facts we think the damages awarded

were excessive and that unless there is a verdict of \$1,000

within ten days the judgment must for that reason be reversed

and remanded. In the majority it was 10 to 9 with the

majority.

REVEREND JUDGE OF THE COURT  
 IN THE COURT OF APPEALS

Reversed, 10 to 9, and remanded.

34551

DONCHIAN FURNITURE COMPANY, Inc.,  
a Corporation,

Appellant,

vs.

V. H. MAGARIAN,  
Appellee.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 680<sup>4</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was in assumpsit, plaintiff claiming an indebtedness from defendant of \$2,740.84 that was not questioned as to its amount and was credited on defendant's set-off claimed for unpaid balances of his salary from June 16, 1923, to January 11, 1928, when he left plaintiff's employ, aggregating \$5,973.16. There was a jury trial and verdict in defendant's favor for \$1., thus recognizing the set-off to the extent of plaintiff's claim. This appeal followed.

The points made on appeal are, (1) that the verdict is contrary to the law and evidence in the case; (2) the verdict is a compromise; (3) error in limiting plaintiff's counsel's time for argument, and (4) error in the refusal and giving of instructions.

Beginning June 16, 1923, defendant became plaintiff's manager under a verbal contract with E. B. Donchian, its president, for a weekly salary and continued in its employ until January, 1927. He claimed an arrangement whereby he was to have a salary of \$100 a week beginning June 16, 1923, and was to draw only \$75 a week, the salary was increased \$10 a week at the end of a year, and to \$125 at the end of the second year's service, he drawing by agreement \$85 a week from that time until he left as aforesaid. He claimed that the balance of his salary was left with the company on the understanding that it was to be applied to the purchase of

... ..

• • •

1. The first group of people who are not allowed to enter the country are those who are not citizens of the United States.

... ..

[illegible]

For example, the fact that the defendant is a member of the Communist Party is not sufficient to establish that the defendant is a member of the Communist Party. The fact that the defendant is a member of the Communist Party is not sufficient to establish that the defendant is a member of the Communist Party.

On the investigation that it was to be applied in the purchase of  
 claimed that the balance of his salary was left with the company  
 and had a cash item that would be left as arrears. He  
 left at the end of the second year's service, he leaving by a res-  
 the salary was included in a form at the end of a year, and in  
 a week beginning June 15, 1935, and was in draw only \$75 a week.  
 He claimed an arrangement whereby he was to have a salary of \$100  
 for a weekly salary and included in the company until January, 1937.  
 manager under a verbal contract with M. E. Donahue, the president,  
 beginning June 15, 1935, following because of his salary.



the stock owned by Donchian's mother, it being contemplated that she intended to part with it later on.

While the jury allowed defendant's set-off to the extent of plaintiff's claim, plaintiff is in no position to complain that the jury did not allow defendant more. And it does not follow, in view of the conflicting evidence as to almost all details, as to some of which the jury may have given plaintiff the benefit, that the verdict was necessarily a compromise.

Except a rebuttal witness called on minor matters <sup>else</sup> Donchian was plaintiff's only witness. As no one ~~was~~ present when he and defendant made the arrangements for a salary, most of the evidence relating thereto consisted of their testimony and it was contradictory in almost every particular. There was, however, corroboration of parts of defendant's testimony. He testified that when he received an offer of a higher salary in January, 1927, from another concern, he told Donchian that he would have to accept it unless Donchian gave him a salary commensurate with the offer, and that thereupon he discussed with Donchian the condition of his account and requested that there be placed upon the books in "black and white" what was coming to him or that he be given a note; that Donchian said he would think it over; that his mother would part with her stock and he and defendant would some day be the sole owners of the company; that he insisted upon getting his money and after some discussion Donchian offered him \$2,500 and a salary of \$7,000, which defendant declined to accept. Donchian denied making said offer and in fact denied categorically defendant's testimony in every particular as to the arrangements and conversations had as to the amount of salary and a drawing account and other matters, as well as the statements of defendant's other witnesses. Two of these witnesses, a former bookkeeper of plaintiff,

the stock owned by Hamilton's mother, it being contemplated that the interest in said stock is to pass to him.

While the jury discussed Hamilton's testimony in the light of Hamilton's claim, Hamilton is in no position to controvert that the jury did not allow defendant more. And it does not follow, in view of the conflicting evidence as to almost all details, as to some of which the jury may have been satisfied, that the verdict was necessarily a compromise.

Except a rebuttal witness called in direct answer to Hamilton's testimony, there is no other evidence. As no one else was present when he and defendant made the arrangements for a salary, and of the witness testimony, those consisted of their testimony and it was contradictory in almost every particular. There was, however, corroboration of parts of defendant's testimony. He testified that when he received an offer of a higher salary in January, 1937, from another company, he told Hamilton that he would have to accept it unless Hamilton gave him a salary commensurate with the offer, and that thereafter he discussed with Hamilton the condition of his account and requested that there be placed upon the books in "black and white" what was coming to him or that he be given a note; that Hamilton said he would think it over; that the next day he went with her back and he and defendant would come for the sale of the company; that he insisted upon getting his money and after some discussion Hamilton offered him \$2,500 and a salary of \$7,500, which defendant declined to accept. Hamilton testified that he in fact denied categorically defendant's testimony in every particular as to the arrangements and conversations had as to the amount of salary and a drawing account and other matters, as well as the statements of defendant's other witnesses. Two of these witnesses, a former bookkeeper of Hamilton's,



and a former shipping clerk, testified to hearing a part of the conversation in which defendant claimed a balance due him and that they heard Donchian say he would give defendant \$2,500 but no more. The testimony of the third witness, another bookkeeper of plaintiff, tended to corroborate defendant to the effect that he had a drawing account on the books.

It seems strange that plaintiff did not offer its books of account with defendant extending, as they did, over this period of three years and a half from the time the parties entered into an arrangement for a specific salary. Seemingly they would have given some light on their agreement favorable to plaintiff if Donchian's testimony was true. We have carefully reviewed the entire evidence and cannot say that the verdict is manifestly against its weight, except perhaps in not allowing defendant greater damages, a matter, however, as before stated, being in plaintiff's favor it cannot complain.

Nor was there reversible error in limiting the argument of counsel to thirty minutes on a side. The evidence did not call for a more extended argument to bring the issues clearly before the jury. There was no abuse of discretion in denying counsel's right to reply when, under the court's warning, he saw fit to consume his entire time in his opening argument.

As to the instructions. The court gave four of the instructions offered by each party, the first three of which were intended to guide the jury in considering and weighing the evidence. Each party's fourth instruction presented his theory of the case. Plaintiff's told the jury that if they found from all the evidence that defendant was not entitled to recover on its claim of set-off the verdict should be for the plaintiff for the amount claimed. Defendant's told the jury if they believed



and a letter stating that, having a part of the conversation in which defendant claimed a balance due him and that they heard defendant say he would give defendant \$1,000 but no more. The testimony of the other witness, without reference to plaintiff, tends to corroborate defendant in the latest part of his testimony. It seems strange that plaintiff did not enter into books of account with defendant extending, as they did, over this period of three years and a half from the time the parties entered into an agreement for a specific salary. Obviously they would have given some light on their agreement favorable to plaintiff if defendant's testimony was true. He has conclusively refuted the other witness and cannot say that the witness is manifestly against the weight, except perhaps in not allowing defendant greater damages, a witness, however, as before stated, being in plaintiff's favor is almost negligible.

It was necessary for the jury to find the right of counsel to thirty minutes in a case. The witness did not call for a more extended argument to bring the issues clearly before the jury. There was no issue of fact or law in the case, a right of thirty minutes, which the court's witness, in his testimony, stated was in his opening argument.

As to the instructions. The court gave four of the instructions offered by the jury, the other three of which were intended to guide the jury in evaluating and weighing the evidence. Each party's fourth instruction provided the jury with the facts. Plaintiff's fourth instruction was intended to guide the jury in evaluating the evidence and was not intended to present an issue of fact or law. The witness stated that the plaintiff's fourth instruction was intended to guide the jury in evaluating the evidence and was not intended to present an issue of fact or law.

from the evidence there was an agreement that defendant should not draw his salary and the balance had not been paid him they should find the issues for defendant and assess his damages for such sum as they found from the evidence to be due. From the character of the testimony and these instructions there was no room for the jury being misled as to what were the real issues; and those given being sufficient to present the real issues of fact and to guide the jury as to the weight and credibility of the evidence, we cannot say the refused instructions withheld from them any principles of law necessary for guidance in determining the simple question of fact presented whether defendant was entitled to a set-off. Some of the refused instructions were but a reiteration or unnecessary elaboration of the plain statement of the issues stated in the given instructions. While we think an instruction informing the jury that the burden of proof rested upon defendant to establish his set-off by a preponderance of evidence might properly have been given, yet there is nothing to show that the jury was misled in any respect in applying those principles.

But plaintiff is in no position to complain of the instructions. Its motion for a new trial was in writing and specified as the errors with respect to said instructions, "The court improperly refused to give to the jury all the instructions offered by the plaintiff," and "all the instructions requested by plaintiff." It is a well established rule of practice that such a joint or general assignment or specification of error as to all instructions, is not available unless the action of the court was incorrect as to all. (46 C. J. 323.) This principle was applied in Huber v. Brown, 148 Ill. App. 399, and in Barth v. Union National Bank, 67 id. 131, where it was sought by the

to show that the jury was misled in any respect in reaching their  
of evidence might suggestly have been given, but there is nothing  
revels when reflected as established his self-off by a prosecution  
think an indication indicated, the jury that the burden of proof  
went of the issues stated in the given instructions. While we  
but a representation of necessary elimination of the facts stated  
was entitled to a verdict. Some of the relevant instructions were  
misleading the jurors as to the burden of proof in the case;  
from them any principles of law necessary for guidance in deter-  
the evidence, we cannot say the jurors were misled or otherwise  
fact and to guide the jury as to the weight and credibility of  
and there given being sufficient to establish the real issues of  
jury for the jury being misled as to what were the real issues;  
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from the evidence there was an apparent, clear balance and should

[illegible]



general language of the assignments of error to bring into question the entire order or decree of the court, the court holding that if the order be part right the assignments must be overruled.

While the point may seem technical, yet unless observed, appellate courts might be required to search the records for reversible error. Not finding reversible error in the case we affirm the judgment.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

General language of the certificate of error is that the error  
The entire error is stated in the certificate, the court holding that  
it was not the duty of the court to be corrected.  
While the error may seem technical, yet unless  
observed, appellate courts might be required to search the records  
for reversible error. Not finding reversible error in this case  
we affirm the judgment.

ATTORNEYS

SEANIN, J. J., and others, J. J. SEANIN.

34570

THEODOR THARANDAY,  
Appellant,

v.

IGNACE GENIUSZ et al.,  
Appellees.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

259 I.A. 660<sup>5</sup>

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree dismissing for want of equity a bill to foreclose a mechanic's lien. The issues were referred to a master in chancery who reported in complainant's favor and overruled objections to the report. The exceptions thereto were, however, sustained and a decree entered dismissing the bill as aforesaid.

The contract and the formal steps taken to assert a lien are not in question. The only facts in controversy were whether the contract price, \$3,475, was paid in full, and whether executed waivers of a lien were delivered.

On the contract itself was indorsed in the handwriting of complainant, payments beginning December 13, 1926, and ending August 17, 1927, sixteen in all, of different amounts covering the purchase price, and the words, "Paid in Full (Full) Theodor Tharanday," admittedly made and so signed by complainant. Complainant, however, contended that he was intoxicated when he made said indorsements and that he never in fact received any cash at the time of said several alleged payments.

A photostatic copy of the contract with these indorsed payments thereon was introduced in evidence. There is no indication in the handwriting that these indorsements were made by one in a state of intoxication. Inasmuch as complainant remembered in his



THOMAS J. BARNES  
JANUARY 1937  
JANUARY 1937  
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THOMAS J. BARNES  
JANUARY 1937

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MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree dissolving the marriage of the parties and awarding custody of the children to the mother. The decree was entered on the basis of a report by the guardian ad litem, who reported in favor of the mother. The exceptions to the report, however, remained and a decree entered dissolving the marriage and awarding custody of the children to the mother.

The complaint was filed in the Circuit Court of the District of Columbia on January 1, 1937. The complaint was amended on January 1, 1937. The complaint was amended on January 1, 1937. The complaint was amended on January 1, 1937.

In the complaint itself was introduced in the handwriting of complainant, payments beginning December 13, 1936, and ending August 17, 1937, sixteen in all, of different amounts covering the purchase price, and the words, "paid in full (Bill) Thomas Barnes," admittedly made and so signed by complainant. Complainant, however, contended that he was informed when he made said instruments and that he never in fact received any cash of the line of said several alleged payments.

A photostatic copy of the contract with these instruments was introduced in evidence. There is no indication in the handwriting that these instruments were made by one in the state of indebtedness. Instruments as complainant remembered in his

intervals of sobriety of making these indorsements when he claimed he was intoxicated, it seems improbable, if no cash was paid thereon, that he would have continued to make other indorsements and permit the matter to rest without a protest, as appears to have been the case. He did not file this bill until about twenty months after the final payment.

While complainant denied receiving the cash payments evidenced by said indorsements, the testimony of Ignatz Geniusz that he did make payments in cash at the time of making said indorsements was corroborated to some extent by a witness who testified he was present on four or five of the occasions, and saw complainant make indorsements and saw the exchange of money, but how much he could not say.

Defendants borrowed money from the bank to enable them to erect the building. Before the bank would make payment it required waivers of a lien from complainant which were delivered to the bank when it made payment of \$1,207.47 to a concern furnishing lumber and gave defendants a check for \$1,264.53. One of these waivers was signed by complainant in consideration of the full purchase price named in the contract, and the other waivers were signed by several supposedly material men or subcontractors. All were dated about the time of said payments by the bank. None of the signatures thereto was questioned. Complainant had them made out, when sober as he admits, but claimed that he went into defendants' saloon, became intoxicated and never saw them afterwards and never delivered them up to the bank. Ignatz said that they went together for the money. The president of the bank testified that when the checks aforesaid were given he thought both Geniusz and Tharanday came to his private real estate office in regard to getting the money, and that he gave a letter of instructions

intervals of activity of making these instruments when he claimed he was interested. It seems improbable, it was said, that he would have continued to make other instruments and permit the matter to rest without a protest, an attempt to have seen the case. He did not file this until about twenty months after the final payment.

While testimony was being given the bank president testified by said instruments, the testimony of Ignace Gervais that he did make payments in cash at the time of making said instruments was corroborated to some extent by a witness who testified he was present on four or five of the occasions, and saw complaint made instruments and saw the exchange of money, but how much he could not say.

Defendant borrowed money from the bank to enable him to erect the building. Before the bank would make payment it required delivery of a lien from complaint which were delivered to the bank when it was paid of \$1,100.00 as a security for making loans and gave defendant a check for \$1,100.00. One of these checks was signed by complaint in consideration of the full purchase price named in the complaint, and the other delivery was signed by several supposedly material men and subcontractors. All were dated about the time of said payment by the bank. None of the signatures thereto was questioned. Complaint had then made out, and asked to be filled, but claimed that he went into defendant's saloon, became intoxicated and never saw them after words and never delivered them up to the bank. Ignace said that they went together for the money. The president of the bank testified that when the checks were given he thought both Gervais and defendant were in the private bank estate office in regard to getting the money, and that he gave a letter of instruction



to deliver the checks upon presentation of the waivers. These waivers were produced by the bank. The last cash indorsement on the contract was on the date of the check to defendants.

On a review of the entire evidence we cannot say that the chancellor was not authorized in discrediting complainant's testimony. It seems improbable that he did not protest against such indorsements and take some steps to ascertain whether after the waivers disappeared they had been delivered to cut off his lien, if he did not receive the cash payments and did not authorize delivery of the waivers.

While it may be true that complainant was furnished intoxicating liquor at a so-called saloon alleged to have been conducted by defendants and was intoxicated a good deal of the time while there and that much of his money may have been spent there, yet his testimony, in view of the recited circumstances, that he received no money when he made said indorsements and was not aware of the delivery of the waivers, is not convincing. The decree is affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.



34325

10 WEST ELM STREET

BUILDING CORPORATION,  
Defendant in Error,

v.

W. L. MACLASKEY,  
Plaintiff in Error.

ERROR TO MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 661

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 14, 1929, a judgment by confession for \$190, on a written lease, was entered against defendant in the municipal court of Chicago. By the lease the plaintiff corporation demised to defendant a certain apartment on the 7th floor of its building at No. 10 West Elm Street, Chicago, for the term from October 1, 1928, to September 30, 1931, at a rental of \$85 per month. The judgment was for rent claimed to be due for the months of June and July, 1929, and \$20 attorney's fees. On September 11, 1929, defendant appeared and moved that the judgment be opened and that he be allowed to make a defense on the merits. The motion was supported by his verified petition which was then filed. On September 24th the court granted the motion and ordered that defendant's petition stand as an affidavit of merits. On January 15, 1930, plaintiff appeared before another judge of the court and moved that defendant's petition, or affidavit of merits, be stricken from the files as not disclosing a good defense to plaintiff's claim. The motion was granted and the court adjudged that said judgment of \$190, as confessed on August 14, 1929, stand confirmed as of that date. Defendant appealed. No appearance has been entered, or briefs filed, by plaintiff in this court.

The sole question is whether defendant's verified petition





states such a defense as requires a trial of the cause upon the merits. We think that the question must be answered in the affirmative. In the petition defendant alleges in substance that about May 13, 1929, it was orally agreed between him and plaintiff, through its officer, that, if he would vacate and surrender the premises described in the lease, plaintiff would release and discharge him from all further liability for rent accruing subsequent to May 31, 1929, and would cancel the lease, and that pursuant to the agreement he (defendant) shortly thereafter did vacate and surrender the premises and the same, so surrendered, were accepted by plaintiff. In our opinion these allegations disclose prima facie a good defense to plaintiff's claim for any subsequent accruing rent. In Alschuler v. Schiff, 164 Ill. 298, it is decided in substance that a contract under seal may be abrogated and cancelled by an executed parol agreement, that evidence is admissible to show that a written lease has been cancelled by a parol agreement and the premises surrendered to the landlord under that agreement, and that the questions whether the parol agreement was made and the premises were surrendered thereunder are questions of fact for a jury to determine. (See, also, Williams v. Vanderbilt, 145 Ill. 238, 246; Wabash Loan Co. v. Krabbe, 145 Ill. App. 462, 464; Chapman v. Cary, 238 Ill. App. 605, 608.) Defendant's petition also set forth a further claimed defense to the payment of the rent sued for, but it is unnecessary now to discuss the same.

The judgment appealed from is reversed and the cause remanded for a trial upon the merits.

REVERSED AND REMANDED.

Scanlan, P. J., and Barnes, J., concur.

stated such a contract as required a trial of the facts upon the

merits. We think that the question must be answered in the

affirmative. On the petition submitted in substance that

about May 15, 1925, it was orally agreed between him and plaintiff,

through the officer, that, if he would vacate and surrender the

premises described in the lease, plaintiff would release and discharge

him from all further liability for rent accruing subsequent to May 15,

1925, and would cancel the lease, and that he agreed to the agreement

he (defendant) orally admitted his release and cancellation of the premises

and the same, as evidenced, was accepted by plaintiff. In our

opinion there is no question about this. It is a fact between the

plaintiff's claim for any subsequent accruing rent. In Albright v.

Albright, 121 Ill. 290, it is held in substance that a contract under

which may be regarded and controlled by an executed oral agreement,

that evidence is admissible to show that a written lease has been can-

celed by a oral agreement and the parties represented at the time-

and under that agreement, and that the parties intended the oral

agreement was made and the premises were surrendered thereunder and

premises of fact for a trial of the merits. (See, also, Albright v.

Albright, 121 Ill. 290, 1901 Ill. App. 2d 121, 1901 Ill. App. 2d 121.

1901 Ill. App. 2d 121, 1901 Ill. App. 2d 121, 1901 Ill. App. 2d 121.

position also set forth a further claimed defense to the payment of

the rent and fee, but it is immaterially not in dispute the same.

The judgment appealed from is reversed and the cause re-

manded for a trial upon the merits.

REVEREND JUDGE OF THE COURT.

Reversed, 7. 11, and Remanded, 11, affirmed.



34375

167  
WILLIAM H. TEGTMEYER et al.,  
Complainants and Appellees,

v.

DAISY C. TEGTMEYER et al.,  
Defendants.

On appeal of DAISY C. TEGTMEYER,  
Appellant.

7  
APPEAL FROM

CIRCUIT COURT,  
COOK COUNTY.

259 I.A. 661<sup>2</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By bill filed on March 11, 1925, and several times amended, complainants, as beneficiaries of an express written trust, dated October 20, 1913, sought to compel Daisy C. Tegtmeier, widow and sole heir of Edward Tegtmeier, deceased, (the trustee named in the trust agreement), to account for a trust fund of \$5,000 and the avails thereof that she had received. After issues joined the cause was referred to a master to take testimony and report his conclusions of law and fact on all issues of liability raised by the pleadings. A mass of oral and documentary evidence was introduced by the respective parties, and on September 28, 1929, the master filed his report, in which after making numerous findings, he recommended that the court decree that Daisy C. Tegtmeier (hereinafter called Mrs. Tegtmeier) account, that she and the Chicago Title & Trust Co. be restrained from disposing of the sum of \$10,000, or the securities substituted therefor, pending such accounting, and that she further be restrained from disposing of certain shares of stock held by her. Objections to the report were ordered to stand as exceptions. Subsequently there was a hearing on the exceptions, and on March 18, 1930, the court entered the decree appealed from.

In the decree the court, after making numerous findings,

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• 1944-1945 • YEAR 9 • Page 11

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THE UNIVERSITY OF CHICAGO PRESS

1946 - 1949 (November) - 1949 (November) - 1949 (November)

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as well as a new state government. . . .

100-443881-100

• 1911 •

SECRET

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confirmed the master's report, except that it was adjudged that the master "erred in finding that Frank Tegtmeier survived his mother and father." And the court further adjudged that said Frank Tegtmeier "is presumed to have died by the end of the year 1903, at the latest, without leaving any issue or wife him surviving;" that he "then was and is legally dead;" and that Mrs. Tegtmeier's motion to dissolve the temporary injunction, entered herein on March 9, 1928, be denied. And the court further adjudged, inter alia:

That Mrs. Tegtmeier, within 20 days, file in this cause a report and account setting forth in detail all property in which said trust fund of \$5,000, or any part thereof, has been invested or intermingled, beginning with the purchase of certain vacant land in Chicago on August 21, 1913, and ending at the time of the filing of such report and account; that she set forth in detail "all investments, re-investments, purchases, sales, substitutions, disposals and uses which she made or caused to be made of the proceeds of the sale she made of said land, and all profits, proceeds, accumulations and income derived therefrom;" and that such account and report set forth the dates of the various transactions and the names and addresses of the persons, firms or corporations with whom they were had.

That the cause be again referred to a master in chancery (naming him) to take testimony and report his conclusions of fact and law as to all property, funds, money and securities that Mrs. Tegtmeier received as a result of any and all investments, purchases, etc., and use that she made with the proceeds of the sale of said land, etc.; that he set forth in his report all such properties as Mrs. Tegtmeier holds in trust for William H. Tegtmeier, Anna L. Boock, the four heirs (naming them) of Minnie C. White, deceased, and the two heirs (naming them) of Lillian Have Wilson, deceased; that he set forth what expenses, if any, Mrs. Tegtmeier incurred in connection with such property, and whether or not she is legally entitled to any credit or deduction on account thereof; and that he take and state an account of the properties and income received by her from such of said property as he finds she holds in trust for said William H. Tegtmeier, Mrs. Boock and said above named heirs, and their respective interests and shares therein.

That thereafter and prior to any distribution complainants and said infant defendants, Lillian Tegtmeier Wilson and Albert Have Wilson, by John Harrington, their guardian ad litem, or some one or more of them, shall cause to be published an advertisement in one issue of each of certain newspapers (here are named 13 newspapers, published in 12 different cities of the United States - 2 being published in the city of Burlington, Iowa), stating that "Anyone knowing anything of the whereabouts of Frank Tegtmeier, who disappeared from his home, near Burlington, Iowa, in 1895, or 1896, is asked to communicate with John Harrington, 120 South LaSalle Street, Chicago, Illinois;" that after the lapse of 30 days from the date of the last publication of such advertisements, said Harrington shall report to this court what response, if any, he received from such advertisements, and in the event no proof is obtained as the result of any such advertisement that Frank Tegtmeier is alive, the distribution to William H. Tegtmeier, Anna L. Boock and said above named heirs shall be made without



continued the master's report, except that it was alleged that the master "erred in thinking that Frank Tegmeyer arrived his mother and father." And the court further adjudged that said Frank Tegmeyer "is presumed to have died by the end of the year 1908, at the latest, without leaving any issue or wife him surviving;" that he "then was and is legally dead;" and that Mrs. Tegmeyer's motion to dissolve the temporary injunction, entered herein on March 9, 1908, be denied. And the court further adjudged, inter alia:

That Mrs. Tegmeyer, within 30 days, file in this cause a report and account herein in detail all property in which said trust fund of \$5,000, or any part thereof, has been invested or intermingled, beginning with the purchase of certain amount land in this state on August 21, 1913, and ending at the time of the filing of such report; and account that she set forth in detail "all investments, real-estate, rents, purchases, sales, assignments, dispositions and uses which she made or caused to be made of the proceeds of the sale of said land, and all profits, proceeds, accumulations and income derived therefrom;" and that such account and report set forth the date of the various transactions and the names and addresses of the persons, firms or corporations with whom they were had.

That she cause to be filed in this cause a report in which she (naming him) to the testimony and report his connections of late and law as to all property, funds, money and securities of late, and received as a result of any and all investments, purchases, etc., and use that she made with the proceeds of the sale of said land, and that she set forth in her report all such property as she has been paid to or for by said land, and the two halves (naming same) at said date, and the two halves (naming same) of said land, and account that she has not been what expenses, if any, she has incurred in connection with such property, and whether or not she is legally entitled to any credit or deduction on account thereof; and that she set forth and state an account of the property and income received by her from said property as he finds she holds in trust for said William E. Tegmeyer, Mrs. Cook and said above named heirs, and their respective interests and shares therein.

That she further and when so any distribution complaints and said interest, William Tegmeyer Wilson and I have been named, by said parties, their estates as litigants in some one or more of them, shall cause to be published an advertisement in one issue of each of certain newspapers (here are named 15 newspapers), published in 15 different cities of the United States - 3 being published in the city of Chicago, Iowa, stating that "anyone having knowledge of the whereabouts of Frank Tegmeyer, who disappeared from his home, near Burlington, Iowa, in 1907, or 1908, is asked to communicate with John Harrison, 1000 North 1st Street, Chicago, Illinois;" this after the lapse of 30 days from the date of the last publication of such advertisement, said Harrison shall report to said court what he knows, if any, he received from such advertisements, and in the event no good is obtained as the result of any such advertisement and Frank Tegmeyer is alive, the distribution to William E. Tegmeyer, and I, Cook and said above named heirs shall be made without

requiring any of them to give bond or security; that in the event any response is obtained that indicates that Frank Tegtmeier is alive, then said Harrington shall report such fact to the court; and that in such case the court reserves jurisdiction to make such further orders as it may deem advisable.

In the decree the court made inter alia the following findings:

That Frank Tegtmeier was a son of Henry Tegtmeier and Louise Tegtmeier, and until 1895 or 1896 lived with them on a farm near Burlington, Des Moines County, Iowa; that on several occasions prior to 1895 he temporarily disappeared from said home and, after search made, was found and was persuaded to return; that in 1895 or 1896 he again disappeared and since then has not been seen or heard of by either of his parents, or by any of his brothers or sisters, or by anyone else to their knowledge, "although due and diligent search and inquiry for him has been made at different times since the year 1903 \* \* by his brothers and others;" that when he finally disappeared in 1895 or 1896 he was about 25 years of age, had never been married and never had had any issue; that his mother, Louise, died in 1907, and his father, Henry, in 1912; that shortly after the death of each of his parents advertisements were published in various newspapers and magazines in Burlington, Iowa, and elsewhere, seeking information as to the whereabouts of Frank Tegtmeier, but no trace of him was found; that by advertisements in 1923 in a newspaper (naming it), published in Keokuk, Iowa, and by correspondence, Edward Tegtmeier endeavored to locate and find him, but did not succeed in learning anything about his existence or whereabouts; that Frank Tegtmeier "is presumed to have died by the end of 1903, at the latest, and is presumed to have been dead since that time and is still presumed to be dead;" and that "at all times from 1903 on he was and is legally dead."

That Louise Tegtmeier died intestate, a resident of Burlington, Iowa, on March 19, 1907, leaving her surviving, as her only heirs and next of kin, Henry, her husband; Edward, her son; William H., her son; Minnie C. White, her daughter; Anna L. Corbett (later becoming Anna L. Boock), her daughter; and Lillian Nave (later becoming Lillian Nave Wilson), her daughter; that on March 26, 1907, Edward Tegtmeier was appointed administrator of Louise's estate by the district court of Des Moines County, Iowa, and he qualified as such and her estate was fully administered and completely distributed; and that thereafter Edward was duly discharged as such administrator.

That Henry Tegtmeier, widower of Louise, died intestate, a resident of Burlington, on October 12, 1912 (over five years after his wife), leaving his said five children as his only heirs and next of kin; that on October 16, 1912, Edward was appointed administrator of Henry's estate by the same district court, and he qualified as such, and the estate was completely administered; that in 1913, distribution was made, and receipts from said heirs and next of kin for their distributive shares were taken; that "Frank Tegtmeier did not inherit any property from the said estates of his mother and father;" and that "no deception or fraud was practiced" on said district court in the probating or administering of said two estates, "or on any of the heirs of said decedents."







That on August 16, 1913, Edward, as administrator of Henry's estate, had on deposit the sum of \$10,235.96, in a certain bank (naming it) in Burlington; that prior thereto it was orally agreed by and between said five heirs of Henry that each should contribute a certain amount to be held by Edward in trust; that the oral agreement was subsequently embodied in a written agreement, dated October 20, 1913; that "instead of actually paying over the entire distributive shares" of Henry's estate to said heirs, Edward agreed with them that they "should sign omnibus receipts, reciting that each heir had received his full portion of his father's estate, and that \$1,000 out of each heir's distributive share, should be retained and held by Edward as trustee;" that pursuant to the written agreement, Edward, William H., Anna, Minnie and Lillian signed and delivered such receipts, which were duly filed in said probate proceeding; that as a result each of said five heirs "contributed \$1,000 from his distributive share of his father's estate to a trust fund, making a total of \$5,000;" that Edward, as trustee, took possession and control of the fund, but he, without the knowledge and consent of said other heirs, caused the sum of \$8,000 to be drawn out of his account as administrator from said Burlington bank, and "deposited said sum in his personal account in the Washington Park National Bank, in Chicago;" that said sum of \$8,000 included said \$5,000, which had been contributed by said five heirs; and that on or a short time prior to October 20, 1913, said five heirs and the wife of Edward (Daisy C. Tegtmeyer) duly executed and delivered a certain written agreement, dated October 20, 1913.

The agreement is set out verbatim in the decree, bearing the purported signatures of said five heirs and also the signature "Daisy C. Tegtmeyer," and is in part as follows:

"WHEREAS Edward Tegtmeyer was the administrator of the estate of his mother, Louise, and is now the administrator of the estate of his father, Henry. And whereas "there was an older son, Frank Tegtmeyer, who many years ago disappeared and who is supposed to be dead". And whereas Edward, as administrator of his mother's estate, distributed the assets thereof amongst the parties to this agreement "on their stipulation that, in the event said Frank Tegtmeyer would ever appear and claim his share of said estate, they would contribute their proportionate part thereof to settle said claim." And whereas the parties are desirous of obtaining a settlement of their interests in their deceased father's estate.

"THEREFORE IT IS AGREED" that Edward, administrator of Henry's estate, "is to proceed to make a final settlement of said estate and distribute the net assets thereof amongst the heirs on the assumption that said Frank Tegtmeyer is dead and left no heirs," but Edward "is to retain \$5,000 out of the assets of said estate as a trust fund, to be kept on deposit in the name of Edward Tegtmeyer, Trustee, for a period of ten years in a reliable bank or trust company, - the interest to be added to and become part of said trust fund."

At the termination of said period, or sooner if it can be proved that Frank Tegtmeyer is deceased and left no heirs, the said trust fund with its accumulations is to be distributed in equal parts to the parties, "unless in the meantime said Frank Tegtmeyer appears and makes claim for his share of said estates."

Should any of the parties hereto die in the meantime, his or her share of the trust fund shall be paid over to the heirs or estate





of said deceased party, and the same disposition shall be made of the balance, should there be any remaining, if said Frank Tegtmeier should appear and settlement be made with him.

Said receipts executed by the parties "are not intended to include or receipt for their interests in this \$5,000 fund."

Daisy Tegtmeier, wife of Edward, "is to sign this contract with her husband as a guarantee that said trust fund of \$5,000, with the interest accumulations, will be kept and distributed as herein provided.

And the court in said decree further found in substance:

That on August 21, 1913, after said oral agreement had been made but before said written agreement had been executed, Edward Tegtmeier, without the knowledge or consent of any of said other heirs of Henry, "invested said trust fund of \$5,000, with other funds, in the vacant land hereinafter described," in Chicago, Illinois, "paying a total of \$18,000 for said land, and taking title in himself and his wife, Daisy C. Tegtmeier, as joint tenants," that neither he nor his wife paid anything of value for the \$5,000 trust fund, and "neither of them paid anything of value for the 5/18ths of said land that was paid for by said trust fund, except only that Edward had contributed \$1,000 to said fund of \$5,000, under the conditions herein set forth," that Edward did not inform any of the other heirs of the purchase of the land "until several years after the time of said purchase;" and that the land (in addition to the legal description stated in the decree) is known "as Nos. 5463-69 South Everett Avenue, Chicago."

That prior to the death of Edward, and while the legal title of the land was standing in the joint names of him and his wife, "each admitted, orally and in writing, that said trust fund of \$5,000 was invested in said described land, and that such land was being held by them subject to said trust;" that shortly prior to October, 1923, (about 10 years after the execution of the written agreement) Edward told William H. Tegtmeier that, after the entry of the United States into the World War, fearing that the banks would become insolvent and the money lost, he had invested the fund in vacant land in Chicago, although in fact such money had so been invested by him about four years before; and that in the latter part of 1922, and continuing for nearly two years, Edward corresponded with various of the beneficiaries of the fund regarding its distribution, and informed them that distribution could not be made because he had been unable to sell the land at a figure acceptable to him, and that no distribution would be made until the land was sold.

That on November 1, 1924, Edward died intestate, a resident of Chicago, Illinois, leaving his widow (Daisy C. Tegtmeier) as his only heir, and without having made any distribution of the fund and without having sold the land; that upon his death the legal title thereto vested in Mrs. Tegtmeier as surviving joint tenant, but charged with the trust; that thereafter, and as long as said title remained in her, she continued to hold the land charged with the trust; that after Edward's death complainants made demand upon her for distribution which was refused; and that both Edward and his wife were residents of Chicago, Illinois, from 1901 until the former's death, after which Mrs. Tegtmeier continued to reside



to each of these individuals and the fact that the individuals to whom the information was given were not the same as the individuals to whom the information was given in the first place.

to include at least the following information:

with the support of the Government, will be kept and distributed as  
soon as possible to the people of the country.

on the basis of the following information:

[illegible]

1. The first of the three main types of the disease is the so-called "acute" form. It is characterized by a sudden onset of symptoms, including fever, chills, and a general feeling of malaise. The patient may also experience a headache and a sore throat. The disease is usually self-limiting and resolves within a few days.

2. The second type is the "subacute" form. It is characterized by a more gradual onset of symptoms, which may include a low-grade fever, fatigue, and a general feeling of weakness. The patient may also experience a headache and a sore throat. The disease is usually self-limiting and resolves within a few days.

3. The third type is the "chronic" form. It is characterized by a long duration of symptoms, which may include a low-grade fever, fatigue, and a general feeling of weakness. The patient may also experience a headache and a sore throat. The disease is usually self-limiting and resolves within a few days.

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its policy.

in Chicago and still is a resident of Chicago.

That about March 13, 1925, Mrs. Tegtmeier entered into a contract with three defendants herein (naming them) for the sale of said vacant land, and thereafter on April 20, 1925 consummated the sale and received in cash, less expenses, the net sum of \$46,240.01; that the Chicago Title & Trust Co. refused to issue a guaranty policy on the land to her; that in order to induce that Company to waive its objection (on account of the pendency of this action) to issue said policy, Mrs. Tegtmeier, pursuant to her guarantee letter of said date, deposited with that company the sum of \$10,000, "as a guarantee fund to protect it," etc.; that such deposit was a part of the purchase price that she had received for the land; that thereafter, about May 2, 1925, that Company, at her request, invested said sum of \$10,000, so deposited, in 35 shares of the preferred stock of the Middle West Utilities Co., and in 50 shares of the common stock of the Commonwealth Edison Co.; that during May, 1925, Mrs. Tegtmeier purchased 100 additional shares of the common stock of said Commonwealth Edison Co. for the sum of \$13,450, which sum "was a part of the proceeds which she had received from the sale she made of said land;" that for this purchase she ultimately received three certificates, - one for 50 shares and two for 25 shares each; that during July, 1925, at her request, the Chicago Title & Trust Co. delivered back to her the certificate for the 35 shares of the stock of the Middle West Utilities Co., free and clear of her said guarantee letter, and received in exchange therefor, and as a deposit under said guarantee letter, one of said certificates for 25 shares of the stock of said Commonwealth Edison Co.; that ever since said date the Chicago Title & Trust Co. has had possession of said two certificates of stock, one for 50 shares and the other for 25 shares, of said Commonwealth Edison Co., subject to the terms of said guarantee letter and also subject to the temporary injunction issued herein on March 9, 1928; that during July, 1925, Mrs. Tegtmeier purchased 50 additional shares of the common stock of the Commonwealth Edison Co., for the sum of \$6,900, receiving a certificate therefor; that during May, 1925, she purchased for \$13,850, 100 shares of the common stock of the American Telephone & Telegraph Co., subsequently receiving 2 certificates of 50 shares each in her name; that subsequently in 1925 she purchased 25 and 10 additional shares of said Telephone & Telegraph Co. stock, paying therefor the sums, respectively, of \$3,462.50 and \$1,416.25, and received certificates in her name; that said sums paid by her for the purchase of said additional shares of said Commonwealth Edison stock and of all of said shares of said Telephone & Telegraph stock, were all "part of the proceeds which she received from the sale she made of said land;" that in August, 1925, she sold the 35 shares of the preferred stock of the Middle West Utilities Co., and received therefor the sum of \$3,387.25; that in March, 1928, she sold 10 shares of the stock of the Commonwealth Edison Co. and received therefor the sum of \$1807.30; and that she has received dividends and other profits and rights on the several shares of stock so owned by her.

That after the death of Henry and prior to the death of Edward, said Minnie C. White died intestate, leaving her surviving, as heirs and next of kin, her husband, William White, and her three sons, Wesley, George and Robert White; that said Lillian Waver Wilson died intestate, in December, 1924, leaving her surviving, as her heirs and next of kin, her husband, Lee M. Wilson; her daughter, Lillian Tegtmeier Wilson; and her son, Albert Waver Wilson, both being children of her first marriage to Oscar Waver; and that said Lee M. Wilson and Inez Hannah Wilson, his present wife, have sold, assigned and transferred to said two children all of their right, title and interest in and to said trust fund of \$5,000, its proceeds and avails,







and in and to the proceeds of this suit, etc.

That the investment of said trust fund in said land, and the use made of the fund as aforesaid, by Edward and Daisy C. Tegtmeier "was and is in violation of the terms of said trust agreement of October 20, 1913, and was and is wrongful, and was and is unauthorized by any of the beneficiaries of said agreement except said Edward Tegtmeier.

That Mrs. Tegtmeier (Daisy C.) "is liable to account for said trust fund and for all investments, re-investments, property, profits, earnings, accumulations and income derived by her from said trust fund to the following named persons in the following proportions:" (here are set forth the names and proportions in detail); that Mrs. Tegtmeier has threatened to prevent the complainants and infant defendants (Lillian Tegtmeier Wilson and Albert Hove Wilson) from realizing anything on account of their right in the trust property, regardless of the result of this litigation; and that there is danger that the property, in which the proceeds derived from said trust fund were invested, will be wholly lost to them, unless the order entered herein on March 9, 1928, directing the issuance of said injunction, be continued in force.

After reviewing the present transcript and the briefs of counsel, we are of the opinion that the court was fully justified, under the evidence and the law, in entering the decree appealed from. We think it appears from a clear preponderance of the evidence (a) that Daisy C. Tegtmeier signed the trust agreement, dated October 20, 1913; (b) that, before the death of her husband (Edward) on November 1, 1924, she knew that the fund had been invested by him in the Chicago land and several times stated to parties interested that as soon as the land was sold an accounting would be made; and (c) that she was not a bona fide purchaser for value of the property in which the fund was invested. And we think that under the evidence it must be presumed that, prior to the deaths of his parents (one in March 1907 and the other in October, 1912) Frank Tegtmeier was dead, and, hence, had no interest in either of their estates and did not inherit anything from them. It is said in Eddy v. Eddy, 302 Ill. 446, 452: "The continuous absence of a person from his home or place of residence for a period of seven years, during which nothing is heard from him, raises a presumption of his death for all legal purposes." (See Whiting v. Nicholl, 46 Ill. 230, 234; Cosper v. Martin, 308 Ill. 224, 229; Spencer v. Means, 231 Ill. App. 351, 359.) And such absence and the





fact that when the person so disappeared he was unmarried, warrants the inferences or presumptions that he died intestate and without issue (Barson v. Mulligan, 191 N. Y. 306, 324-5; George v. Clark, 186 Mass. 426, 428.) In the Appeal of Esterly, 109 Pa. St. 222, it appears from the opinion that in May, 1870, one Gery disappeared from his home, leaving a wife and four children, and was not thereafter heard from. In March, 1879, his father, Joseph T. Gery, died intestate, leaving a considerable estate of real and personal property. Creditors of the absent son sought to satisfy their claims out of what they asserted was his share of the father's estate. But the decision was against them, - the court holding in substance (a) that after Gery's disappearance and for more than seven years unheard from the law presumed him to be dead, and that the presumption was as effective in the case as direct proof that he was dead; (b) that, Gery being presumed to be dead, his share of the father's estate went to his children directly, they inheriting as grandchildren; and (c) that Gery's creditors could not participate in the distribution of the proceeds of such share. (See, also, Eckersley v. Curran, 143 N. Y. Supp. 662, 663; Malay v. Penn. R. Co., 258 Pa. St. 73, 79; George v. Clark, 186 Mass. 426, 429.) And, under these authorities and the evidence, we do not think that there is any merit in the contentions of counsel for Mrs. Tegtmeyer that the trust fund, being as claimed by counsel Frank Tegtmeyer's share of his father's or both parents' estates, could not be distributed except by having an administration on Frank Tegtmeyer's estate in Iowa.

Equally without merit, in our opinion, is counsel's further contention that the circuit court was without jurisdiction to enter the decree in question for the reason that the situs of the trust fund was in Iowa. The fact that the present proceeding is against the widow of Edward Tegtmeyer, deceased (on whose estate no administration



fact that when the person so designated he was unmarried, unmarried  
 the defendant in proceedings that he had indicated and without  
 issue (Hanson v. Hanson, 171 N. W. 2d 444, 445; Hanson v. Hanson,  
 184 Mass. 438, 439.) In the Trust of Deane, 189 Pa. 28, 288, it  
 appears from the opinion that in May, 1870, one Gory disappeared from  
 his home, leaving a wife and four children, and was not thereafter  
 heard from. In March, 1879, his father, Joseph T. Gory, died intestate,  
 leaving a considerable estate of real and personal property.  
 Trustees of the absent son sought to establish that he was alive  
 they asserted was his share of the father's estate. For the estate  
 was against them, - the court holding in substance (a) that after  
 Gory's disappearance but for some years passed without from the  
 law presumed him to be dead, and that the proceedings were an effective  
 in the case in which fact that he was dead; (b) that Gory being  
 presumed to be dead, his share of the father's estate went to his  
 children directly, they inheriting as tenants in common; and (c) that  
 Gory's intestate estate was not entitled to the distribution of the pro-  
 ceeds of such share. (Hanson, also, Century v. Century, 143 N. Y. 299.  
 301, 302; Hanson v. Hanson, 171 N. W. 2d 444, 445; Hanson v. Hanson,  
 184 Mass. 438, 439.) And, under these authorities and the evidence,  
 we do not think that there is any merit in the contention of counsel  
 for Mrs. Tegemeyer that the trust fund, being so claimed by counsel  
 Frank Tegemeyer's share of his father's or both parents' estates,  
 could not be distributed except by having an administration on Frank  
 Tegemeyer's estate in Iowa.  
 Finally, without merit, in our opinion, is counsel's further  
 contention that the circuit court was without jurisdiction to enter  
 the decree in question for the reason that the title of the trust fund  
 was in Iowa. The fact that the present proceeding is against the  
 widow of Henry Tegemeyer, however, on these facts no administration

was had) does not prevent a court of equity from taking jurisdiction, as she may be considered a trustee de son tort. (Lehnard v. Specht, 180 Ill. 208, 216.) Furthermore, as a suit to enforce a trust is transitory and not local, a court of chancery has jurisdiction of such a suit wherever the trustee may be found, regardless of where the property is located. (22 Ency. Pl. & Pr., p. 20; Johnson v. Gibson, 116 Ill. 294, 302; Craft v. Indiana etc. R. Co., 166 Ill. 580, 593.) And it appears that, after the creation of the trust in 1913, the fund was invested in land in Cook county, Illinois (where both the trustee, Edward, and his wife, Daisy, resided, and continued to reside until his death, and she thereafter) and the title to the land was taken in both as joint tenants. Hence the situs of the trust fund and the avails thereof remained in Cook County, Illinois.

And we think that, under the terms of the trust agreement, the trust fund was distributable at the end of ten years from October 20, 1913, - Frank Tegtmeyer not having appeared and made any claim. And Edward Tegtmeyer, had he lived, would be estopped from denying the validity of the trust agreement as against the named beneficiaries. (39 Cyc. 226.) And so is his widow, Daisy C. Tegtmeyer. (Fowle v. Guante, 246 Ill. 568, 573.) She was a joint tenant with him in the land in which the fund was invested with her knowledge, and upon his death she derived the full title thereto as survivor. As a joint tenant she was in privity with him (50 Corpus Juris 407) and upon his death, she took no better title than he had to the 5/18ths of the land, which portion was paid for by the trust fund. In Erie County v. Lamberton, 297 Pa. St. 406, 415, it is said: "It is a familiar principle that neither a trustee nor any in privity with him, can acquire any rights by a breach of the trust." And in Merchants Trust Co. v. Northern Trust Co., 246 Ill. 511, 515, it is said: "A cestui que trust has the right, as against his trustee, to pursue the trust fund into any investment that the trustee may make, or, repudiating



was had) does not prevent a court of equity from making satisfaction,  
as the law is settled by the cases of Wheeler v. Wheeler,  
182 Ill. 211, 212, 213. The court in that case is  
unanimously and not only, a court of equity has jurisdiction of such  
a suit whenever the trustee may be found, regardless of where the  
property is located. (182 Ill. 211, 212, 213; Wheeler v. Wheeler,  
182 Ill. 211, 212, 213; Wheeler v. Wheeler, 182 Ill. 211, 212, 213.)  
And it appears that, after the execution of the trust in 1811, the  
land was conveyed in land in Cook county, Illinois (where both the  
testator, Wheeler, and his wife, Mary, resided, and continued to reside  
until his death, and she thereafter) and the title to the land was  
taken in both as joint tenants. Hence the title of the trust fund  
and the estate thereof remained in Cook county, Illinois.  
And as such land, under the terms of the trust agreement,  
the trust fund was distributed at the end of ten years from October  
1, 1811, - from February 1st having appeared and made any claim.  
And Wheeler testifies, and no living, could be assigned from anything the  
validity of the trust agreement as against the named beneficiaries.  
(182 Ill. 211, 212, 213; Wheeler v. Wheeler, 182 Ill. 211, 212, 213.)  
Hence, and 182 Ill. 211, 212, 213, one was a joint tenant with him in the  
land in which the trust was invested with her knowledge, and upon his  
death she derived the full title thereof as survivor. As a joint  
tenant she was in privity with him (no Corpus Loric 407) and upon his  
death, she took no better title than he had as the trustee of the  
land, which parties was paid for by the trust fund. In Wheeler v. Wheeler,  
182 Ill. 211, 212, 213, it is said: "It is a familiar  
principle that neither a trustee nor any in privity with him, can  
acquire any title as a trustee of the trust." And in Wheeler v. Wheeler,  
182 Ill. 211, 212, 213, it is said: "A trustee  
and his wife are the same, as against his creditors, as persons who have  
land into any investment that the creditor may make, or, regarding



the investment, compel him to pay over the money." And in Wilam v. Kennedy, 316 Ill. 253, 261, it is said: "It is immaterial whether the purchase was made and the money paid by the trustee or the cestui que trust, \* \* and if the trustee adds his own funds to purchase money furnished by the cestui que trust a trust will result to the owner of the trust funds employed, and the burden is on the trustee to show the amount he embarked in the enterprise and, the trustee failing to sustain this burden, the cestui que trust will take the whole estate."

Other points are urged as grounds for a reversal of the decree. We have considered them but deem them to be lacking in substantial merit.

The decree appealed from should be affirmed and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Barnes, J., concur.



34408

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G. A. SPELSON (for use of  
William Gran) and D. A.  
SPELIOTOPOLUS,

Appellees,

v.

JOSEPH LEITER et al., Trustees  
under the Last Will of Levi  
Z. Leiter, deceased,  
Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 661<sup>3</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On a second trial without a jury of an action in assumpsit the municipal court entered a finding and judgment, on April 4, 1930, against defendants for \$9,000, and the present appeal followed.

The action, commenced on June 22, 1928, was based upon certain provisions of a written lease by defendants to plaintiffs, and on the first trial a finding and judgment was entered against defendants for \$11,000. On appeal to this court that judgment, on July 3, 1929, was reversed and the cause remanded. (Spelson v. Leiter, 254 Ill. App. 19.)

By the lease, dated January 2, 1926, and filed in the recorder's office on April 22, 1926, defendants demised to plaintiffs for a period of five years from May 1, 1923, and until April 30, 1933, the ground floor store known as No. 4 South Clark Street, Chicago, and also 100 square feet in the basement, to be used for a restaurant, etc. The stipulated rent, payable in monthly installments, was for the first year \$12,000; for the second \$13,000; more for the succeeding three years; and for the entire term \$70,000. The lease, in addition to the usual provisions, contained the following clause:



2443

D. A. [illegible] (for use of  
[illegible] and D. A.  
[illegible])

[illegible]

[illegible]

[illegible]

[illegible]  
[illegible]  
[illegible]  
[illegible]  
[illegible]

85014.661

MR. [illegible] [illegible] [illegible]

In a recent trial witness a jury of six men in [illegible]

The municipal court entered a finding and judgment, on April 4, 1934.

against defendant for \$1,000, and the plaintiff received.

The action, commenced on June 12, 1933, was based upon

certain provisions of a written lease by defendant to plaintiff.

and on the first trial a finding and judgment was entered against

defendant for \$1,000. On appeal to this court last judgment, on

July 1, 1934, was reversed and the cause remanded. (Exhibit 7.)

[illegible] and [illegible] (p. 17.)

By the lease, dated January 2, 1933, and filed in the

recorder's office on April 24, 1933, defendant leased to plaintiff

lots for a period of five years from May 1, 1933, and until April

30, 1934. The ground floor above known as No. 4 South Clark Street,

Chicago, and also the space feet in the basement, to be used for

a restaurant, etc. The stipulated term, payable in monthly install-

ments, was for the first year \$2,000; for the second \$15,000; and

for the succeeding three years; and the entire term \$70,000.

The lease, in addition to the usual provisions, contained the

following clauses:

"It is hereby covenanted and agreed \* \* that in case the lessors (defendants) shall desire to sell the premises of which the demised premises are a part, or to make a 99 year lease of said premises, or to lease the entire building in which said premises are situated to one party, or to remodel the building now on said premises, or to erect a new building thereon, they shall be entitled to terminate this lease by giving to the lessee (plaintiffs) six months' notice in writing of their desire so to terminate this lease, and by repaying to the lessee, upon the surrender of said demised premises, an amount equal to six months' rent herein reserved. And the lessee hereby covenants and agrees that, at the expiration of the period of such six months' notice, he will peaceably surrender to the lessors possession of the premises hereby demised, and the said lessee shall not be entitled to receive the said sum equal to six months' rent herein reserved unless he shall so peaceably surrender possession at the expiration of said six months' period as hereinbefore provided."

Attached to the lease is a rider, signed by the parties, to the effect that defendants (lessors) agree to pay to plaintiffs (lessees) certain amounts "in the event this lease is cancelled before its expiration," viz., \$5,000, "if cancelled during the year 1928;" \$4,000, if cancelled during 1929; \$3,000, if cancelled during 1930; and \$2,000, if cancelled during 1931. And it is stated that "these amounts are in addition to the amount of one-half of the year's rental provided in the lease for the cancellation on the six months' notice."

In plaintiffs' original statement of claim, upon which the cause was first tried, they based their right of recovery upon the provisions of said clause of the lease and upon said rider. They alleged that "prior to May 1, 1928" (the date of the commencement of the term of the lease), defendants caused or permitted the building to be wrecked and the premises leased to another, and thereby they became indebted to plaintiffs in the sum of \$5,000, as provided in said rider. They further alleged that defendants either made a 99-year lease of the premises or themselves erected another building thereon, and, prior to May 1, 1928, "caused the building on the premises to be torn down and destroyed and a new building started thereon;" that thereby "defendants elected to take advantage of said







clause of the lease and terminate the lease;" and that they are indebted to plaintiffs in the additional sum of \$6,000, "being one-half of the year's rent during which the lease was so terminated." The aggregate of these two sums is \$11,000, and the first judgment was for that aggregate amount.

On the former appeal defendants' counsel contended in substance that the first judgment should not be allowed to stand for the reasons, (1) that said provisions were not intended to become effective until after the term of the lease had commenced and plaintiff had taken possession; (2) that unless the method reserved to the lessors (defendants) for terminating the lease was followed, there is no provision in the lease for liquidated damages, and the attempted collection of said two sums, aggregating \$11,000, amounts to the enforcement of a penalty which is not sanctioned by the courts; and (3) that plaintiffs' claim, if any they have, must be for the actual damages sustained by them and there was no evidence of such damages. In our former opinion (254 Ill. App. pp. 26-29) we discussed and sustained these contentions.

After the cause had been re-docketed in the municipal court plaintiffs, on January 22, 1930, upon leave given, filed what amounts to a new statement of claim upon the theory that defendants, as lessors, were guilty of a breach of their lease contract and of its implied covenants for quiet possession and enjoyment, etc. After setting forth the execution and recordation of the lease, they alleged that thereafter, and "prior to May 1, 1928, to-wit, during February, 1928," defendants, "without the knowledge or permission" of plaintiffs, "caused or permitted" the building to be wrecked and destroyed, "so that on May 1, 1928 (the day of the commencement of the term of plaintiffs' lease), the building, and/or the improvements on the premises which had so been leased to plaintiffs, were completely destroyed, and another building was then and there being erected on

claim of the lease and terminate the lease" and that they are

indebted to plaintiffs in the principal sum of \$5,000, "being

one-half of the year's rent during which the lease was so terminated."

The agreement of lease was made in 1911, and the first payment

was for the first year's rent.

On the first of January, 1912, the lease was renewed in 1912-

and that the first payment should not be allowed to stand for the

year, (1) that the lease was not intended to become effective

until after the term of the lease had commenced and plaintiff had

taken possession; (2) that while the money reserved to the lessor

(defendant) for termination of the lease was allowed, there is no

provision in the lease for liquidated damages, and the attempted

collection of said two years, aggregating \$10,000, amounts to the

enforcement of a penalty which is not warranted by the contract; and

(3) that plaintiffs' claim, if any they have, must be for the actual

damages sustained by them and there was no evidence of such damages.

In our former opinion (144 Ill. App. 2d 11-12) we discussed and

explained these contentions.

After the cause had been re-heard in the municipal

court plaintiffs, on January 11, 1912, upon leave given, filed

what amounts to a new statement of claim upon the theory that defend-

ants, as lessors, were entitled to a portion of their lease contract and

of the implied covenants for quiet possession and enjoyment, etc.

After setting forth the execution and non-execution of the lease, they

alleged that defendant, and "prior to May 1, 1912, to-wit: during

February, 1912," "withheld the knowledge or possession"

of plaintiffs, "caused or permitted" the building to be wrecked and

destroyed, "on and on May 1, 1912 (the day of the commencement of

the term of plaintiffs' lease), the building, and/or the improvements

on the premises which had been leased to plaintiffs, were completely

destroyed, and another building was soon and there being located on



the land;" that prior thereto defendants, without plaintiffs knowledge or consent, leased the premises to the Madison-Clark Building Corporation for a period of 99 years, and "permitted or required" said Corporation to wreck and destroy the building; that by reason thereof the premises, so leased to plaintiffs, "became useless and of no value to them," and "defendants thereby cancelled plaintiffs' said lease and did breach their said lease agreement or contract;" and that plaintiffs were deprived of the use and enjoyment of said premises and have been damaged in the sum of \$50,000. And plaintiffs further alleged that on February 4, 1928, one of the plaintiffs, Spelson, by written assignment, assigned and set over to William Cran "all moneys and other good and valuable considerations due or to become due to him by defendants arising out of the aforesaid lease;" that Cran is now the actual owner thereof; that on April 27, 1928, defendants received a copy of the assignment; and that Cran is entitled to whatever moneys become due to Spelson by reason of said lease and "the breach thereof."

In defendants' affidavit of merits they denied that they had caused or permitted the building to be wrecked and destroyed without the knowledge or permission of plaintiffs, and alleged that "on November 1, 1926," they executed the 99-year lease, and that in Section 3 of Article IV thereof it is provided that the lessee, Madison-Clark Corporation,

"may, after the now existing leases now covering parts of the demised premises have been duly cancelled or terminated, tear down and wreck the building now standing on said demised premises for the purpose of erecting and constructing a fireproof modern building, in accordance with the provisions of this Article."

Defendants further alleged that the 99-year lease "was subject to the lease made to plaintiffs," that defendants prior to the time said Corporation commenced to wreck the building notified it of the lease to plaintiffs and it had further notice of the lease by reason of its recordation. They denied that they had permitted or required the Corporation to wreck the building without plaintiffs'



[illegible]

consent, but admitted that the Corporation had completely torn down the building "about three months prior to the beginning of the term of plaintiffs' lease;" denied that they had aided in the destruction of the building and stated that if plaintiffs had suffered any damage by reason thereof such damage was caused solely by the acts of the Corporation; admitted that about April 27, 1928, they had received a copy of said assignment by Spelson to Cran; and denied that they were indebted in any sum to plaintiffs.

On the second trial the lease to plaintiffs, as well as the 99-year lease to the Madison-Clark Corporation of November 1, 1926, (recorded December 11, 1926), were introduced in evidence by plaintiffs. In Sections 1 and 2 of Article III of the 99-year lease it is provided:

(1) "That this lease is made by the lessors (defendants) and accepted by the lessee (Madison-Clark Corporation) subject to various leases to various tenants of portions of the building now upon the demised premises, a list of which leases has been furnished by the lessors to the lessee, and each of which leases is subject to termination by the lessors on not more than six months' notice, and on sundry terms of payment to the lessee or lessees as described in said respective leases, and the said leases have been contemporaneously with the execution hereof assigned by the lessors to the lessee, and the lessee covenants and agrees that it will perform all the obligations of the lessors in said leases contained and the lessors agree that the lessee shall from and after the date of the delivery of this instrument be entitled to receive and collect all the rentals in said respective leases reserved.

(2) The said lessee covenants and agrees that it will forthwith and with all due diligence cause said leases so assigned to it to be terminated and cancelled, and will itself take possession of the various premises demised in such leases with all convenient speed, so that it may proceed as soon as may be to erect the building hereinafter in Article IV provided for."

In addition to the provisions of Section 3 of Article IV (as above stated in defendants' affidavit of merits) it is provided in Section 1 of said Article IV as follows:

"The lessee further agrees that it will with all reasonable speed, after it obtains possession of said premises from the present lessees of portions of said premises, erect or cause to be erected upon said demised premises a first class fireproof building, \* \* not less than twenty (20) stories in height, costing not less than \$1,250,000, and covering substantially the whole area of said demised premises, except reasonable spaces for light and air."







On the second trial the following facts were stipulated and agreed to: That no notice was given to plaintiffs by defendants before the 99-year lease was executed, or at any time until January, 1928, when plaintiffs conferred with Mr. A. M. Rogers, one of the attorneys for defendants; that after the execution of the 99-year lease the Madison-Clark Corporation tore down the building; that the wrecking began during January, 1928, and the building was completely wrecked before the end of March, 1928; that on May 1, 1928, when the term of plaintiffs' lease commenced, "there was no building or premises for plaintiffs to take possession of;" that the premises leased to plaintiffs in the old building consisted of a store, about 15 feet wide, facing on South Clark street, and extending back a distance of about 39 feet at this width, and then extending 10 feet farther back at a width of 12 feet; and that there was about 705 square feet of space in the store.

The only other evidence introduced related to the question of plaintiffs' damages. The plaintiff, Speliotopolus, testified, and plaintiffs called as witnesses Samuel G. Winter and Grover T. Cook, real estate experts. On behalf of defendants, Robert W. Blair and J. I. Parker, also real estate experts, gave testimony. All were cross-examined, and at the conclusion of the evidence the court entered the finding and judgment against defendants for \$9,000, as first above mentioned.

Defendants' counsel contend in substance that the judgment should be reversed because (1) defendants did not breach any of the covenants, express or implied, of the lease to plaintiffs; (2) that even if defendants were guilty of a breach of their lease agreement, plaintiffs did not sufficiently prove that they had suffered any damages; and (3) that, in any event, the damages of \$9,000, awarded by the court, are excessive.

In support of their first contention counsel argue that

On the second trial the following facts were stipulated and agreed to: That no notice was given to plaintiff's by defendant before the 75-year lease was executed, on or about early January, 1928, when plaintiff's contract with Mr. A. E. Sawyer, one of the attorneys for defendant, was after the execution of the 75-year lease the Western-Bank Corporation came down the building that the writing began during January, 1928, and the building was completely wrecked before the end of March, 1928; that on May 1, 1928, when the term of plaintiff's lease commenced, there was no building on premises for plaintiff to take possession of; that the premises leased to plaintiff in the old building consisted of a store, about 15 feet wide, facing on North Clark street, and extending back a distance of about 35 feet at this width, and then extending 15 feet further back at a width of 15 feet; and that there was about 700 square feet of space in the store.

The only other evidence introduced related to the question of plaintiff's damages. Two plaintiffs, defendant, testified, and plaintiff called as witnesses Samuel G. Fisher and Gustav E. Cook, real estate appraisers. In behalf of defendant, Robert J. Hall and J. L. Brown, also real estate appraisers, testified. All were cross-examined, and at the conclusion of the evidence the court ordered the parties to submit written statements of the facts, as stated above.

Plaintiff's counsel in defendant's brief the following should be reversed because (1) defendant did not prove any of the elements, except as implied, of the lease to plaintiff; (2) that even if defendant were guilty of a breach of their lease agreement, plaintiff did not establish that they had suffered any damages; and (3) that, in any event, the damages of \$1,000, awarded by the court, are excessive.

In support of their brief defendant offered the following



it does not appear from the evidence that defendants at any time cancelled the lease to plaintiffs, that the denial of plaintiffs' right to the possession and enjoyment of the premises was occasioned by the wrongful act of the Madison-Clark Corporation, a third party, and that plaintiffs must look to that Corporation for their damages. Counsel refer to section 3 of Article IV of the 99-year lease, wherein it is provided that "after the now existing leases now covering parts of the demised premises have been duly cancelled and terminated," said Corporation may wreck the building, etc., and further argue that inasmuch as plaintiffs' lease was never cancelled, the act of the Corporation in wrecking the building before obtaining the cancellation was wrongful and a violation of the provisions of the 99-year lease. But it appears that the lease was executed on November 1, 1926 (18 months before plaintiffs were entitled to take possession of the part of the building demised to them) and that there are other provisions in the lease as above set forth. In section 1 of Article III it is provided that the Corporation accepts the lease "subject to various leases to various tenants of portions of the building, \* \* a list of which lessees has been furnished by the lessors to the lessee." Plaintiffs were not tenants in the building and the evidence does not disclose that plaintiffs' lease was included in the list mentioned. It is also provided in Section 1 of Article IV that "after it obtains possession of said premises from the present lessees of portions of the premises," the Corporation will, "with all reasonable speed, erect or cause to be erected" a new building, etc. The Corporation, preliminary to the erection of such building, proceeded to wreck the old building as it was required to do under the lease, and we do not think that its act in so doing can be considered as the wrongful act of a third party, as contended. Furthermore, the Corporation was directed by defendants to do the act, and they should not be heard to say that it was not their act, in so far as it amounts to a breach



it does not appear from the evidence that defendant at any time  
annulled the lease to plaintiff. That the annulment of plaintiff's  
right to the premises and enjoyment of the premises was annulled  
by the original act of the Madison-Clock Corporation, a third party,  
and that plaintiff must look to that corporation for their remedy.  
Council notes to section 3 of article IV of the 92-year lease, where-  
in it is provided that "after the new existing lease was covering  
parts of the leased premises have been duly cancelled and terminated,"  
said Corporation may enter the building, etc., and further agree that  
inasmuch as plaintiff's lease was never cancelled, the act of the  
corporation in seeking the building before obtaining the cancellation  
was wrongful and a violation of the provisions of the 92-year lease.  
But it appears that the lease was executed on November 1, 1906 in  
months before plaintiff's was entitled to take possession of the part  
of the building (owned to them) and that there are other provisions  
in the lease as above set forth. In section 1 of Article III it is  
provided that the Corporation waives the lease "subject to various  
leases to various parties of portions of the building." A list of  
which leases has been furnished by the lessee to the lessee.  
Plaintiff was not included in the list and the evidence does not  
disclose that plaintiff's lease was included in the list mentioned.  
It is also provided in section 1 of Article IV that "after it obtains  
possession of said premises from the present lessee of portions of  
the premises," the Corporation will, "with all reasonable speed,  
erect or cause to be erected" a new building, etc. The Corporation  
wholly in the erection of such building, proceeded to erect the  
old building as it was required to do under the lease, and we do not  
think that the act in so doing can be considered as the wrongful act  
of a third party, as contended. Furthermore, the Corporation was  
directed by defendant to do the act, and they should not be held  
to say that it was not their act, in so far as it amounts to a breach

of the lease agreement with plaintiffs and of its implied covenants. (Green v. Williams, 45 Ill. 206; Berrington v. Casey, 73 id. 317.) In our opinion there is no merit in counsels' first contention.

As to the second and third contentions we think that the evidence sufficiently shows that plaintiffs suffered substantial damages by reason of their inability to secure the possession and enjoyment of the premises demised to them, but we think that the amount (\$9,000), awarded by the court, is excessive. There was no dispute on the trial as to the measure of damages. Apparently it was agreed that such measure was the excess, if any, of the actual rental value of the premises for the term of the lease over the rental stipulated in the lease to be paid. Evidence was introduced by both parties upon that theory. The total rent to be paid by plaintiffs for the entire term was \$70,000; for the first year \$12,000; for the second \$13,000; for the three succeeding years \$15,000 per year. The average annual rental for the term is \$14,000.

Plaintiff's first witness, Winter, testified on direct examination that he had been engaged as a real estate broker for about 12 years "mostly in the loop district of Chicago;" that he had been and is familiar with the rental values of property in the neighborhood of the southwest corner of Madison and Clark Streets, Chicago; and that prior to the year 1928 an old building, about 4 or 5 stories high, was on that corner. The location and size of the premises, as mentioned in the lease to plaintiffs and in the stipulated facts, were described to the witness and he was asked to give his opinion as to their rental value, when used for restaurant purposes, "between January 1, 1928 and May 1, 1928," and he replied: "About \$15 a square foot at that time." As there were about 705 square feet in the store, the total rental value at that time in the opinion of the witness would be \$10,575, exclusive of the basement space. He was then asked to give his opinion as to the rental value in the first part of the year



of the lease agreement with plaintiffs and of its implied covenants.

(Plaintiffs' Exhibit 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

In our opinion there is no merit in defendant's first contention.

As to the second and third contentions we think that the

evidence sufficiently shows that plaintiffs suffered substantial

damages by reason of their inability to secure the possession and

enjoyment of the premises claimed to them, but we think that the

amount (\$5,000), awarded by the court, is excessive. There was no

dispute on the trial as to the measure of damages. Apparently it

was agreed that such measure was the excess, if any, of the actual

rental value of the premises for the term of the lease over the

rental stipulated in the lease to be paid. Evidence was intro-

duced by both parties upon that theory. The total rent to be paid

by plaintiffs for the entire term was \$75,000; for the first year

\$12,000; for the second \$15,000; for the three succeeding years

\$18,000 per year. The average annual rental for the term is \$25,000.

Plaintiffs' first witness, Vinter, testified on direct

examination that he had been engaged as a real estate broker for

about 12 years "mostly in the loop district of Chicago" that he had

been and is familiar with the rental values of property in the neigh-

bors of the southwest corner of Madison and Clark streets, Chicago;

and that prior to the year 1928 an old building, about 4 or 5 stories

high, was on that corner. The location and site of the premises, as

mentioned in the lease to plaintiffs and in the stipulated facts, were

described to the witness and he was asked to give his opinion as to

their rental value, when used for restaurant purposes, "between January

1, 1928 and May 1, 1928", and he replied: "About \$15 a square foot

at that time." As there were about 700 square feet in the store, the

total rental value at that time in the opinion of the witness would

be \$10,500, exclusive of the basement space. He was then asked to

give his opinion as to the rental value in the first part of the year



1928, "for a period of five years," and he replied: "The average rental value is about \$15 a square foot per year; there are 705 square feet; the average annual rental would figure about \$11,000, \* \*, including the basement space." The witness further expressed the opinion that the value of a five year lease on the premises "would be between \$65,000 and \$70,000 for the five year period." He was not then cross-examined, but, after all the other witnesses had testified, he was again called by plaintiffs and stated that he desired to change his testimony as to values; that when previously on the stand he thought his opinion was asked as to values as of the date of the signing of plaintiffs' lease (January, 1926) rather than May, 1928, when the term began; that in his opinion, when the lease was signed, the rental value of the premises was \$15 a square foot; but that at the time the lease would become effective (May, 1928), such rental value "would run about \$22 a square foot" (or about \$15,500 per year). The witness, after giving certain reasons for his opinion and mentioning the stipulated rentals of certain other similar premises in the vicinity, stated on cross-examination that when he previously mentioned the figures "\$65,000 to \$70,000 for the five year period," he "really meant the five year period from the date they signed that lease, \* \* from January, 1926 to January, 1931;" that the fact that the five year lease did not commence until May, 1928, "would increase the rental value about from \$5 to \$7 a square foot;" and that his opinion was given "on the assumption that this lease had a cancellation clause in it." This changed testimony tended to show that plaintiffs, by reason of the destruction of the premises demised to them, had suffered considerable damage, at least when the stipulated rent for the first two years of the term was considered.

Plaintiffs' witness, Cook, testified that he had been in the real estate business in Chicago for about 18 years, and was familiar with the old building on the corner prior to 1928; that he

1932. "For a period of five years," and he testified: "The average rental value is about \$12 a square foot per year; there are 700 square feet; the average annual rental would figure about \$8,400."

"\* , including the basement space." The witness further expressed the opinion that the value of a five year lease on the premises "would be between \$22,000 and \$25,000 for the five year period."

He was not then cross-examined, but, after all the other witnesses had testified, he was again called by plaintiff's and stated that he desired to change his testimony as to value; that when previously on the stand he thought his opinion was asked as to value as of the date of the signing of plaintiff's lease (January, 1932) rather than May, 1932, when the term began; that in his opinion, when the lease was signed, the rental value of the premises was \$12 a square foot; but that at the time the lease would become effective (May, 1932), each rental value "would run about \$22 a square foot" (or about \$15,400 per year). The witness, after giving certain reasons for his opinion and mentioning the stipulated rental of certain other similar premises in the vicinity, asked on cross-examination that when he previously mentioned the figures "\$22,000 to \$25,000 for the five year period," he "really meant the five year period from the date they signed that lease, " "from January, 1932 to January, 1937," that the fact that the five year lease did not commence until May, 1932, "would increase the rental value about from \$2 to \$4 a square foot," and that his opinion was given "on the assumption that this lease had a cancellation clause in it." This changed testimony tended to show that plaintiff, by reason of the expiration of the premises leased to them, had suffered considerable damage, at least that the estimated rent for the first two years of the term was considerable.

"plaintiff's" witness, Cook, testified that he had been in the real estate business in Chicago for about 18 years, and was familiar with the old building on the corner prior to 1932; that he



was acquainted with rental values of various premises in the neighborhood in the early part of the year 1928; that the kind of business operating in a particular location is to be considered in estimating rental values, which would be higher for a restaurant than for other businesses; that the premises leased to plaintiffs are particularly adapted for a restaurant as it is a "24-hour corner;" that in 1928 and for a few succeeding years, in his opinion, <sup>the</sup> space would be worth about \$25 a square foot per year; and that a fair rental value thereof, for a five year period commencing in May, 1928, "probably is \$16,000 or \$17,000 a year for restaurant purposes." On cross-examination he testified that he did not know of any premises, regarded as similar to the location at said corner, which had ever rented for restaurant purposes at a rental as high as \$25 a square foot per year, and that in his opinion the fact that the lease in question had a six months' <sup>clause</sup> cancellation would reduce the rental value "about 20% per year." Reducing his valuation of \$25 per square foot per year by that per cent would leave \$20 per square foot per year, and reducing his valuation of \$17,000 per year for the period would leave \$13,600 per year. The testimony of this witness tended to show, when the stipulated rental for the first two years of the term of plaintiffs' lease is considered and which lease was subject to cancellation, that plaintiffs suffered some damages by the destruction of the premises before the beginning of the term.

Defendants' witness, Blair, expressed the opinion that a fair rental value of the premises for the five year period was from \$700 to \$800 per month, taking into consideration the cancellation clause. And their witness, Parker, expressed the opinion that a fair rental value of the premises for said period would be "in the neighborhood of \$8,000 to \$9,000 a year;" that if the lease had a cancellation clause, "it would affect the rental value of that property very much;" and that a cancellation clause, permitting the lease to be



was acquainted with rental values of various premises in the neighborhood in the early part of the year 1928; that the kind of business operating in a particular location is to be considered in estimating rental values, which would be higher for a restaurant than for other businesses; that the premises leased to plaintiffs are particularly adapted for a restaurant as it is a "24-hour business"; that in 1928 and for a few succeeding years, in his opinion, <sup>the</sup> space would be worth about \$28 a square foot per year; and that a fair rental value there-of, for a five year period commencing in May, 1928, "probably is \$16,000 or \$17,000 a year for restaurant purposes." On cross-examination he testified that he did not know of any premises, regarded as similar to the location at said corner, which had ever rented for restaurant purposes at a rental as high as \$28 a square foot per year, and that in his opinion the fact that the lease in question was a six months' cancellation clause would reduce the rental value "about \$2 per year." Regarding his valuation of \$28 per square foot per year by that time, he would leave the per square foot per year, and regarding his valuation of \$17,000 per year for the period would leave \$16,000 per year. The testimony of this witness tended to show, when this stipulated rental for the first two years of the term of plaintiffs' lease is considered and which lease was subject to cancellation, that plaintiffs suffered some damages by the destruction of the premises before the beginning of the term. Defendants' witness, Blair, expressed the opinion that a fair rental value of the premises for the five year period was from \$17,000 to \$20,000 per month; taking into consideration the cancellation clause. And their witness, Barker, expressed the opinion that a fair rental value of the premises for said period would be "in the neighborhood of \$24,000 to \$25,000 a year;" that if the lease had a cancellation clause, "it would affect the rental value of that property very much," and that a cancellation clause, permitting the lease to be

cancelled at any time upon six months' notice and repayment of six months' rental to the lessee, and a further payment of \$5,000 if the lease be cancelled in the first year, and of smaller payments if the lease be cancelled in succeeding years, "would decrease the rental value at least \$1,500 a year." We are not impressed with the testimony of either of defendants' witnesses, especially when consideration is given to the location of the premises, the purpose for which they were to be used, the amounts of the annual rentals agreed to be paid during the five year term, and the fact that, if plaintiffs had taken possession (as was undoubtedly the intention) and if defendants had cancelled the lease during 1928, the parties had agreed in the rider that the sum of \$5,000 should be paid to plaintiffs as damages, in addition to the payment back to them of certain sums which, under said conditions, they would have paid as rent.

Speliotopolus, one of the plaintiffs and the only other witness heard, testified that he had been engaged in the restaurant business for 15 years, having operated eight restaurants at different times during that period in and outside of the loop district of Chicago. Over the objection of defendants that he was not sufficiently qualified as an expert on rental values in said loop district, he was allowed by the court to testify, and testified, that in his opinion the rental value of the premises in question for restaurant purposes in the early part of the year 1928 was "\$1,000 a front foot," or \$15,000 per year, and that the rental value of the premises for a five year term from May 1, 1928, was "about \$85,000." Yet he testified on cross examination that the highest rental that he had ever paid for any of his restaurants was at a rate of less than \$600 a front foot and of less than \$12 a square foot, some of which restaurants were not far from the premises in question. He further testified on direct examination that after plaintiffs' lease had been executed in January, 1926, they were "just waiting for May 1, 1928;" that in the meantime



cancelled at any time upon six months' notice and repayment of the  
monthly rental to the lessor, and a further payment of \$5,000 if the  
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lease be cancelled in succeeding years, "would determine the rental  
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of either of defendants' witnesses, especially when consideration is  
given to the location of the premises, the purpose for which they were  
to be used, the amount of the annual rental agreed to be paid during  
the five year term, and the fact that, if plaintiff had taken possession  
(as was undoubtedly the intention) and if defendants had cancelled the  
lease during 1932, the parties had agreed in the rider that the sum of  
\$5,000 should be paid to plaintiff as damages, in addition to the pay-  
ment due to him at certain times when, under said conditions, they  
would have made no rent.

Philadelphia, one of the plaintiffs and the only other  
witness here, testified that he had been engaged in the restaurant  
business for 15 years, having operated eight restaurants at different  
times during that period in and outside of the Loop district of  
Chicago. Over the objection of defendants that he was not sufficiently  
qualified as an expert on rental values in said Loop district, he was  
allowed to testify, and testified, that in his opinion the  
rental value of the premises in question for restaurant purposes in the  
early part of the year 1932 was "about \$1,000 a month," or \$12,000 per  
year, and that the rental value of the premises for a five year term  
from May 1, 1932, was "about \$60,000." Yet he testified on cross  
examination that the highest rental that he had ever paid for any  
of his restaurants was at a rate of less than \$500 a month and  
of less than \$12 a square foot, some of which restaurants were not  
far from the premises in question. He further testified on direct  
examination and after plaintiff's lease had been executed in January,  
1932, they were "just waiting for May 1, 1932," that in the meantime



he leased another restaurant on Wabash avenue and operated it until about January, 1928, when he sold it and proceeded to "get ready" to occupy the premises in question; that prior to 1928 he had contracted for the purchase of new fixtures for the premises in question and made a "down payment of \$3,000" on the fixtures, which he "lost". It however appeared from his cross examination that "around December, 1927, or January, 1928" he was advised that the old building, in which the premises in question were located, was to be torn down, and that he "made a profit" on the subsequent sale of said fixtures. And the testimony of Speliotopolus must be viewed in the light that he is one of the plaintiffs and interested in the result of the litigation.

In view of the conflicting testimony as above outlined, and of all the evidence, it is difficult to determine the fair amount of damages suffered by plaintiffs in consequence of the destruction of the premises demised to them. We are satisfied, however, that the evidence discloses that plaintiffs suffered substantial damages, though not in excess of the sum of \$5000, and we conclude that there should be a remittitur from the judgment appealed from of \$4,000. Accordingly, if plaintiffs will within 10 days file a remittitur in the sum of \$4,000, the judgment will be affirmed for \$5,000; otherwise it will be reversed and the cause remanded. In the event a remittitur is filed the costs paid in this court by the respective parties will not be taxed against the other party.

AFFIRMED FOR \$5,000, UPON REMITTITUR OF \$4,000;  
OTHERWISE REVERSED AND REMANDED.

Scanlan, P. J., and Barnes, J., concur.



34549

JOHN R. EHLSCHLAGER, MARIE  
EHLSCHLAGER and C. W. R.  
EICHHOFF,

Complainants,

v.

WEST SIDE BOND & MORTGAGE  
COMPANY et al.,

Defendants.

L. S. DAVIS,

Intervening Petitioner  
& Appellee,

ON APPEAL OF WEST SIDE BOND &  
MORTGAGE COMPANY, a corporation,  
Appellant.

INTERLOCUTORY

APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

259 I.A. 661<sup>4</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order of the Superior court of Cook county, entered June 24, 1930, appointing the Union Bank of Chicago as receiver of the assets of the West Side Bond & Mortgage Company, a corporation. In the order it is stated that the same was entered on motion of L. S. Davis, intervening petitioner and cross-complainant, after the court had read complainants' bill and the intervening petition (which had been ordered to stand as a cross-bill) and the answers thereto, and had also "heard the admissions of counsel in open court and the statements of the parties." These admissions, etc., are incorporated in the certificate of evidence contained in the transcript before us.

On April 12, 1930, the three complainants, as owners respectively of 50, 50 and 20 shares of the preferred stock (par value \$12,000) of the defendant corporation, filed their bill on behalf of themselves, and such other stockholders as might join with them and pay their proportionate share of the costs and expenses of



24849

JOHN E. HANCOCK, JR.  
LAWYER AND C. E. E.  
BOSTON,  
Commonwealth.

v.

WEST BIRMINGHAM & CO.  
CORPORATION OF ALA.  
Birmingham.

I. E. HARRIS,  
Inspector of Fisheries,  
Alabama.

ON APPEAL FROM THE CIRCUIT COURT OF THE  
SOUTHERN DISTRICT OF ALABAMA.  
Appeals.

RECEIVED FROM SUBMISSION  
JANUARY 1930

2501 A. 681

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALABAMA.

This is an interlocutory appeal from an order of the  
Superior Court of Cook County, entered June 26, 1929, appointing  
the Union Bank of Chicago as receiver of the assets of the bank  
of the State of Illinois. In the order it is  
stated that the bank was ordered on motion of I. E. Harris, Ins-  
pecting Fisheries and Game Commissioner, State of Illinois, to  
appoint a receiver and make a return of the assets of the bank.  
The order also stands as a cross-bill and the answer thereto, and has  
also been the subject of a motion to set aside the order and the  
motion of the parties. These motions, etc., are now pending in  
the Circuit Court of the Southern District of Alabama. On April 12, 1930, the three complainants, as above  
respectively of \$5,000 and \$5,000 of the preferred stock (par  
value \$10,000) of the defendant corporation, filed their bill on  
behalf of themselves, and each filed a statement of their claim and  
then and pay their proportionate share of the costs and expenses of

the litigation, against the corporation and the directors thereof, praying for a dissolution of the corporation, an accounting, an injunction and the appointment of a receiver. Their bill was drafted and filed by one William Shapiro as complainants' solicitor. On May 24th, the answer of G. Levant Hackley, one of the defendants and formerly the president of the corporation, was filed. On June 6th L. S. Davis, the owner of three shares of the preferred stock, was given leave to file her intervening petition, - the same to stand as an answer and a cross-bill, and all parties were ruled to plead thereto within five days, and her motion for the appointment of a receiver pendente lite was set for hearing on the following day. There was a partial hearing of the motion on June 7th and a further and final hearing thereon on June 23rd. Between the dates of the two hearings, on June 14th, the joint and several answer of the corporation and six of its nine directors was filed.

In their sworn bill complainants alleged in substance that in April, 1927, and thereafter in July, 1928, they were induced by false and fraudulent representations of certain officers and agents of the corporation, and by glowing pictures of great future profits, to purchase, and to pay for at par (\$12,000), said preferred stock now owned by them and for which they severally hold certificates; that the corporation was organized in Illinois on December 3, 1926, with authorized preferred stock of \$250,000, consisting of 2,500 shares of the par value of \$100 per share, and authorized common stock, consisting of 2,500 shares, of no par value but having a value of \$5 per share and equal voting power with the preferred stock; that the purpose of the corporation, as stated in the certificate of incorporation, was "to acquire by purchase, subscription or otherwise, and to hold as an investment or otherwise, and to sell, assign, mortgage, exchange, deal in or otherwise dispose of, any bonds, mortgages, shares of stock, notes or other securities or evidences of indebted-



the litigation, against the corporation and the directors thereof, praying for a dissolution of the corporation, an accounting, an injunction and the appointment of a receiver. That bill was filed and filed by one William Hedges as complainant, solicitor. On May 28th, the answer of E. J. Hayes, Esq., one of the defendants and formerly the president of the corporation, was filed. On June 28th, I. J. Hayes, the owner of three shares of the preferred stock, was given leave to file his intervening petition, - the same to stand as an answer and a cross-bill, and all parties were told to show thereon within five days, and the motion for the appointment of a receiver George H. Hedges was set for hearing on the following day. There was a partial hearing of the motion on June 28th and a further and final hearing thereon on June 29th. Between the dates of the two hearings, on June 28th, the joint and several answer of the corporation and six of its nine directors was filed. In their answer all complainants alleged in substance that in April, 1914, one Hedges, in 1914, 1915, 1916, and 1917, by false and fraudulent representations of certain officers and agents of the corporation, and by illegal promises of great rewards, procured, as Hedges, and to pay for it (Hedges), said petition; stock now owned by them and for which they severally hold certificates; that the corporation was organized in Illinois on December 3, 1906, with authorized preferred stock of \$250,000, consisting of 2,500 shares of the par value of \$100 per share, and authorized common stock, consisting of 2,500 shares, of no par value but having a value of \$2 per share and which voting power with the preferred stock; and the purpose of the corporation, as stated in the certificate of incorporation, was to acquire by purchase, subscription or otherwise, and to sell or an investment in securities, and to sell, lease, mortgage, exchange, deal in or otherwise dispose of, any lands, buildings, machinery of stock, notes or other securities or evidences of indebted-



ness;" that thereafter the directors of the corporation, or some of them, fraudulently caused to be issued to themselves without consideration the 2500 shares of the common stock, whereby with such shares of the preferred stock as they held they secured the control of the corporation; that on January 6, 1927, the corporation, in an attempted compliance with the Illinois Securities Act, caused a sworn statement, signed by its president, Hackley, to be filed with the Secretary of State to the effect that all of its common stock had been fully paid; that on March 19, 1929, the corporation, by said Hackley, filed a supplementary sworn statement with said official to the effect that the corporation had \$204,600 of its authorized preferred stock fully paid for in cash, and also all of its common stock of 2500 shares of no par value but of the real value of \$5 per share, or \$12,500, fully paid for in cash; that these statements were knowingly false and untrue and made with the intent to deceive the Secretary of State and defraud numerous stockholders of the corporation; that said Hackley had caused to be issued to himself 1,075 shares of the common stock, of the value of \$5,375 and 25 shares of the preferred stock, for which he had not paid anything; that on April 8, 1930, at a meeting of the stockholders called for the purpose of considering the dissolution of the corporation, Irvin R. Hazen, one of its officers and directors, stated that he had not paid anything for the stock which he held, viz, \$2500 in preferred and \$250 in common stock; that complainants are informed and believe and state that other directors held stock in the corporation for which they have not paid anything; that the defendant directors, out of the moneys received from the sale of the corporation's stock, and in violation of the stated purpose of its incorporation, have allowed Hackley to invest large sums of money on open accounts without security, - they having left the conducting of the business of the corporation largely in his hands; that as a result its report of November 30, 1929, showed a deficit of

report that thereafter the directors of the corporation, as some  
 of them, fraudulently caused to be issued to themselves without  
 consideration the 2500 shares of the common stock, whereby with  
 such shares of the preferred stock as they held they secured the  
 control of the corporation; that on January 4, 1937, the corporation,  
 in an attempted compliance with the Illinois Securities Act, caused  
 a sworn statement, signed by its president, Mackley, to be filed with  
 the Secretary of State to the effect that all of its common stock  
 had been fully paid; that on March 19, 1938, the corporation, by  
 said Mackley, filed a supplementally sworn statement with said official  
 to the effect that the corporation had 2500 shares of its authorized  
 preferred stock fully paid for in cash, and also all of its common  
 stock of 2500 shares of no par value out of the total value of 25  
 shares, or \$12,500, fully paid for in cash; that these statements were  
 knowingly false and untrue and made with the intent to deceive the  
 Secretary of State and defraud numerous stockholders of the corporation;  
 that said Mackley had caused to be issued to himself 1,075 shares of  
 the common stock, of the value of 53,750 and 25 shares of the preferred  
 stock, for which he had not paid anything; that on April 27, 1938, at a  
 meeting of the stockholders called for the purpose of considering the  
 dissolution of the corporation, Irvin R. Mackey, one of its officers  
 and directors, stated that he had not paid anything for the stock  
 which he held, viz., 12500 in preferred and 2500 in common stock; that  
 complainants are informed and believe and state that other directors  
 hold stock in the corporation for which they have not paid anything;  
 that the above is true, and the money received from the  
 sale of the corporation's stock, and in violation of the stated purpose  
 of the incorporation, have allowed Mackley to invest large sums of  
 money on open accounts without security, - they having left the con-  
 ducting of the business of the corporation largely in his hands; that  
 on a recent file report of November 20, 1938, showed a balance of



\$26,857; that since December 3, 1926, and prior to April 8, 1930, contrary to the by-laws, no meetings of stockholders were held and the defendant directors have continued to hold their positions as such; that about November 1, 1929, Hackley resigned as president of the corporation, and on November 12, 1929, the defendant directors caused a letter to be sent to the stockholders falsely and fraudulently representing that the corporation had "amply earned the preferred dividend with a substantial surplus left for the common stock," but that thereafter, having discovered the misdoings of said Hackley, they determined to discontinue the business of the corporation; that on March 26, 1930, they caused a letter to be sent to the stockholders, calling a meeting for the purpose of determining "whether the corporation shall continue in business or liquidate by the collection of assets, etc.;" that at said meeting held on April 8th, the defendant directors, controlling all of the common stock, "voted to discontinue doing business and to liquidate and dissolve the corporation;" that after Hackley resigned as president and wrongfully appropriated to his own use certain funds of the company the management of its affairs was left in the hands of certain incompetent and irresponsible members of the board of directors who, as complainants believe, unless a receiver is appointed, will further mismanage, waste and dissipate the assets of the company to their detriment and that of all other preferred stockholders; that complainants and such other stockholders have no adequate remedy at law; and that a receiver should immediately be appointed to conserve the assets, and that the corporation should be dissolved by decree and its business affairs wound up and its net assets distributed among its stockholders.

In Hackley's answer he denied all charges of fraud, mismanagement and misappropriation of the company's funds, as contained in the bill, but he admitted the filing of said statements with the Secretary of State, and stated that the same as filed "were not





correct." He further admitted that a number of shares of the stock of the company had been issued to him "for which he has not yet paid."

In the intervening petition or cross-bill (sworn to) of L. S. Davis, she states that, as a preferred stockholder in the corporation owing three shares, she elects to join with complainants in their bill and agrees to bear her proportionate share of the costs and expenses, etc., and that she "adopts each and all of the allegations of said bill and makes them a part hereof as if they were herein specifically reiterated." She further states in substance that on April 13, 1930, the day following the filing of the bill, complainants, by their solicitor (William Shapiro), moved for the immediate appointment of a receiver for the corporation, but that the motion was continued until April 18th; that on that date the motion was not presented to the court and no receiver has yet been appointed; that complainants, by their said solicitor, entered into "an agreement or understanding with the defendants or some of them," without the consent or acquiescence of petitioner and other stockholders of the company, "not to press said motion for a receiver but to allow the same to lapse and remain dormant," and that the affairs of the company "should be conducted by a so-called 'liquidating committee', consisting of Irwin R. Hazen, William Shapiro and Edward C. Oakes, which committee was to wind up the corporation's affairs;" that in pursuance of the agreement said committee "are now in possession and control of the assets of the corporation;" that the three members of the committee "are not proper and suitable persons" to wind up the affairs of the corporation; that said Hazen is indebted to it for unpaid stock subscriptions in the sum of \$2750; that the committee is dissipating the assets of the company; that shortly after April 18th, out of said assets, it "paid to William Shapiro the sum of \$3,000 for alleged services rendered or to be rendered by him as a member of said committee;" that there is no warrant in law for such an expenditure



... "The further admitted that a number of shares of the company  
of the company had been issued to him "for which he had not yet paid."  
In the intervening petition on cross-petition (answers to)  
of L. E. Davis, she states that, as a preferred shareholder in the  
corporation owning these shares, she elected to join with complainant  
in their bill and agrees to bear her proportionate share of the  
costs and expenses, etc., and that she "admits each and all of the  
allegations of said bill and makes them a part thereof as if they  
were herein specifically reiterated." The further stated in sub-  
answers that on April 12, 1930, the day following the filing of the  
bill, complainant, by their solicitor (William H. Hays), moved for  
the immediate appointment of a receiver for the corporation, and  
that the motion was continued until April 15th, 1930, and that on that date the  
motion was not granted in the court and no receiver has yet been  
appointed. That complainant, by their said solicitor, entered into  
"an agreement to withdraw with the defendants on some of them,"  
without the consent or acquiescence of petitioner and other stock-  
holders of the company, "and to issue said motion for a receiver and  
to allow the same to lapse and remain dormant," and that the filing  
of the company "should be regarded by a so-called 'illustrious'  
committee," consisting of Edwin K. Hanson, William Hays and Edward  
J. Jones, which committee was set up by the corporation's attorney,  
that in pursuance of the agreement said committee "and now in possession  
and control of the assets of the corporation," that the three members  
of the committee "has not tried and will not proceed" to wind up the  
affairs of the corporation; that said motion is included as it for  
unpaid stock subscriptions in the sum of \$2,750; that the committee is  
discharging the assets of the company; that shortly after April 15th,  
out of said assets, it paid to William Hays the sum of \$2,000 for  
alleged services rendered or to be rendered by him as a member of  
said committee; that there is no warrant in law for such an expenditure



and that said sum is greatly in excess of the value of any services rendered or to be rendered by him; and that it is necessary, in order to protect petitioner and other stockholders of the company, that a receiver be immediately appointed. In addition to praying for the appointment of a receiver, petitioner prayed that the corporation be dissolved and its affairs wound up, that its net assets be distributed among its stockholders, that said committee be required to repay to the company said \$3,000, and that petitioner and the other stockholders be granted such further relief as to equity appertains.

From the admissions made in the answer of the corporation and of six of its directors, including Hansen and Oakes, and from the admissions and statements made by their solicitor, Le Roy V. Penwell, and from the statements made by said William Shapiro, on the two hearings before the court on the question whether a receiver should be appointed pendente lite, it appeared that the material allegations of complainants' bill, and of the intervening petition of L. S. Davis, were substantially true, that the business of the corporation had been mismanaged, that some of its directors had neglected their duties to the injury of the stockholders, that its assets had been wasted, that it had discontinued the business for which it had been incorporated, that the appointment and actions of the so-called liquidating committee had not been in the interests of the stockholders, and that the payment by said committee out of the company's funds of \$3,000 to said William Shapiro, solicitor for complainants, was without authority and could not be sanctioned. And we are of the opinion that the court was fully warranted under the facts and under the law in appointing a receiver pendente lite. (Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 297; Merrifield v. Burroughs, 153 Ill. App. 523, 526; Crow v. Bond & Mortgage Co., 202 Iowa 38, 42; Du Puy v. Transportation & Terminal Co., 32 Md. 408, 426.)

The interlocutory order of June 24, 1930, appealed from, is affirmed.  
Seanlan, P. J., and Barnes, J., concur.

AFFIRMED.





34070

HENRY I. GREEN,

Appellee,

vs.

ASHLAND SIXTY-THIRD STATE BANK,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 662

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

I. This is an appeal by defendant from a judgment in the sum of \$29,326.40 entered upon the verdict of a jury returned by direction of the court, motions of defendant for a new trial and in arrest having been overruled.

The declaration consisted of counts based on a contract in writing hereinafter set up verbatim, to which were added the consolidated common counts. There were pleas of the general issue and special pleas which averred in substance that the contract was ultra vires, executed without authority and void as against public policy. There was attached to the original declaration a copy of the account sued on and an affidavit of Joseph H. Fleck, an agent, stating that the demand of the plaintiff was for money due and owing under an agreement between Andrew Russel and defendant, which agreement had been assigned to plaintiff, as set forth in the declaration, and that there was due to plaintiff from defendant, after allowing all just credits, deductions and set-offs, \$25,000 and interest from October 13, 1925.

II. The agreement upon which the suit is based is in part in typewriting as follows:

"Chicago, Illinois, October 13, 1925

This is to certify that Andrew Russel has this day deposited with the Ashland & 63rd State Bank, of Chicago, Illinois, Twenty Five Thousand (\$25,000) Dollar principal amount of bonds of the United States of America, bearing interest at three and one-half per cent (3½%) per annum as evidenced by interest coupons there-to attached; that pursuant to said deposit credit has been given in said bank to the amount of \$25,000.00 to the account of the Grant Park State Bank of Grant Park, Illinois, which said credit is to remain and be maintained accordingly for a period of seven (7) months from this date, unless during said period said bonds are withdrawn as hereinafter provided.





"It is understood and the undersigned therefore hereby agrees that if at any time within the period of seven (7) months from this date said Andrew Russell or the assignee of his rights hereunder shall so request, then in such event the said United States Government bonds, with the coupons thereto attached, shall be promptly returned and delivered to the said Andrew Russell, or to such person, persons, or corporation as the said Andrew Russell may designate, and the principal amount thereof charged against the account of the said Grant Park State Bank of Grant Park, Illinois; and any assignment or transfer by the said Andrew Russell of his rights or interests hereunder or in the property aforesaid, shall operate and be construed as a designation by him of the person, persons or corporation to whom such assignment or transfer shall have been made.

Ashland Sixty-Third State Bank  
By E. A. Curtis  
President."

In the left-hand corner of the upper part of this document appears the following memorandum in longhand:

"To E. A. Curtis, Pres., Ashland & 63rd State Bank, Chicago.

Please credit acct. of Grant Park State Bank with \$25000.00 per deposit of U. S. Bonds mentioned below. 10/13/25.  
Andrew Russell."

In the second line of the body of that part of the document which is typewritten and in the same handwriting as above, after the word "that," appears as in insert the phrase, "Per instructions above." At the bottom of the document appears the following:

"For value received, I hereby assign, transfer and set over to Henry I. Green all my right, title and interest in the subject matter of the above and foregoing instrument, and hereby designate my said assignee as entitled to demand and receive the return and delivery of the government bonds above in said instrument mentioned, pursuant to the terms and provisions therein recited and therein reserved."

This assignment is signed by Andrew Russell, and in appropriate blank spaces appear the name of Henry I. Green and the date, "10/15/25" in longhand. This document was offered in evidence by plaintiff and received and marked "Plaintiff's Exhibit 1."

III. Upon the trial of the cause plaintiff testified in his own behalf, Fleck in behalf of plaintiff testified to a computation of the amount claimed to be due, and John Kohlman, cashier of the defendant bank, testified for defendant. No other witnesses were called, nor was their absence accounted for.







There is no controversy on the record as to material facts.

Plaintiff is a lawyer and sues as an assignee of Andrew Russel. He was present when Russel signed his name to Exhibit 1, and the longhand memorandum in the left-hand top corner of it was written by plaintiff. Plaintiff thought that the typewritten portion of the document above the assignment was dictated in that form, but he was not certain. The typewritten portion preceding the signature of the bank was written within a day or two prior to the execution of the assignment.

The transaction arose out of a proposal that the Ashland Sixty-Third State Bank should place some credit to the Grant Park State Bank. Vern Curtis was an officer of the Grant Park State Bank; E. A. Curtis, his brother, was president of the Ashland Sixty-Third State Bank. Plaintiff talked with E. A. and Vern Curtis and with Russel about drawing the document, and he wrote out a number of forms and submitted them to Vern Curtis, who finally said to plaintiff that this one with the longhand memorandum on it was satisfactory. At the request of Vern Curtis, plaintiff wrote that memorandum. Russel signed the memorandum before the signature of the Ashland Sixty-Third State Bank by E. A. Curtis was put on it, and plaintiff turned the document back to Vern Curtis, who told plaintiff the Grant Park State Bank had excessive loans at the Ashland Sixty-Third State Bank for which it did not have satisfactory collateral. After the document was executed Donald Curtis, a son of E. A. Curtis, went to Russel's office in Chicago, taking with him the document and a letter which he delivered to Russel, and Russel gave him the bonds. Some time afterwards Vern Curtis went to plaintiff, to whom the agreement had been assigned, and asked for additional authority. Plaintiff told him that the agreement had been assigned to him, plaintiff.

The testimony of the cashier of the Ashland Sixty-

There is no controversy on the point as to whether

1900.

Wheeler is a lawyer and was at no time of  
 another party. As the present was signed by him in  
 1900, and the longhand memorandum in the left-hand copy comes  
 of it was written by Wheeler. Wheeler's signature was placed  
 written portion of the document above the assignment was placed  
 in that form, but as was not correct. The signature portion  
 preceding the signature of the bank was written within a day or  
 two prior to the execution of the assignment.

The transaction arose out of a proposal that the bank

and thirty-third Street bank should place some capital in the bank

Bank State Bank. Your bank was an officer of the bank

State Bank; at a certain time, his brother, was president of the bank

and thirty-third Street Bank. Wheeler called with H. A. and your

bank and with Russell about having the document, and he wrote

out a number of forms and submitted them to your bank, who

finally said to Wheeler that this was one with the longhand memorandum

on it was satisfactory. At the request of your bank, Wheeler

wrote that memorandum. Russell signed the memorandum before the

signature of the bank and thirty-third Street bank by H. A. Wheeler and

but in it, and finally turned the document over to your bank,

who said Wheeler that this was the bank and not the bank

of the bank and thirty-third Street Bank for which it did not have

authority to collect. After the document was executed Wheeler

called, a son of H. A. Wheeler, came to Wheeler's office in Chicago,

to talk with him the document and a letter which he delivered to

Wheeler, and Wheeler gave him the money. Some time afterwards the

bank was in Chicago, at which time the document was delivered,

and the bank was satisfied. Wheeler's signature was placed on the

document and was returned to him, Wheeler.

The testimony of the officer of the bank and



Third State Bank shows that on October 14, 1926, when the bonds were delivered to the bank, a credit of \$25,000 was made to the account of the Grant Park State Bank, and the account shows a credit balance on that date of \$30,276.25. He stated that he had charge of the books and records of the bank during the years 1925 and 1926 and up to the time of the trial, and he identified as a part of the record a debit of \$25,000 under date of October 14, 1925, on account of liberty bonds in that amount. A credit ticket of that date in the witness's handwriting shows a deposit of \$25,000 with the Ashland Sixty-Third State Bank for the account of the Grant Park State Bank. A record sheet of bond transactions, covering the period from September 2, 1925, to August 12, 1926, and made in the regular course of business, journal entry sheets for the months of October, November and December, 1925, and January, February, March, April, May, June and July, <sup>1926,</sup> and a general ledger sheet to which all these entries were posted, were admitted in evidence. This witness further testified:

"I have made a computation from this Defendant's Exhibit 7, being the ledger sheet of the Grant Park State Bank, of the amount of the debits from October 15, 1925, to April 20, 1926, and also all the credits from the same dates. The debits total from October 15, 1925, to April 20, 1926, \$184,273.35, and the credits an amount of \$159,222.57, a difference of \$25,050.78. Those entries are from the entry of October 15, being \$2,000 debit and \$4,000 credit down to the entry under date of April 20, 1926, showing a \$2,000 debit, the next entry on the books being an entry under April 26, 1926, showing a \$2,000 credit, including the first \$2,000 debit but not the \$2,000 credit. The difference in that computation was \$25,050.78. It is an excess of debits. They drew more than they deposited to that extent. In other words, the Grant Park State Bank drew out \$25,000 more than they had deposited in that period."

Defendant also put in evidence the charter of the defendant bank issued by Andrew Russel, auditor of public accounts, October 17, 1922. It authorized said bank to commence business as a bank or banking association, under the provisions of "An Act to revise the law with relation to banks and banking," approved June 23, 1919, in force December 1, 1930, for the purpose of





discount and deposit, to buy, sell and exchange, and to do a general banking business, excepting the issuing of bills to circulate as money, and with power to loan money on personal and real security, and to accept and execute trusts.

The by-laws of the defendant bank were <sup>also</sup> admitted in evidence. Article 7 thereof provides as follows:

"No cash expenditure, contract, agreement or transaction which is of extraordinary nature and which involves a sum or liability of the bank or property of the bank greater than \$10,000 in value or amount shall be executed or performed without the prior authority of the Board of Directors."

On April 23, 1926, plaintiff wrote a letter addressed to the defendant bank and its president, E. A. Curtis, in which plaintiff stated that he was the assignee of Russel under the instrument dated October 13, 1925, that the instrument provided for the return of the bonds at any time within a period of seven months upon request; that he therefore requested the return of the bonds to him, asking that the same be forwarded to the Urbana Banking Company at Urbana, Illinois, or that he might come to the bank and accept delivery there. Not receiving any response to his letter plaintiff wrote again on May 6, 1926, and on May 7th E.A. Curtis replied on the stationery of the defendant bank that he had taken the matter up with his attorney. who agreed with him that there was no liability in the matter on the part of either the bank or himself, and asked for copies of any documents pertaining to the matter. This suit followed.

IV. It is insisted by defendant that the declaration is fatally defective in that while plaintiff sues as assignee of Russel he has not complied with section 18 of the Practice act (Smith-Hurd's Ill. Rev. Stats., chap. 110, sec. 18), which provides:

"The assignee and equitable and bona fide owner of any chose in action not negotiable, heretofore, or hereafter assigned, may sue thereon in his own name, and he shall in his pleadings on oath, or by his affidavit, where pleading is not required, allege that he is the actual, bona fide owner thereof, and set forth how and when he acquired title."



element and himself, in fact, will not recognize, and so in a  
 general business transaction, assuming the liability of this is all-  
 out of the way, and this power is then money on payment and  
 total security, and so money and security given.

The following is the substance of the statement in  
 evidence. Article 7 thereof provides as follows:

"The bank, notwithstanding, however, agreement of the President  
 which is of substantially nature and which involves a loan to  
 liability of the bank of liability of the bank of liability of the  
 bank, and in case of default shall be satisfied by payment  
 without the value liability of the bank of liability."

In April 1914, liability with a letter addressed  
 to the defendant bank and the President, J. A. Davis, in which  
 Plaintiff stated that he was the holder of bonds which the  
 instrument dated October 11, 1913, that the instrument provided  
 for the return of the bank at any time within a period of seven  
 months was provided that he should receive the return of the  
 bonds to him, seeing that the bank he furnished to the bank bank-  
 ing company at Chicago, Illinois, or that he might come to the bank  
 and receive delivery there. And providing any response to him  
 letter liability bank which on May 1, 1914, and on May 15, 1914.  
 Davis failed to give Plaintiff at the defendant bank that he had  
 taken the letter to his attorney, who agreed with him that  
 there was no liability in the matter on the part of either the  
 bank or himself, and that the matter of any bonds being returned  
 to the matter. This was the result.

14. It is further by defendant that the defendant  
 is totally defective in that while Plaintiff was an officer of  
 the bank he was not authorized with respect to the President and  
 (Davis-Davis's Ill. Rev. Stat., Chap. 116, which provides:

"The President and officers and agents of any bank  
 in action not authorized, however, or otherwise authorized, may  
 and persons in his name, and no bank in his name, and  
 only, or by his authority, where liability is not provided, except  
 that he is the bank, and the bank, and the bank, and the bank  
 and when he is authorized to do so."



Plaintiff contends that this question is raised for the first time on this appeal and that it was not raised in the trial court. The record does not bear out this contention. There was a motion by defendant at the close of all the evidence for an instructed verdict, which was denied, a motion by plaintiff for an instructed verdict in his favor, which was allowed, defendant excepting, and a motion for defendant in arrest of judgment which was denied. Any one of these motions would seem to be sufficient to preserve the question for our consideration.

Indeed the record would indicate that plaintiff did not regard this section of the statute as applicable. The affidavits and an amended affidavit (which was by plaintiff himself) attached to the declaration indicate an intention to comply with section 55 of the Practice act and to ignore section 18. At no place in any count of the declaration which has been called to our attention is there an averment that plaintiff is the bona fide owner of the claim on which he sues, and which it is averred was assigned to him, nor is the affidavit attached to the original declaration made by plaintiff.

Plaintiff cites a large number of cases construing section 55 which in substance hold that an affidavit by an agent meets the requirement of that section, but sections 18 and 55 differ materially in language and in the purpose for which the same were enacted. Section 55 requires an affidavit. Section 18 requires "his," the plaintiff's, affidavit. The distinction is pointed out clearly in two cases, upon which plaintiff relies, namely, Young v. XXX v. Browning, 71 Ill. 44, and Wilder v. Arwedson, 80 Ill. 435. Clearly, then, the declaration is defective, first, in that it does not allege that plaintiff is the bona fide holder, and, secondly, in that its allegations are not verified by plaintiff as this section of the statute requires.





In Allis-Chalmers Mfg. Co. v. Chicago, 297 Ill.446,

the Supreme court in construing section 18 said:

"A declaration in a suit by an assignee of a chose in action does not state a cause of action in favor of the plaintiff unless it contains the allegations required by section 18, showing the assignment of the chose in action, the actual ownership thereof by him and setting forth how and when he acquired title."

In Gallagher v. Schmidt, 313 Ill. 40, our Supreme court, again construing this section of the statute in a case where, as here, an attorney sued on an assignment of a chose in action made to him by his client, said:

"A declaration, to be sufficient to meet the requirements of section 18, must state on the plaintiff's oath, in all cases where pleading is required, that he is the equitable and bona fide owner thereof, and must set forth, on oath, how he acquired the title."

In Taylor Co. v. Anderson, 275 U. S. 431, 72 L. ed.

355, the Supreme court of the United States, construing this same section and considering the construction placed upon it by the courts of the state of Illinois, said:

"It is established by the decisions of the Supreme Court of Illinois that in an action under that section a declaration that does not state that plaintiff is the actual, bona fide owner thereof and set forth how and when he acquired title fails to state a cause of action."

Therefore, whether we adopt as applicable the rule announced in Gallagher v. Schmidt, 231 Ill. App. 168, where the third division of this court held that section 18 was remedial in its nature and should be liberally construed, or whether we hold the same to be in derogation of the common law and therefore to be strictly construed, as was held in Pingado v. Wilson Co., 205 Ill. App. 267, by the second division, and in Madison & Kedzie Bank v. Old Reliable Co., 236 Ill. App. 442, by the first division (so far as the briefs disclose, the Supreme court of this state has not yet decided the question), we must hold that this declaration fails to comply with the essential provisions of section 18 of the Practice act, and therefore fails to state a cause of action.



[illegible][illegible]

Section 10, which was on the "Municipal" side, in all cases  
where there was a "Municipal" side, was on the "Municipal" side  
and the "Municipal" side was on the "Municipal" side.

...the ... ..

...as a first and foremost principle in the work of the Commission, especially

nature and should be liberally construed, or whether we hold the

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and therefore fails to state a cause of action.

Secondly, the essential provisions of section 13 of the Trustee Act (the "Trustee Act") are not satisfied. The Trustee Act provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee.

Thirdly, the Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee.

Fourthly, the Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee.

Fifthly, the Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee.

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Tenthly, the Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee. The Trustee Act also provides that a trustee must be a person who is capable of acting as a trustee.

Plaintiff argues, however, that assuming all this, any defects of the declaration were cured by the verdict. He invokes the unquestioned law that after verdict the rule by which pleadings are to be construed when tested on demurrer is reversed and that anything which may be fairly inferred by the declaration will then be regarded as alleged. Plaintiff cites Miller v. Kresge Co., 306 Ill. 104, where the court said:

"\* yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict. Chicago, Burlington and Quincy Railroad Co. v. Harwood, 90 Ill. 428; Chicago and Alton Railroad Co. v. Clausen, 173 id. 100; Hinchliff v. Rudnik, 212 id. 569; Sargent Co. v. Baublis, 215 id. 428; Grace & Hyde Co. v. Sanborn, 225 id. 138."

Plaintiff also cites Wheeler v. C. & W. I. R. R. Co., 267 Ill. 306; Wagner v. C. R. I. & P. Ry. Co., 277 Ill. 114; Gensel v. N. Y. C. & St. L. R. Co., 249 Ill. App. 164; Lambert v. City I. & S. Bank of Kankakee, 252 Ill. App. 315.

There are, however, numerous cases which set forth the distinction between a declaration which states no cause of action because of the omission of an essential fact, and one which states a cause of action defectively. In the first class of cases the defect is not cured by verdict. McLean County Coal Co. v. Long, 91 Ill. 617; City of Chicago v. Lonergan, 196 Ill. 518; Hartry v. Chicago Ry. Co., 290 Ill. 85. In the second class of cases the defect is cured by verdict. City of Chicago v. Selz, Schwab & Co., 104 Ill. App. 376; Decatur Amusement Park v. Porter, 137 Ill. App. 443; Yancey v. Taylor Coal Co., 199 Ill. App. 14.

Plaintiff cites Winitt v. Kernblith, 243 Ill. App. 108. That was an action of the fourth class in the Municipal court of Chicago, where written pleadings were dispensed with by statute. No bill of exceptions was preserved, and we held that we would assume that the proof was sufficient to sustain the judgment in favor of







the assignee. Obviously, that holding is not controlling here.

In Lambert v. City T. & S. Bank of Bankakee, 252 Ill. App. 315, also cited by plaintiff, a suit was brought by the assignee of a lessee against a lessor for a breach of a covenant in a lease requiring the lessor to make repairs, and it was held that section 18 was not applicable since section 15 of the Landlord and Tenant act (Cahill's Ill. Stats., chap. 80, par. 15) extended the remedies of lessees to their assignees. In that opinion, which was by the Appellate court of the second district, the court further stated (although not necessary to a decision of the case and no authority was cited) that the verification of the declaration required by section 18 was no part thereof; that a demurrer simply went to the declaration, and that in order to raise the question of the sufficiency of the verification a motion to strike for a want thereof should be interposed. The contention here is that not only<sup>is</sup> the verification insufficient but the declaration itself omits essential averments required by this section of the statute. We hold that the declaration here fails to state a cause of action and that the defect was not cured by the verdict. Indeed, there is no evidence tending to prove the omitted averment.

Plaintiff next contends that section 18 is not applicable because the instrument assigned was of such nature that the assignee could maintain a suit thereon in his own name at common law. Plaintiff says (rightly, we think) that this section of the statute does not purport to modify the common law in so far as it permitted an assignee to sue in his own name or to abolish rights of action arising out of contracts made for the benefit of a third party. Plaintiff calls attention to the provision of the writing which provides that upon request of Andrew Russel or the assignee of his rights the bonds deposited shall be returned promptly to Andrew Russel or to such person, persons or corporation as Andrew

the parties. The court is not satisfied that

IN RE THE ESTATE OF JAMES M. HARRIS

1883 Ill. App. 312, also cited by authority, a bill was passed by the assignment of a lease against a lease for a term of a year and in a lease regarding the former to make repairs, and it was held that section 13 was not applicable since section 12 of the Revised and Revised Statutes (Ill. Stat., ch. 110, sec. 12) contained the provision of leases to their assignment. In that case, which was by the approval of the second district, the court further stated (although not necessary to a decision of the case and not material) that the provision of the lease was not required by section 13 was not part thereof; that a demurrer simply went to the decision, and that in this case the question of the applicability of the provision of section 13 was not involved. The court said that for a full and complete answer to the question of the applicability of the provision of section 13, it is not necessary to consider the question of the applicability of the provision of section 13. It is sufficient to say that the provision of section 13 is not applicable to the case at hand. We hold that the decision here is to be affirmed. The court said that the decision was not based on the facts of the case and that the facts were not stated by the parties. Indeed, there is no evidence tending to prove the omitted facts. Plaintiff next contends that section 13 is not applicable because the instrument assigned was of such nature that the assignee would maintain a suit thereon in his own name as owner. Plaintiff says (rightly, we think) that this section of the statute does not require to modify the common law in so far as it relates to the assignment of a lease for a term of a year as it is contained in the statute. Plaintiff calls attention to the provision of the statute which provides that upon request of either party of the assignee of his lease the lease deposited shall be returned promptly to the assignee of the lease, or upon request of either party of the assignee of his lease the lease deposited shall be returned promptly to the assignee of the lease.



Russel may designate, and plaintiff says: "The legal effect of the transaction was to create a liability or privity of contract between the defendant and the plaintiff." To this point plaintiff cites Clinton Co. v. Stiles, 197 Ill. App. 305; Jenks v. Harris, 228 Ill. App. 219; City of Carlyle v. Carlyle Water, Light & Power Co., 140 Ill. 445; Lawrence v. Oglesby, 178 Ill. 122; Gobb v. Haron, 180 Ill. 49; Weston v. Barker, 12 Johnson's Rep. 276; Weston v. Penniman, 29 Fed. Case No. 17455 (p. 815); 6 R. C. L., sec. 274, p. 837.

We cannot agree with this contention. The cases cited are based upon the theory that a defendant had recognized the assignment and promised to meet the obligation of the assigned contract. The statement of facts already made shows that this assignment had not been written on the document at the time the president of the defendant bank executed the contract, and as defendant points out, there is nothing in the record from which it may be inferred that anyone connected with defendant, not even E. A. Curtis, the president, ever saw the assignment or ever saw the original contract after it had been delivered to Russel and before the assignment was placed upon it. The first notice to Curtis of the assignment was on April 23, 1926, and the reply of Curtis thereto denied all liability. It would extend this opinion to an unwarranted length to discuss in detail the facts as to each of the opinions cited by the respective parties which concern this contention, but the same are easily distinguished.

It is undoubtedly true, as stated in Ensign v. Ill. Cent. R. R. Co., 130 Ill. App. 382, that section 18 does not change the common law in any particular except that at common law the suit brought on such an instrument by an assignee had to be brought in the name of the assignor, and we assent to the proposition of law





as stated in 5 Corp. Jur. 937, on which plaintiff relies:

"Under the rules of the common law, no action could be brought against the debtor by the assignee of a debt in his own name, unless there was a promise by the debtor to him to pay him the debt."

In no case cited by plaintiff to this point was a defendant held liable in the absence of such promise, and no such promise by the alleged debtor is claimed in this case. We therefore hold that in this case plaintiff could not, irrespective of the statute, maintain this action in his own name.

Plaintiff next contends that the document upon which suit is brought is a negotiable instrument and that upon that theory plaintiff can maintain his suit irrespective of the statute. He cited Luther v. Crawford, 116 Ill. App. 351. We can scarcely regard this contention as seriously made. This case is in many respects distinguishable from the one cited. There a customer deposited with the bank cash and bonds to be delivered on demand. Here, there was a delivery of bonds made pursuant to an agreement containing promises and covenants which, as we will later point out, make it difficult to determine the terms of the agreement. Whatever else may be said about this agreement, it is uncertain and indefinite and about as far removed from being a negotiable instrument as any document which we might imagine. Whatever it may or may not be, it is not a negotiable instrument upon which the holder can maintain a suit in his own name without regard to the statute.

V. Defendant contends that on the merits plaintiff was not entitled to recover, in the first place, because the credit given to the Grant Park State Bank was entirely withdrawn or used by that bank before the return of the bonds was demanded by plaintiff. This contention assumes the construction of the contract for which defendant contends, and which will be discussed later. Defendant further says that assuming the construction of the contract for which plaintiff contends, the president of the defendant bank was



as stated in 2 Govt. Ser. 107, on which plaintiff relies:

"Under the rules of the common law, no action could be brought against the holder of a bill in his own name, unless the bill was payable to him or to the order of him."

It is not stated by plaintiff in this bill that a bill

payable to him was presented, and no such

presentment by the alleged holder is shown in this case. The plaintiff

has not shown in this case that he is the holder of the

note, and that he is the holder in his own name.

Plaintiff now contends that the document upon which

he is suing is a negotiable instrument and that upon that theory

plaintiff can maintain his suit notwithstanding the fact that

it is not payable to him or to the order of him.

That this contention is entirely wrong. This case is in many ways

quite distinguishable from the one cited. There a certain bill

was presented to the bank and bonds were delivered on account.

Here, there was no delivery of bonds until payment in full was made.

Concerning procedure and government action, as we will later point out,

make it difficult to determine the terms of the agreement. Whatever

else may be said about this agreement, it is certain and indisputable

that and about as far removed from being a negotiable instrument as

any document which we might imagine. Whatever it may be, it is

it is not a negotiable instrument upon which the holder can maintain

a suit in his own name without regard to the statute.

Plaintiff contends that on the facts presented and

not entitled to recover, in the first place, because the bill

given to the bank was not a bill, and was not given to the bank

that bank before the return of the bonds was demanded by plaintiff.

This contention assumes the correctness of the plaintiff's

defendant's contentions, and which will be discussed later. Defendant

argues that assuming the correctness of the plaintiff's

which plaintiff contends, the plaintiff of the defendant bank was



without authority to execute the contract; that in such case the contract is ultra vires, illegal and void; that it violates section 41, chap. 38 of the Criminal code, by which it is declared to be unlawful for a bank to assume the payment of or to become liable for or to guarantee to pay the principal of or the interest on any bonds, notes or other evidence of indebtedness of, for or on account of any person, persons, company or corporation, and that any assumption, liability or guaranty whereby deposits or trust funds could be jeopardized or impaired shall be null and void. Again assuming the construction of the contract for which plaintiff contends, it is argued that the only purpose of the contract was to create a fictitious credit which was against public policy, to attempt a fraud on the depositors and stockholders of these banks and to deceive the bank examiners, and further, that the agreement so far as defendant is concerned, was in that case without consideration.

As already stated, the parties differ fundamentally as to the construction to be placed upon the contract. Plaintiff says that the contract imposes upon defendant the unconditional obligation to return the bonds upon demand, absolutely and in all events; that the contract in this respect does not provide for or contemplate any contingency whatsoever. On the other hand, defendant says that the obligation to return the bonds is conditional and contingent upon the amount of the credit actually used by the Grant Park State Bank at the time demand is made for the return of the bonds; that Russel directed defendant bank to give the Grant Park State bank a credit of \$25,000 on the security of these bonds and that defendant bank had a right to reimburse itself out of said bonds to the amount of such credit as the uncontradicted evidence shows the Grant Park State bank had used the same, and that defendant bank had not been reimbursed at the time of such demand; that





plaintiff was therefore not entitled to the return of the bonds, and that it was error to give judgment to plaintiff for the value of the same.

Plaintiff bases his contention that the contract should be construed as imposing an absolute obligation upon the typewritten portion of the contract. Defendant bases its construction largely upon the modification of the same resulting from the memorandum in longhand placed thereon after the typewritten portion had been prepared and before the transaction in question was closed.

The entire contract was prepared by plaintiff, who was a practicing lawyer, and it must be construed most strongly against him in case of doubt, ambiguity or uncertainty. Mueller v. Northwestern University, 95 Ill. App. 253, affirmed in 195 Ill. 236; Leshner v. U. S. Fidelity Co., 239 Ill. 502.

The parties argue for their respective theories not only from the language of the document but also from the facts and circumstances under which the document was made and delivered. Plaintiff says that the construction for which defendant contends is against the plain language of the instrument and the intention of the parties as therein expressed. This contention is based upon his own testimony to the effect that Vern Curtis of the Grant Park State bank had represented to plaintiff that the Grant Park State bank owed defendant a good deal of money; that he, Vern Curtis, wanted something on deposit against that credit; that he ought to have temporarily some more collateral in the bank to his credit. Plaintiff says that this evidence shows that it was not the intention that the credit should be one to be drawn against for the reason that the credit had been already extended to the Grant Park State bank, and he also says:

"The deposit was a loan made for the benefit of the two banks involved in order to give them an opportunity of placing the proper assets or credits in the defendant bank to take care of the loans actually existing at the time the contract was drawn by





Plaintiff asks, if the credit was to remain and to be maintained for seven months, how could it be said that the Grant Park State bank had a right to draw upon it without reservation? These two ideas, according to plaintiff, would be incompatible.

The difficulty with this position is that it rests entirely upon the evidence of plaintiff as to conversations between Vern Curtis and himself. He says that Vern Curtis originally told him that he wanted a credit that could not be drawn upon; and it is argued that the fact that Vern Curtis afterwards asked from plaintiff the permission to have this restriction removed so that the account could be drawn against, shows that this was the understanding. It is evident, however, that the conversations <sup>of plaintiff</sup> with Vern Curtis, who represented the Grant Park State bank but who did not in any way represent the defendant bank, were not binding upon defendant. Indeed, the testimony of plaintiff disclaims any knowledge that Vern Curtis in any way represented the defendant bank. Plaintiff admits that he never talked with E. A. Curtis, the president of the defendant bank, and that he made no investigation to find out whether the Grant Park State Bank owed defendant \$25,000 or any other amount. The uncontradicted evidence in the record is to the effect that the Grant Park State Bank was not indebted to the defendant bank at any time. It is therefore apparent that Russel, unless he was misinformed (of which there is no competent evidence) could not have meant to direct the president of the defendant bank to credit the account of the Grant Park State Bank against loans already made. Plaintiff's evidence as to conversations with Vern Curtis being eliminated, there is no foundation upon which the construction for which plaintiff contends may stand, other than that of the language of the document itself.

Again, if such was the intention of the parties, it is difficult to understand why plaintiff, who says that he spent much



[illegible]



time in framing a satisfactory document, seems to have made no investigation of the financial relations between the two banks, and this is more difficult to understand when it is noted that even at that time the assignment of the agreement to plaintiff was in contemplation. Moreover, if such was the intention of the parties, for what reason did E. A. Curtis refuse to execute the typewritten document when it was first presented to him? In this connection plaintiff testifies that his attention was directed to the fact, either by Russel or by some officer of the Grant Park State bank, that there was an objection, in that the document itself did not in so many words authorize the credit to be given the bank; that it only recited that this had been done, and that the bank was not satisfied with that recitation unless there was some authorization in the documents to give the credit to the Grant Park State bank. He says that an officer of that bank talked with him a great deal about this, and that Mr. Russel did so also; that he wrote out a number of forms in longhand in which the particular authority might be given and submitted them to Vern Curtis, who came back to him with the statement that the one which appears upon the document would be satisfactory, and that plaintiff then took the document and wrote on it the words:

"To E. A. Curtis, Please credit account of Grant Park State Bank with \$25,000 per deposit of U. S. Bonds mentioned below 10/13/25."

Plaintiff testifies that Russel signed this memorandum before it was signed by defendant bank and the document was turned back to Vern Curtis.

If it had been the intention of the parties that Russel was to have the unconditional right to take back the bonds at any time he wished and that the Grant Park State bank was to have a credit of \$25,000 which it could not under any circumstances use, and if defendant was not even to receive interest upon the credit,

[illegible]



it would appear that all the parties were engaged in a rather absurd transaction and that the longhand memorandum - the very thing without which the transaction could not have been brought to pass - would be without any meaning whatsoever.

Even if it is assumed that the Grant Park State bank was indebted excessively to the defendant bank, the construction for which plaintiff contends makes the actions of the parties in the transaction appear without reasonable cause. Upon that construction, it was the intention of the parties to give defendant permission of holding in its possession for an indefinite and uncertain length of time collateral which it might not under any circumstances use, and to give to the Grant Park State bank a credit which could not be of any conceivable use unless it was desired to deceive its creditors or stockholders, or, perhaps, the bank examiners, whose duties would require an examination of its assets. It is difficult to understand why learned lawyers and experienced business men should spend so much time and energy to produce an agreement which, as a matter of fact, plaintiff now contends must be construed not to mean anything at all. On the other hand, this apparently absurd situation becomes clear and reasonable if we assume that E. A. Curtis - realizing the danger which might come to his institution as a result of giving credit to the Grant Park State bank upon collateral deposited by Russel, which Russel was given an absolute and unconditional right to withdraw at his pleasure - asked specific direction from Russel to give the credit, thus placing on Russel the responsibility therefor and that the longhand memorandum was placed upon the typewritten document and signed by Russel in order to protect the defendant bank from any danger of loss in the transaction. This memorandum in longhand evidently expresses the last and final thought of the parties and must, we think, control any part of the document inconsistent



It would appear that all the parties were present in a rather  
 abrupt conversation and that the defendant was present - the very  
 thing which the prosecution would not have been prepared to  
 deny - would be without any meaning whatever.

Even if it is assumed that the Grand Jury State Bank

was intended exclusively as the defendant bank, the conversation  
 for which plaintiff contends would have taken place in the office in  
 the transaction of some other business or matter. Upon that con-  
 sideration, it was the intention of the parties to give defendant  
 possession of the building in the possession for an indefinite and un-  
 certain length of time subject to the right to give notice and

terminate the lease, and as to the Grand Jury State Bank a

lease, which would not be of any benefit to the defendant as it was

also to transfer the building to the defendant, or, perhaps, the

bank building, which would require an examination of the

records. It is difficult to understand why the defendant would not  
 have an agreement with the bank to lease the building for a term of  
 years, and a better of fact, plaintiff now contends  
 that the defendant was aware of the fact that the bank was not

to be concerned with the building and the defendant.

It is necessary to show that the defendant was aware of the fact  
 that the bank was not to be concerned with the building and the defendant.

State bank upon which the building was located, which would

be his intention as a result of the fact that the bank was

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State bank upon which the building was located, which would

therewith. Construing this longhand memorandum, together with that clause of the typewritten part of the document which provides:

"\*\* said credit is to remain and be maintained accordingly for a period of seven (7) months from this date, unless during said period said bonds are withdrawn as hereinafter provided."

it seems most reasonable to hold the intention was that defendant could not withdraw from the Grant Park State Bank the credit or that part thereof which had been used by the Grant Park State Bank, unless Russel in the meantime demanded his bonds, in which event, of course, the bonds would be used to satisfy such part of the credit as should have been actually used at that time by the Grant Park State bank. To summarize the situation, there seems to be two possible constructions which may be put upon the agreement of the parties: (1) The agreement may be construed (upon the theory of plaintiff) to mean that there was an unconditional right given plaintiff to withdraw the bonds deposited at any time without obligation. That construction leaves the transaction without a meaning or purpose other than one which would necessarily be fraudulent and illegal. (2) Upon the theory of defendant the agreement may be construed to mean that the right of plaintiff to withdraw the bonds was conditioned upon whether the credit given the Grant Park State bank had been exhausted. If this construction is adopted the whole transaction seems usual, probable and reasonable and wholly within the power of the defendant bank to make in the usual course of its business. That construction is the one which a consideration of the whole case compels us to conclude is the one which should be adopted.

The briefs discuss quite at length the doctrine of ultra vires and cite a large number of authorities. The points we have already considered are decisive of the case. We will not assume that attorneys of high standing at the bar and citizens repeatedly honored by the people of the state conspired together

thereafter. Concerning this language, however, I have not been

aware of the provisions of the statute which would

"as said statute is in force and be subject to amendment by a vote of seven (7) members of the House, and no other vote being required."

It seems most reasonable to hold the statute as now amended

could not withstand the test of the statute as now amended.

part thereof which has been used by the State in this case, and

less than in the previous case, his body, in which case, at

course, the body will be used in exactly the same way as the body

as should have been actually used as that of the State in

State Bank. In connection with the statute, there seems to be no

possibility of amendment which may be put upon the statute of the

question: (1) The statute may be amended (from the statute of

question) to read that there is no amendment which shall

possibility to amend the statute as now amended as may be amended by

action. That amendment is the provision which is amended

or suppose that the statute would be amended by the statute and

illegal. (2) Then the statute of amendment the statute may be

conferred to read that the right of amendment is conferred on the

was considered upon the statute as now amended as may be amended by

back had been amended. It is amended in which the statute

transaction seems to be, perhaps, and perhaps not wholly within

the power of the statute as now amended as may be amended by

business. That amendment is the statute which is amended by

the statute as now amended as may be amended by the statute as

amended.

The statute as now amended as may be amended by the statute as

also read and also a large number of amendments. The statute

we have already considered and amended as may be amended by the statute as

seems to be amended as may be amended by the statute as

possibly amended by the statute as may be amended by the statute as



to produce fictitious credit in order that the public might be deceived. The contract must be construed as meaning that the promise to return these bonds was conditional, not absolute, and that since the contingency contemplated by the parties did not arise, defendant was not obligated to return the same when demanded.

The judgment will therefore be reversed with a finding of facts and judgment here for defendant.

REVERSED WITH A FINDING OF FACTS AND  
JUDGMENT HERE FOR DEFENDANT.

McSurely, J., concurs in the conclusion.

O'Connor, J., specially concurs. (Over.)

#### FINDING OF FACTS.

We find as facts that on October 13, 1925, the assignor of the plaintiff and the defendant entered into an agreement, which was in part in writing, and in and by which plaintiff's assignor deposited with the defendant bank \$25,000 par value of liberty bonds of the United States and requested defendant bank to give a credit thereon of \$25,000 to the Grant Park State bank; that defendant bank accepted said deposit and made said credit as directed, and that said credit was used by the Grant Park State Bank and has not been repaid; that under the terms of the agreement the bonds were to be returned to plaintiff's assignor, or his assignee, upon the contingency that said credit was not used or was repaid; that said contingency has not occurred; that plaintiff has not alleged in his declaration that he, as assignee, is the owner in good faith of the cause of action or verified his declaration as required by section 18 of the Practice act, and for that reason also he may not maintain this suit; that judgment should be entered herein in favor of defendant and against plaintiff for costs.



O'CONNOR, J., SPECIALLY CONCURRENCING:

I agree with the conclusion reached that the judgment should be reversed with a finding of fact for the reason that on the merits of the case plaintiff was not entitled to recover the bonds or their value after the Grant Park State Bank had been given credit with the Chicago bank and after the Grant Park State Bank had drawn against the Chicago bank for the value of the bonds. But I disagree with a great deal that is said in the opinion about section 18 of the Practice Act.

Among other cases, the opinion refers to Fingado v. Wilson Braiding & Embroidering Co., 205 Ill. App. 267 and Wilder v. Arwedson, 80 Ill. 435. In the Fingado case, it was held by another division of this court that an assignee of a chose in action who brings suit in his own name must, himself, verify his claim. That part of Section 18 which authorizes an assignee and equitable and bona fide owner of a chose in action to sue in his own name was in derogation of the common law and should be strictly construed. We disagreed with this construction in the case of Gallagher v. Schmidt, 231 Ill. App. 168, and held that that part of Section 18 was remedial and should be liberally construed. In that case, after quoting the paragraph of Section 18, we said, (p. 175):

"Prior to the amendment of this section in 1907, where a chose in action was assigned, the law required that suit be brought in the name of the assignor for the use of the assignee. And to remedy this, so as to permit the assignee to bring suit in his own name, the statute was passed. It is a general rule of statutory construction that statutes relating to remedies and procedure are to be liberally construed with a view to the effect-



THE COURT, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

ive administration of justice. And this is especially true of statutes designed to render the method of procedure more simple and convenient. 36 Cyc. 188; McKay v. Provus, 181 Ill. App. 364; People v. Sholen, 238 Ill. 203; State v. Alderman, 81 N.J.L. 549; Bees v. McClendon, 130 La. 814." And later this division repudiated the doctrine laid down in the Fingado case in Sinit v. Kornblith, 248 Ill. App. 108, where we said, (p.110): "In Fingado v. Wilson Braiding & Embroidering Co., 205 Ill. App. 267, and the second division of this court stated that this provision of the statute, 'being in derogation of the common law, it must be strictly construed and a strict compliance therewith is indispensable,' citing as authority Edwards & Bradford Lumber Co. v. Bontjes, 193 Ill. App. 392; Leemon v. Grand Crossing Tack Co., 187 Ill. App. 247, and similar language without the citation of authority to support it is found in Madison & Kedzie State Bank v. Old Reliable Motor Truck Co. supra. The cases cited in Fingado v. Wilson Braiding & Embroidering Co., supra, do not sustain the statement, and a careful reading of the opinions of the Supreme Court in the two cases heretofore cited fails to disclose the adoption of such rule of construction."

In the Wilder case, the Supreme Court had another statute before it for consideration. And the court there said, (p. 436):

"It is a sufficient answer to this position that the statute does not require the affidavit of the plaintiff himself to accompany the declaration. The language of the statute is, 'If the plaintiff shall file with his declaration an affidavit.' If the legislature had intended to require the affidavit of the plaintiff, the word his no doubt would have been used; but independently of the words used in the act, we perceive no good reason why any person acting for the plaintiff, and who is cognizant of the facts, may not with as much propriety make the affidavit as the plaintiff himself." (Italics mine.)

In the instant case obviously it was the intention of the legislature to advance the remedy so that the assignee could bring





suit in his own name and although the statute says that he "may sue thereon in his own name, and he shall in his pleading on oath, or by his affidavit, where pleading is not required, allege that he is the actual bona fide owner thereof, and set forth how and when he acquired title," it is not to be understood that anyone who was familiar with the facts could not make the affidavit. In fact it is often that the assignee would know nothing about the facts but that the only one cognizant of the facts would be the employee of the assignee. Moreover, if it were a corporation, suit could not be brought at all by an assignee if the construction placed upon the statute in the Fingado case were followed.

The Supreme Court in the Wilder case, it will be noted, took a more liberal view of a somewhat similar statute.

Section 18 has so often received such narrow constructions. The words have been so weaseled that all the benefit intended by the legislature will be destroyed, in my opinion, unless a more liberal forward-looking construction is taken.



34244

ROSS R. DRAMAE,  
Appellee.

vs.

GRAND TRUNK WESTERN RAILWAY  
COMPANY, a Corporation,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 662<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$7500 entered upon the verdict of a jury in an action in case brought under the Federal Employers' Liability act, Barnes' Federal Code, sec. 8069 (Canill's Ill. Stats., ch. 114, secs. 321-329.) The declaration was in two counts.

The first count averred that on January 7, 1928, defendant was a common carrier engaged in interstate commerce and plaintiff was employed by defendant in interstate commerce as a "special officer and car inspector in examining and inspecting divers cars and contents thereof;" that near the end of certain refrigerator cars were certain bunker doors and above each bunker door was a lever which was connected thereto by means of a certain fastening; that it was necessary and customary for plaintiff when inspecting these cars to operate, move or pull the levers, and that said bunker doors could <sup>not</sup> be opened until such levers were properly adjusted or moved; that plaintiff was inspecting a certain one of said refrigerator cars, and that pursuant to his duty he got on top of the car for the purpose of opening a bunker door; that it then and there became the duty of defendant to use ordinary care to see that the bunker doors could be lifted, raised and opened and that the levers and appliances connected therewith could be operated and moved with reasonable safety by those who were required to or customarily did open the bunker doors and operate and move the levers and appliances;





that defendant not regarding its duty in the premises, carelessly, negligently, wrongfully and improperly used the car while the lever was old, worn out, cracked, defective and after it had notice or knowledge of the defective condition; that plaintiff did not have knowledge or means of knowing the lever was defective; that while plaintiff was standing on top of the car, near the end thereof, and in attempting to open and to lift the door with one hand and to operate, move or pull the lever with the other hand, said lever broke; that plaintiff was thereby caused to fall to the ground and injured.

The second count was the same as the first, except that it alleged that the top of the car was icy and slippery and that this icy and slippery condition of the car contributed to plaintiff's fall.

Defendant filed a plea of the general issue and a special plea denying that plaintiff was injured while engaged in interstate commerce and another special plea setting up a release by plaintiff upon the consideration of the payment of certain compensation.

At the close of plaintiff's evidence and again at the close of all the evidence, defendant moved for an instructed verdict, which was denied, and upon the return of the verdict<sup>by</sup> the jury made motions for a new trial and in arrest, both of which were overruled.

Defendant contends that the motion for an instructed verdict should have been given because there was no proof of negligence on the part of defendant, because upon the uncontradicted evidence plaintiff assumed the risk, because plaintiff's negligence was the sole cause of the accident, and because there was no proof that plaintiff was engaged in interstate commerce at the time he received his injury.

From around one half past four till five o'clock on 13 September 1941 he had  
to operate, save at half past four till five o'clock, at the  
factory; that amount was heavily taxed in 1941 on the ground that  
he was a married man.

That this boy was allegedly admitted at the age mentioned in  
that is alleged that the age was 14 and allegedly not  
that record would not be made as the first, except  
Wilmott's Fall.

by plaintiff upon the recommendation of the payment of certain non-

1. The above information was obtained from a review of the files of the FBI, New York Office, and the files of the FBI, New York Office, and the files of the FBI, New York Office.

that point it was alleged in the evidence that the line of



We have examined each of these contentions and are of the opinion that it was not error to deny defendant's request for an instructed verdict, as there was evidence as to each one of these issues raising a question for the consideration and decision of the jury.

The controlling question in the case is whether the verdict and the judgment are manifestly against the weight of the evidence, for if the accident occurred in the way that plaintiff said it occurred, then the questions argued were for the jury. In order to understand this issue it will be necessary to summarize the material facts.

Plaintiff was 31 years of age and was employed first as a car repairman and later as a special officer inspecting cars? He received his injury on January 7, 1928, while inspecting Pacific Fruit Express refrigerator car No. 13553, which was standing in defendant's yards at Blue Island, Illinois, for the purpose of ascertaining whether there had been any pilfering from the car. He climbed on the car and while in the performance of his duties fell therefrom to the ground receiving injuries more or less serious. The refrigerator car in question stood at the north end of track No. 3. Snow had fallen, and on this particular day the car was icy and slippery. The testimony of plaintiff is to the effect that he got up on top of the car by means of a ladder at the northeast corner of it. On the top of this car were four bunker doors which were opened and closed for the purpose of ventilating the car by means of a contrivance which will hereafter be described. These bunker doors were made of pine wood, were about two feet square and about as thick as the outside door of the car. In the center of the door there was a metal ring, and by means of this ring the door was lowered or raised in such manner as to give the degree of ventilation desired. It seems to have been held in

It is not possible to say whether or not the witness is a person of good character and the fact that he is not a person of good character is not a reason for saying that he is not a person of good character. The fact that he is not a person of good character is not a reason for saying that he is not a person of good character. The fact that he is not a person of good character is not a reason for saying that he is not a person of good character.

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The witness is not a person of good character and the fact that he is not a person of good character is not a reason for saying that he is not a person of good character. The fact that he is not a person of good character is not a reason for saying that he is not a person of good character. The fact that he is not a person of good character is not a reason for saying that he is not a person of good character.



place through the operation of a cast iron lever which was about 20 inches long, 2 inches wide and about  $\frac{1}{4}$  inch thick. This lever passed through a bracket made of similar metal which was fastened to the middle of the open end of the door. The lever curved downward, the convex portion of it being at the end of the car. In appropriate spaces upon this lever there were several holes about  $\frac{3}{8}$ ths of an inch in diameter. Corresponding to each of these holes in the lever was a hole of the same size in the bracket, and when the bunker door was moved up to the desired angle of elevation it was held there by means of a fastener which passed through the holes in the bracket and a corresponding hole in the lever.

Plaintiff testifies that after going up the ladder to the northeast corner of the car he placed himself in a position to open the car; that the car was icy and slippery on top; that he got all the way to the top of the car; that when he reached down to open the door it was quite tight; that he got hold of the lever to pull it so that he could release and put his right hand in position to pull the door open, and that while he was so doing the lever broke, his foot slipped from under him and he fell down backwards onto the ground.

On cross-examination plaintiff said that when he got on top of the car the first thing he did was to take hold of the lever with his left hand and raise it up to an angle to release the door; that he started to reach over on his right hand to get over the door to help to open it; that he had hold of the lever; that the lever broke with him; that he reached over and pulled the lever towards him; that he raised it up halfway when it broke; that when it broke he still had hold of it and pulled it up to that position; that there was a ring off the side of the lever but he did not get hold of the ring; that he would not say that the door was frozen down but that it was tight; that he fell off the northeast



place through the operation of a good iron lever which was about  
20 inches long. I looked into the hole and saw a small  
passage through a circular hole of similar size which was  
to the middle of the open end of the hole. The lever entered from  
west, and never pulled it in before at the end of the day. In  
approximate manner this lever must have been several inches  
2\3rds of an inch in diameter. Corresponding to each of these  
holes in the lever was a hole of the same size in the ground, and  
when the lever was moved up to the desired height of eleva-  
tion it was held there by means of a T-shaped wedge placed between  
the holes in the ground and a corresponding hole in the lever.  
The lever itself was about 10 feet long and 10 inches wide.  
The northeast corner of the cave is slightly elevated in a position  
to open the cave; that the cave was not, and slightly so; that  
He got all the way to the top of the cave; that when he reached down  
to open the door he was unable to do so; that he was not at the lever  
to pull it as soon as could be done and that he was not able to pull  
him to pull the lever down, and that while he was at the lever  
space, his foot slipped from under him and he fell from the  
only the ground.  
The operation of the lever was as follows: The lever was put  
on top of the cave and the lever was put on top of the  
lever with its left end and pulled it up to the point of release  
the door; that he pulled it down over on his right hand to get  
over the door to pull it down; that he was not at the lever;  
that the lever moved with him; that he reached over and pulled the  
lever towards him; that he pulled it up halfway when it was;  
when it was he still had hold of it and pulled it up to the  
position; that there was a big hole in the lever and he  
did not get half of the door; that he pulled out; that the lever  
was thrown over his head it was light; that he fell off the lever

corner of the car but did not try to catch anything as he went down. He says, "I turned over backwards, a complete somersault and lit on my left foot."

He also testifies that the upper part of the lever was cracked; that it was rusty down through the hole; that from the lower part of the hole it was a fresh break; that the point where the lever broke was an inch and a half to two inches in width; that he looked at the lever before he took hold of it - just looked at it to take hold to pull up to open the door. He says:

"The lever was used for the purpose of opening the door. If you pulled up on the lever it helped to release the door. In order to open the door you take hold of the lever and pull up the lever to the extent of maybe 45 degrees. Then you finish opening the door with a ring that is in the door. I cannot say that I pulled much more than I did on other cars, but maybe a little bit more. All of the doors are tight. The lever broke at the first hole."

The testimony of plaintiff as to the precise manner in which the accident occurred is contradicted by many facts appearing in the record. In the first place, it is contradicted by a written statement obtained from him by the district claim agent of the defendant company, who was an investigator in the case. In this written statement, which was made at the home of plaintiff on March 1, 1928, plaintiff says:

"I continued my regular work, and about 1 o'clock p. m. when I started to inspect several cars that came from the I.R.B. Railway the accident occurred. In making this inspection it is necessary to get on top of cars and open bunker doors, and while in the act of opening one of these doors on refrigerator P.F.E. 13653 standing on track number three; just as I was opening this door my feet slipped due to ice and snow on top of car causing me to turn completely over, and when I started to fall I grabbed a lever to save me from falling but lever broke off and I struck on my left foot on the ground between I.R.B. number one and Grand Trunk number three track. My work was being done in the usual way, and cars standing still at the time."

A brakeman employed by defendant company, Everett D. Willis, testified that he witnessed the accident; that he was then about ten feet north of the end of the car, on the east side of





track No. 3; that he first saw plaintiff when he started to go up the side of the car; that when he got to the second step from the top he reached over with his right hand and fell feet first. The witness says that he saw the piece of the lever in plaintiff's hands and that the break in it was fresh; that he saw plaintiff grab the lever with the right hand and that it looked as if he was pulling himself up; that then the lever broke; that the break in the lever was eight or ten inches from the top right across from one of the holes; that the piece was dropped to the ground and he does not know who picked it up.

Henry F. Wick, a car inspector for defendant, testifies that he inspected the car prior to the time plaintiff was injured; that after the accident he went up to the top of the car and examined the break which was fresh and right through a hole and ten or eleven inches was broken off. This witness says:

"The purpose of this lever is to regulate the ventilation. That is it is used to lift the hatch cover and ventilate the load, which may be perishable freight. That lever is not used to lift the bunker door."

This witness produced a lever admitted to be similar to the one that was on the car and it was received in evidence as defendant's exhibit No. 4. This witness further says:

"A man in operating the lever has to stand in the middle of the car on the running board, get over the hatch door and get hold of the ring. You can lift the door open with the ring without operating the lever. You take the pin out and there is nothing to hold it."

Edward H. Wick, another car inspector, describes the lever and attachment as a "ventilator regular," and says:

"To open the door with it in that position all you have to do is lift on the door and the hatch comes up and comes out of this casting. It will slip right through this casting and lift the door right up. You do not have to pull the lever up at the time you open the door. You take hold of the door and lift it up. If you take the pin out you don't have to touch the stationary lever to pull up the hatch cover."

A yard conductor, William C. Wick, testifies that he





went up to plaintiff after he fell to the ground and that plaintiff said "he fell off the car," and that plaintiff had a part of the lever in his hand when witness got there.

Merrill, the district claim agent who took the statement of plaintiff, testifies that plaintiff read the statement over, admitted that it was correct and signed it, and that part of it was in plaintiff's handwriting; that plaintiff gave the facts to him as stated in the writing which was signed.

As already stated, a similar lever and contrivance was by agreement admitted in evidence, and has been forwarded to this court for our inspection. We have satisfied ourselves by examining it that the bunker door was opened for ventilating purposes by means of force applied to the ring and that as a matter of fact it would have been impossible to lift the door by force applied to the lever. Plaintiff had experience in this work, and we therefore think that it was highly improbable that he undertook to raise the door by means of power applied to the lever. In fact, it would have been a physical impossibility to lift the door in that way. It must therefore, we think, be held that as a matter of fact the accident did not occur in the way plaintiff says it did, but that on the contrary a clear preponderance of the evidence indicates either that he reached up from the ladder and took hold of the lever in order to get upon the car, or that after he was upon the car he slipped and fell and in endeavoring to save himself grabbed hold of the lever and broke it in the manner which he describes in the written statement he gave to defendant's investigator.

There is uncontradicted evidence in the record to the effect that there was a running board on the side of the car and that in operating the lever the usual custom was that the employee should stand upon this running board. It would therefore appear that plaintiff was not operating the lever in any manner contemplated



went up to the first floor after he left to the ground and that Plaintiff said "he told me the way," and that Plaintiff had a part of the fever in his hand when witness got there.

Now, the first class agent was from the state-

ment of Plaintiff, Plaintiff was Plaintiff from the state- over, admitted that it was removed and signed it, and that part of it was in Plaintiff's handwriting; that Plaintiff gave the letter to him as stated in the written order was signed.

As already stated, a similar fever and convulsion was

by Plaintiff stated in evidence, and was then returned in this court for our inspection. We have admitted ourselves by examining

it that the doctor had not signed the visiting papers by means of force applied to the ring and that as a matter of fact it would have been impossible to lift the door by force applied to the fever. Plaintiff had examined in this case, and we there-

fore think that it was highly probable that he consented to raise the door by means of force applied to the fever, in fact, it would have been a physical impossibility to lift the door in that way. It must therefore, we think, be held that as a matter of fact the ac- cident did occur in the way Plaintiff says it did, and that on

the contrary a clear statement of the evidence indicates either that he reached up from the floor and took hold of the lever in order to get upon the box, or that after he was upon the box he slipped and fell and in consequence he was himself struck with of the lever and broke it in the manner which he stated in the written statement he gave to Plaintiff's investigation.

There is no material evidence in the record to the

effect that there was a condition found on the side of the car and that in consequence the lever the usual custom was that the employee should stand upon this running lever. It would therefore appear

that Plaintiff was not violating the laws in any manner contemplated

by the employing railroad company. As we understand it, plaintiff concedes that if he simply slipped and took hold of the lever for the purpose of saving himself, defendant would not be liable. This is true for the obvious reason that in that case the use made of the lever was not one for which it was furnished and intended, and that the charge of negligence in that case could not be sustained as against defendant railroad company for the double reason that plaintiff assumed the risk in making such use of the lever and that defendant was not negligent with respect thereto.

Consideration of the whole evidence from the standpoint of its probability and reasonableness, the number of witnesses who testify to material facts, and the uncontroverted physical facts, compels us to hold that the verdict of the jury is clearly and manifestly against the weight of the evidence, and the judgment will have to be reversed for that reason.

It is urged by defendant that it was an essential element of plaintiff's case that he prove he was engaged in interstate commerce at the time he received his injury, and D.L. & W.R.Co. v. Seales, 18 Fed. (2nd) 73; Feaster v. Southern R. Co., 15 Fed. (2nd) 540, and other cases cited. We have held in Foreman T. & S. Bank v. Grand Trunk Ry. Co., 242 Ill. App. 428, that the burden of establishing this fact is on the plaintiff. We also held in that case, citing authorities, that ordinarily the question was for the jury and pointed out that the federal courts, whose decisions we are obligated to follow, held in Pedersen v. D.L. & W.R.Co., 228 U. S. 146, "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?" and in the later case of Shanks v. D. L. & W.R.Co., 239 U.S. 556:

"The true test of employment in such commerce in the sense intended is, Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it."

[illegible]



We have not been cited to any case which indicates that this rule has been in any respect modified, and a determination of the question seems to depend entirely upon the particular facts of each case. While under the authorities cited by defendant it has been held that one engaged merely in local police duty is not engaged in interstate commerce, we think the evidence here discloses that the work which this plaintiff was engaged in doing was much more closely connected with the interstate shipment of these goods than that of the local police officers in the cases cited. Under all the evidence it was at least a question for the jury. Michigan Cent. R. R. Co. v. Ind. Com., 321 Ill. 620.

For the reason already indicated the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely and O'Connor, JJ., concur.

all the witnesses it was at least a question for the jury. Whether  
then that of the local police officers in the case cited. Under  
more closely connected with the interests of these points  
that the work which I said was engaged in being was when  
engaged in interstate commerce, so that the witnesses have discussed  
been held that was engaged merely in local police duty is not one  
each case. While under the circumstances cited by defendant it was  
the question seems to have arisen entirely upon the particular facts of  
this case has been in my request modified, and a determination of  
We have not been able to say even what that was.

[illegible]

for the reasons already indicated the following would be reversed and the cases remanded for further trial.

... ..

34515

MIKE ORBAN,  
Defendant in Error,

vs.

IMRE FAGSZAN,  
Plaintiff in Error.

ERROR TO SUPERIOR COURT OF  
COOK COUNTY.

259 I.A. 662<sup>3</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant in the trial court asks a review of the record of a cause in chancery wherein one Mike Orban as complainant filed a bill on August 27, 1925, alleging the existence of a copartnership between complainant and defendant in conducting certain rooming houses at 855-857 N. La-Salle street, Chicago.

The bill set up certain facts with reference to the condition of the business and averred that complainant and defendant had been unable to agree with reference to the manner in which the same should be conducted; that complainant had not been able to secure an accounting or settlement of the partnership affairs. The bill prayed that an account should be taken, the copartnership dissolved and its assets distributed by an order of court, and that a receiver might be appointed to take charge of the business.

Defendant answered the bill and the cause was referred to a master to take the evidence and report. This order was made on October 14, 1925, and it appears that a replication to the answer had not at that time been filed. The master took the evidence and reported, objections of defendant were overruled, the same by order stood as exceptions before the chancellor, and on April 1, 1926, the court entered a decree overruling the exceptions and finding that on March 1, 1925, Orban had purchased from defendant a half interest in the business; that the operation of the business had been continued under an oral agreement; that



THOMAS W. HARRIS, JR.  
Plaintiff in Error.  
vs.  
JAMES HARRIS, JR.  
Defendant in Error.

ORDER TO SHOW CAUSE  
TO THE COURT

2591 A. 682

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT  
OF THE STATE OF FLORIDA

By this writ of error defendant in the trial court asks a review of the record of a cause in which certain and like cases as complaints filed a bill on August 27, 1935, alleging the existence of a partnership between complainant and defendant in conducting certain trading houses at 255-257 N. La Salle street, Chicago.

The bill set up certain facts with reference to the condition of the business and averred that complainant and defendant had been unable to agree with reference to the manner in which the same should be conducted; that complainant had not been able to secure an accounting or settlement of the partnership affairs. The bill prayed that an account should be taken, the partnership dissolved and its assets distributed by an order of court, and that a receiver might be appointed to take charge of the business. Defendant answered the bill and the cause was referred to a master to take the evidence and report. This order was made on October 14, 1935, and it appears that a replication to the answer had not at that time been filed. The master took the evidence and reported, objections of defendant were overruled, the same by order stood as exceptions before the chancellor, and on April 1, 1936, the court entered a decree overruling the exceptions and finding that on March 1, 1935, Green had purchased from defendant a half interest in the business; that the operation of the business had been continued under an oral agreement; that

Urban agreed to pay the sum of \$1500 for the half interest and thereupon paid \$1000 in cash and agreed to pay the balance from his share of the profits to be received from the business as such profits accrued. Further transactions concerning the copartnership were set out in detail, and it was ordered, adjudged and decreed that the copartnership existing should be dissolved; that a receiver should be appointed for the business; that the cause should be further referred to the master to take and state an account of the partnership dealings.

It is urged by defendant that the court erred in referring the cause to the master in the first instance, because the same was not then at issue, no replication having been filed. The record shows a motion to vacate the reference upon that ground which was denied and which defendant contends should have been allowed. As a matter of fact, the record also shows that a replication was thereafter filed on December 1, 1925, in the usual form, and as it further appears that the cause was considered upon evidence heard, it would at any rate appear that upon appeal this objection will be deemed to have been waived. Piot v. Davis, 241 Ill. 434.

It is next urged that the court erred in entering several orders striking a cross-bill and amended cross-bills filed by defendant, but defendant did not elect to stand by these pleadings or any one of them, and as a matter of fact upon his petition leave was thereafter given to file a cross-bill which complainant was ruled to answer. It is contended, however, that the granting leave to file order ~~striking out cross-bill~~ cross-bill was erroneous in that it was made upon the condition that defendant pay the costs theretofore incurred under the order of reference amounting to \$114.20, but the record fails to disclose that defendant made any objection to this provision of the order, and as he paid the amount and thereby



It was agreed to pay the sum of \$2500 for the said interest and thereupon said \$2500 in cash and agreed to pay the balance from the share of the profits to be received from the business of such profits earned. Further transactions concerning the copartnership were not set in detail, and it was ordered, adjudged and decreed that the copartnership existing should be dissolved; that a receiver should be appointed for the business; that the same should be further referred to the master to take and state an account of the partnership dealings.

It is urged by defendant that the court erred in referring the same to the master in the first instance, because the same was not then at issue, no replication having been filed. The record shows a motion to vacate the reference upon that ground which was denied and which defendant contends should have been allowed. As a matter of fact, the record also shows that a replication was thereupon filed on December 1, 1932, in the usual form, and as it further appears that the cause was committed upon evidence heard, it would at any rate appear that upon appeal this objection will be deemed to have been waived. Bill v. Davis, 221 Ill. 432.

It is now urged that the court erred in entering several orders granting a cross-bill and amended cross-bills filed by defendant, but defendant did not object to them at the time, and as a matter of fact upon his petition leave was thereupon given to file a cross-bill which amendment was taken to answer. It is contended, however, that the order ~~granting leave to file~~ cross-bill was erroneous in that it was made upon the condition that defendant pay the costs of the proceedings incurred under the order of reference amounting to \$114.30, but the record fails to disclose that defendant made any objection to this provision of the order, and as he paid the amount and thereby



availed himself of the benefit of the order he is not in a position to urge the point here. Moreover, the order itself under all the circumstances which appear in this record would seem to be just and equitable.

As a matter of fact, the alleged cross-bill set up in substance that pending the hearing before the master, and on November 5, 1925, complainant and defendant made a full settlement of all the matters in controversy between them with reference to the subject matter of the suit. The answer of complainant in substance admitted negotiations on that date to that end but alleged that an error had been made in computing the amount of money due to complainant and denied other allegations of the cross-bill; stated that upon discovery of the error on November 7, 1925, complainant tendered back to defendant all moneys, papers, etc., received by him pursuant to the supposed settlement, and denied that defendant was entitled to any relief under the cross-bill.

Replication was filed, and the matter came on for hearing before the chancellor in open court in connection with the consideration of the exceptions of defendant to the report of the master upon the original bill. No certificate of evidence was preserved although defendant attempted to have one presented and approved long after the term of court at which the decree was entered had expired. That decree, of April 1, 1926, by which the report of the master was approved and another reference directed, ordered, adjudged and decreed that the cross-bill should be, and it was thereby, dismissed for want of equity. Although defendant contends to the contrary, the presumption under these circumstances is in favor of the decree, and complainant was not bound either to present a certificate of evidence or to recite the finding of facts upon which the decree was based in order to support that decree. Jackson v.

avoided himself of the benefit of the order he is not in a position  
to urge the point here. However, the order itself would still be  
circumstances which appear in this record would seem to be just and  
equitable.

As a matter of fact, the alleged cross-bill was up in  
evidence that pending the hearing before the master, and on November  
19, 1935, complaint was filed and returned a full settlement of  
all the matters in controversy between them with reference to the  
subject matter of the bill. The answer of complaint in evidence  
admitted negligence on the part of the defendant and that the  
error had been made in computing the amount of money due to defendant  
and denied other allegations of the cross-bill; stated that upon  
discovery of the error on November 7, 1935, complaint was filed  
back to defendant all money, papers, etc., received by him pursuant  
to the original bill, and denied that defendant was entitled  
to any relief under the cross-bill.

Complaint was filed, and the matter came on for hear-  
ing before the master in open court in connection with the con-  
sideration of the application of defendant to the report of the mas-  
ter upon the original bill. In testimony of evidence was presented  
although defendant attempted to have one presented and approved long  
after the term of court at which the hearing was entered had expired.  
That hearing, on April 1, 1936, by which the report of the master was  
removed and another returned directed, entered, signed and de-  
creed that the cross-bill should be, and it was thereby, dismissed  
for want of due diligence in presenting it to the court.  
The presentation under these circumstances is in favor of the de-  
fendant, and complaint was not heard either to present a partition  
of evidence in the matter of the bill or to present any other  
error was made in order to support that decree.



Sackett, 146 Ill. 646. It is urged that upon the hearing of exceptions to the master's report further evidence in open court pertaining to the issues thus framed could not be taken, and Cent. Ill. Serv. Co. v. City of Sullivan, 294 Ill. 101, is cited. That case is not applicable for the reason that the issues under the cross-bill were not referred to the master and there was no reason why the court could not hear the evidence pertaining to such issues in open court. We find no reversible error in the decree of April 1, 1926.

Pursuant to that decree the master took the evidence and stated the account. The record shows that defendant filed voluminous objections which were overruled by the master and which upon the hearing before the chancellor stood as exceptions. The chancellor overruled the exceptions and entered an order approving the report, and a decree in conformity therewith was entered on July 10, 1928. The decree finds a balance due defendant of \$497.83 and orders that complainant pay the same within ten days and that complainant and defendant each pay half of the master's fees amounting to \$167. Defendant does not assert that any item of the account as stated by the master is erroneous. His contention seems to be that the court erred in not stating the account upon the theory that the partnership was dissolved at the time of the supposed settlement on November 5, 1925. Defendant says, "In this the court erred as it was by law bound to review the whole record and undo the injustice done to complainant in and pursuant to the decree of April 1, 1926."

The decree dismissing defendant's cross-bill was a final adjudication of the issues in that regard against defendant. As these issues had been adjudicated they were not before the master for consideration, and since, regarding those issues as



... it is stated that the master of the ...  
... in the master's report ...  
... and ...  
... is cited. That ...  
... case is not ...  
... other ...  
... why the court ...  
... even in open court. We find no ...  
... of April 1, 1884.  
... and stated the ...  
... upon the ...  
... the ...  
... July 12, 1887. The ...  
... and that ...  
... of the ...  
... it ...  
... upon the ...  
... the ...  
... to the ...  
... the ...  
... As ...  
... master for ...

settled, there is no claim of error in regard to the finding of the master on any particular fact, it would seem that the court did not err in approving the report of the master in its decree of July 10, 1928.

It is suggested in defendant's behalf that the record shows error in that the court approved the petition of the receiver of a sale of certain assets of the copartnership for the sum of \$50. No objection, however, was made at the time the order of approval was entered. It is further urged that this \$50 paid to the receiver should have been included in the account by the master, but the receiver's account was not referred to the master and he had no duty with respect thereto.

We have endeavored to give a fair consideration to the many points raised by the brief of defendant in this case. The brief does not comply with rule 19 of this court in that the argument of defendant does not set forth the facts so as to give the information necessary to an understanding of the case. Not once in the argument is the court referred to the page of the abstract where the evidence to which the argument refers might be found. The neglect to comply with the rule in these respects has imposed an unnecessary amount of labor upon this court. The amount actually in controversy between these parties is comparatively small. The decree finds a balance due to defendant from complainant amounting to \$497.83. If we disregard the transaction of November 5, 1925, it would seem the amount of the balance must be conceded to be correct.

We find no reversible error in the record, and the final decrees and orders entered therein will therefore be affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

settled, there is no claim of error in regard to the finding of the master on any particular fact. It would seem that the court did not err in approving the report of the master in the decree of July 12, 1928.

It is suggested in defendant's behalf that the record shows error in that the court approved the position of the receiver of a sale of certain assets of the corporation for the sum of \$250,000. In objection, however, was made at the time the order of approval was entered. It is then urged that this \$250,000 paid to the receiver should have been included in the account by the master, but the receiver's account was not referred to the master and he had no duty with respect thereto.

We have endeavored to give a fair consideration to the many points raised by the chief of defendant in this case. The brief does not comply with rule 19 of this court in that the argument of defendant does not set forth the facts so as to give the information necessary to an understanding of the case, but once in the argument is the court referred to the page of the abstract where the evidence is which the argument refers might be found. The neglect to comply with the rule in these respects has imposed an unnecessary amount of labor upon this court. The amount actually in controversy between these parties is comparatively small. The decree finds a balance due to defendant from complainant amounting to \$250,000. If we disregard the transaction of November 8, 1927, it would seem the amount of the balance must be conceded to be correct.

As there are reversible errors in the record, and the time between and orders entered therein will therefore be affirmed.

Respectfully submitted,  
J. J. ...



34523

JEANETTE REICHOID,  
Appellee,

vs.

CITY OF CHICAGO, a  
Municipal Corporation,  
Appellant.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 662<sup>4</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

The City of Chicago, defendant, appeals from a judgment in the sum of \$1500 entered against it upon the verdict of a jury in an action on the case for personal injuries, motions for a new trial and in arrest having been overruled.

The declaration was in a single count, which alleged in substance that on December 16, 1922, defendant, a municipal corporation, carelessly and negligently failed and neglected to perform its duty, in that it failed to keep a sidewalk under its control at the intersection of Thirty-eighth street and Albany avenue in a reasonably safe condition, that it permitted a large and dangerous hole in the sidewalk to be and remain, defendant city, its officers, employees and agents having knowledge of the same (or that in the exercise of reasonable diligence they should have had such knowledge), whereby plaintiff while walking upon the sidewalk on said December 16th and while in the exercise of due care and caution, stepped suddenly into the hole and was then and there injured. To this declaration defendant pleaded the general issue.

It is urged that defendant was not negligent; that plaintiff was guilty of contributory negligence; that the court should have granted a motion of defendant for a directed verdict, and that the judgment is against the manifest weight of the evidence.

Defendant offered no testimony in its own behalf. The

54883

THOMAS R. BROWN, JR.  
Applicant.

vs.

CITY OF CHICAGO, a  
Municipal Corporation.  
Respondent.

CV 1000000000

IN SENATE  
JANUARY 10, 1900

The City of Chicago, respondent, answers the complaint  
of the City of Chicago, applicant, as follows:  
1. That in an action for damages for personal injuries, which  
for a long time has been pending in the Circuit Court of Cook  
County, Illinois, the City of Chicago, respondent, is a party.

In substance that on December 10, 1899, respondent, a municipal  
corporation, negligently and negligently killed and caused to  
be killed the City of Chicago, applicant, a citizen of the  
State of Illinois, by the negligence of its officers and agents  
in a negligently made construction, that it is alleged that  
and respondent is not liable to be and remain, defendant  
City, its officers, managers and agents having knowledge of the  
same (as that is the substance of respondent's allegations) that  
have had been established, that City of Chicago, applicant, has  
suffered an irreparable loss and injury in the exercise of its  
rights and property, which respondent has not and can not and  
therefore is liable. It is requested that the Court award the  
damages.

It is urged that respondent was not negligent; that  
plaintiff was guilty of contributory negligence; that the same  
should have resulted in a finding of no liability for a personal injury,  
and that the judgment is against the manifest weight of the evidence.  
Respondent claims no liability in its own behalf. The

evidence for plaintiff tended to show the existence of this hole in the sidewalk at the place as alleged and that although plaintiff had passed over the sidewalk at this place for eight days prior to the time of the accident, she did not see it because snow was falling, it was dark, and the sidewalk and the hole in question were covered with snow. One witness describes the hole as "a pretty big hole there about six inches long and say about three or four inches deep."

Defendant cites a number of cases, such as Hobbs v. City of Chicago, 248 Ill. App. 183, where it is held that mere slipperiness of a sidewalk occasioned by ice and snow is not such a defect as will make a municipality liable for injuries to a pedestrian who is thereby injured, but that it is liable where ice hillocks have been allowed by the city to remain on a sidewalk after due notice of such condition. This case has no application to facts such as exist here. The evidence does not tend to show that defendant was injured by slipping and falling on the ice and snow on the sidewalk, but it does show that the cause of her injury was falling into the hole in the sidewalk. The facts that the hole was filled and covered with snow and that plaintiff walked in the darkness are merely circumstances which tend to excuse what otherwise might be held to be contributory negligence.

There is no reversible error in the record, and the judgment is affirmed.

**AFFIRMED.**

McSurely and O'Connor, JJ., concur.



evidence for plaintiff tended to show the existence of this hole in the sidewalk at the place as alleged and that plaintiff actually had passed over the sidewalk at this place the night before to the line of the sidewalk, and did not see it because snow was falling. It was dark, and the sidewalk and the hole in question were covered with snow. One witness described the hole as "a pretty big hole there about six inches long and only about three or four inches deep."

Defendant also a number of cases, such as Hobbs v.

City of Chicago, 104 Ill. App. 1st, where it is held that where

negligence of a sidewalk is established by law and snow is not removed as will make a materiality liable for injuries to a person

travelling who is thereby injured, but that it is in places where the

defendant have been allowed by the city to remain on a sidewalk

after the notice of such condition. This case has no application

to facts now at issue here. The evidence does not tend to show

that defendant was injured by slipping and falling on the ice and

snow on the sidewalk, but it does show that the cause of her fall

was falling into the hole in the sidewalk. The facts that

the hole was filled and covered with snow and that plaintiff

walked in the darkness are merely circumstances which tend to

show that defendant might be held to be contributorily negligent.

There is no reversible error in the record, and the

judgment is affirmed.

ATTORNEY.

Respectfully and Sincerely, W. J. ...

34569

EMIL N. ANDERSON et al.,  
Appellees,

vs.

ADELAIDE M. WILLIAMSON et al.  
On Appeal of MORT D. GOLDBERG,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY

259 I.A. 663

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

Defendant Goldberg appeals from an order of the Superior court which denied the prayer of a petition filed by him asking that the receiver appointed in a proceeding to foreclose a mortgage should be required to turn over to petitioner the surplus remaining in the hands of such receiver after the payment of the deficiency after sale and receivership expenses, including solicitor's fees. The amount remaining in the receiver's hands was \$188.53.

The petition in substance set up that pending the foreclosure proceedings petitioner became the owner of the equity of redemption by a deed from the bailiff of the Municipal court delivered by the bailiff pursuant to a sale under an execution issued against the then owner of the equity of redemption and a defendant to the foreclosure proceedings, Adelaide M. Williamson, to whom the court by order directed this surplus to be paid.

The petition set up the proceedings in detail. No party to the record in the trial court has appeared here to support the order, which is clearly erroneous.

The sale under execution divested Adelaide M. Williamson of all her right, title, interest and estate in the premises. Cook v. Norton, 48 Ill. 20; Livingston v. Moore, 252 Ill. 447; Morey v. Brown, 305 Ill. 284; Smith-Hurd's Ill. Rev. Stats. 1929, chap. 77, sec. 32, p. 1758.

Complainant having been paid in full and all costs and

...the ... ..

... to ... ..  
... ..  
...

THE UNIVERSITY OF CHICAGO

of all new ships, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 25



expenses satisfied, petitioner as the owner of the equity was entitled to receive the rents pending the period of redemption from foreclosure sale which was held on November 4, 1929.

For the reasons indicated the order will be reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and O'Connor, JJ., concur.

expenses indicated, provision on the order of the equity was ex-  
 tended to provide the same benefit the period of redemption from  
 the date of the order was made on November 4, 1935.

and the same amount.

REVEREND AND HONORABLE.

Respectfully and sincerely,  
 J. J. Jones

34483

ROY O. BROWN, Doing Business  
as BROWN REALTY COMPANY,  
Defendant in Error,

vs.

JOSEPH TETZ,  
Plaintiff in Error.

ERROR TO SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 663<sup>2</sup>

MR. JUSTICE MOSURELY DELIVERED THE OPINION OF THE COURT.

Defendant by this writ of error seeks the reversal of a judgment against him of \$1020, entered on May 18, 1928.

Plaintiff filed a plea in this court asserting that the writ should be dismissed for the reason that it was brought after the expiration of the statutory period of two years from the rendition of the judgment; that the judgment was rendered May 18, 1928, and the writ of error sued out May 28, 1930. Defendant filed an amended replication alleging that the judgment entered May 18, 1928, was not final, because on April 24, 1929, an order was entered in the Superior court of Cook county correcting the record nunc pro tunc as of May 18, 1928, and sustaining the demurrer of plaintiff to the motion of defendant to correct the record under section 89 of the Practice act in the nature of a writ of error coram nobis and that defendant "brings his writ of error to the attention of the court for the orders entered on the 24th day of April, 1929, which said date was less than two years prior to the date when the writ of error was brought." Plaintiff filed a demurrer to this replication, alleging its insufficiency and as special ground that it constituted a departure in that <sup>in</sup> defendant's assignment of errors the judgment complained of and sought to be reviewed by the writ of error was rendered May 18, 1928.

The demurrer is well taken. None of the assignments of error complains of any judgment or order by the trial court other than the judgment of May 18, 1928, except the seventh assign-



THE STATE OF TEXAS,  
COUNTY OF DALLAS.

Know all men by these presents,  
that I, the undersigned,

do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the County of Dallas, State of Texas.

WITNESSED my hand and seal of office this 14th day of May, 1933.

Notary Public in and for the State of Texas.

Testimony of this writ of error reads the reversal  
of a judgment against him of \$1000, entered on May 18, 1933.  
Plaintiff filed a bill in this court asserting that  
the writ should be dissolved for the reason that it was granted  
after the expiration of the statutory period of two years from the  
 rendition of the judgment; that the judgment was rendered May 18,  
 1933, and the writ of error sued out May 28, 1933. Defendant filed  
 an amended replication alleging that the judgment entered May 18,  
 1933, was not final, because on April 24, 1933, an order was en-  
 tered in the Superior Court of Cook County reversing the verdict  
 WHERE UPON as of May 18, 1933, and sustaining the demurrer of  
 plaintiff to the motion of defendant to correct the record under  
 section 30 of the Practice act in the nature of a writ of error.  
 JOHN ROHLF and JOHN ROHLF "prayer his writ of error to the  
 attention of the court for the orders entered on the 24th day of  
 April, 1933, which said date was less than two years prior to the  
 date when the writ of error was brought." Plaintiff filed a de-  
 murrer to this replication, alleging its insufficiency and as  
 special ground that it constituted a demurrer in that defendant's  
 assignment of errors and judgment complained of and sought to be  
 reviewed by the writ of error was rendered May 18, 1933.  
 The demurrer is well taken. None of the assignments  
 of error complained of was judgment or order by the trial court  
 other than the judgment of May 18, 1933, except the reversal of

ment which reads as follows: "The order of April 24, 1929, entered nunc pro tunc as of May 18, 1928, in and by which last named order the court admits said error of fact."

The judgment order in May, 1928, included a recital that both parties were present by their attorneys, respectively, and that by agreement made in open court the cause was submitted to the court for trial without a jury. The proceedings in February, 1929, were as follows: Defendant served notice that he would move to vacate the judgment heretofore entered. This was supported by affidavit setting forth the judgment order of May, 1928, and concluding with the assertion that: "Neither he, the defendant, nor anyone for him or the defendant was present when the cause was called for trial; that he, the defendant, nor anyone for him or the defendant, stipulated or agreed in open court or otherwise that said cause be submitted to the court for trial without a jury." Plaintiff filed a demurrer to this motion, alleging that it was not sufficient in law, and also filed a motion asking the court to correct the form of judgment nunc pro tunc as of May 18, 1928. Subsequently, on April 24, 1929, the court entered an order nunc pro tunc as of May 18, 1928, correcting the form of judgment so that, instead of reading that both parties were present and agreed to a trial by the court, it read: "This cause being regularly reached for trial on the trial call this 18th day of May, 1928, comes to the plaintiff to this suit by his attorney and the defendant comes not, and on motion of plaintiff's attorney the cause is submitted to the court for trial without a jury." The court also entered an order sustaining the demurrer to plaintiff's motion to vacate the judgment and denying said motion.

It will be noted that the assignment of error Number

ment which reads as follows: "The order of April 22, 1935,

entered under the name of the defendant, is hereby

reversed and the case is remanded to the court

from which it was removed, to be tried by a jury.

That both parties were present by their attorneys, respectively,

and that by agreement made in open court the cause was submitted

to the court for trial without a jury. The proceedings in this

case, 1935, were as follows: Defendant served notice that he

would move to vacate the judgment heretofore entered. This was

supported by affidavit setting forth the judgment entered on May

1935, and concluding with the assertion that: "Defendant, the

defendant, was present for him at the defendant was present when

the cause was called for trial; that he, the defendant, was not

present at the defendant, stipulated or agreed in open court

or otherwise that said cause be submitted to the court for trial

without a jury." Plaintiff filed a demurrer to this motion,

alleging that it was not sufficient in law, and also filed a

motion asking the court to correct the form of judgment entered

on May 18, 1935. Subsequently, on April 22, 1935, the

court entered an order under the name of the defendant, reversing

the form of judgment as above, instead of rendering that both

parties were present and agreed to a trial by the court, it reads:

"This cause being regularly removed for trial on the trial day

this first day of May, 1935, came to the attention of the court

by his attorney and the defendant comes not, and on motion of

plaintiff's attorney the cause is submitted to the court for

trial without a jury." The court also entered an order reversing

the demurrer to plaintiff's motion to vacate the judgment and

granting said motion.

It will be noted that the assignment of error is



7 under discussion does not refer, directly or indirectly, to the order of the court denying the motion to vacate the judgment. It refers only to the order entered nunc pro tunc correcting the form of the judgment. Moreover, the brief of the defendant questions only the judgment and not the rulings of the court on any subsequent motion.

We might add that in our opinion <sup>court</sup> the/ruled properly in denying the motion of defendant to vacate the judgment of May 18, 1928, and to reinstate the cause on the trial calendar. The only basis for the motion is that neither the lawyer nor the defendant was present when the case was called for trial. This fact was not sufficient to vacate the judgment. It appears both in the original order entered May 18, 1928, and in the order entered nunc pro tunc that the cause was regularly reached for trial on the trial call and there is no attempt to give any reason why the defendant did not appear.

It follows, therefore, that plaintiff's demurrer to defendant's amended replication must be sustained and the writ of error dismissed, and it is so ordered.

WRIT OF ERROR DISMISSED.

Matchett, P. J., and O'Connor, J., concur.



34519

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

vs.

JOSEPHINE WARREN, LILLIAN EAY  
DOUGLAS, HARRY GREGORY and  
VIVIAN MARTIN,  
Plaintiffs in Error.

ERROR TO CRIMINAL COURT  
OF COOK COUNTY.

259 I.A. 683

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants, charged with larceny, were found guilty by a jury which fixed the value of the stolen property at \$14.95. Judgment was entered upon the verdict and each defendant sentenced to imprisonment in the county jail for the term of one year and a fine of \$100. They seek a reversal.

As it is not claimed by defendants in their brief that the evidence was not sufficient to sustain the verdict, we shall only briefly summarize the facts.

On the morning of February 7, 1930, defendants drove in an automobile belonging to Lillian Eay Douglas and driven by Harry Gregory to Lande's store on Fifth avenue in Maywood, Illinois. The three women entered the store and defendant Lillian Eay Douglas inquired of a sales clerk as to a green lumber jacket she said she wished to purchase for her son. She was shown a number of jackets and of suits but she rejected them and after an interval left. In the meantime the other two women were approached by a sales clerk who inquired if they wished to be waited on and they replied that they were waiting for the defendant Douglas. Shortly thereafter the three women left the store. At about this time Louis Friedman, the manager of the store, was returning from his luncheon, about 11:45 a. m., and saw two women whom he afterwards identified as the defendants Josephine Warren and Vivian Martin, walk out of the store and one of the women had her arms full of unwrapped pink



34312

THE PEOPLE OF THE STATE OF ILLINOIS

Defendants in Error,

vs.

JOSPHINE WATSON, WILLIAM WATSON, ALBERT WATSON, and VIVIAN WATSON, Defendants in Error.

Plaintiffs in Error.

IN SENATE, JANUARY TWENTY-NINE, 1930.

Defendants, charged with larceny, were found guilty of a larceny which was committed on the estate property of J. J. Watson. The evidence was not sufficient to sustain the verdict, and the verdict was reversed. The case was remanded to the county jail for the term of one year and a fine of \$100. They were a reversal.

As it is not claimed by defendants in their brief that the evidence was not sufficient to sustain the verdict, we shall only briefly summarize the facts.

On the morning of February 7, 1930, defendants were in an automobile belonging to William Watson and driven by Harry Gregory to Landa's store on Fifth Avenue in Chicago, Illinois. The three women entered the store and defendant William Watson inspected of a sales clerk as to a green lumber jacket who said she asked for evidence for her son. She was shown a number of jackets and of suits but she rejected them and after an interval left. In the meantime the other two women were approached by a sales clerk who asked if they wished to be waited on and they replied that they were waiting for the defendant Douglas. Shortly thereafter the three women left the store. At about this time Louis Williams, the manager of the store, was returning from his lunchroom, about 11:45 a. m., and saw the women whom he afterwards identified as the defendants Josephine Watson and Vivian Watson, walk out of the store and one of the women had her arms full of merchandise.

rayon bloomers. He saw the two women get into a closed Chrysler automobile parked in front of the store and place the merchandise in the car. He entered the store and looked at the counter where the bloomers were kept and saw only a few of them; that before he had gone to lunch there were about six dozen bloomers on the counter. The police were notified and police officer Evans responded and he and Friedman in a police car followed the Chrysler car and signalled for it to stop. They looked into the Chrysler and found 13 dresses and 64 pairs of bloomers unwrapped on the floor of the car, partly covered with a blanket. The bloomers and dresses were taken to the police station and produced and identified on the trial as Lande's property. Defendant Douglas, who was<sup>not</sup> in the car at the time of this arrest, was arrested shortly thereafter and taken into Lande's store where she was identified as having been in the store with the two other women defendants. Defendant Gregroy disclaimed any knowledge of the stolen merchandise and testified that, while the car was standing in front of the store, he went to a neighboring drugstore for cigarettes and that the first time he noticed the goods was in the police station after he was arrested. Defendants Warren and Douglas testified in their own behalf and both denied knowing anything about the larceny. Defendant Martin did not testify.

The only points presented by defendants' brief relate to procedural errors upon the trial. It is first argued that the court erred in admitting incompetent evidence over defendants' objection and in refusing competent evidence offered by defendants. None of the particulars presented to support this point is important. Defendants' counsel asked one of the saleswomen whether there was anything unusual "about a lady coming in and looking around and not buying anything." Objection was sustained. We think the witness might have been permitted to answer, but in any event the



...blossoms. He saw the two women get into a closed Chrysler automobile parked in front of the store and place the flowers in the car. He entered the store and looked at the flowers where the blossoms were kept and saw only a few of them; that before he had gone to lunch there were about six dozen blossoms on the counter. The police were notified and police officer James Thompson and he and Wiedman in a police car followed the Chrysler car and signalled for it to stop. They looked into the Chrysler and found 13 dresses and 64 pairs of blossoms wrapped on the floor of the car, partly covered with a blanket. The blossoms and dresses were taken to the police station and produced and identified on the trial as Landa's property. Defendant Dargatzis, who was in the car at the time of this arrest, was arrested shortly thereafter and taken into Landa's store where she was identified as having been in the store with the two other women defendants. Defendant Dargatzis disclaimed any knowledge of the stolen merchandise and testified that, while the car was standing in front of the store, he went to a neighboring drugstore for cigarettes and that the first time he noticed the goods was in the police station after he was arrested. Defendants Warren and Dargatzis testified in their own behalf and both denied knowing anything about the flowers. Landa and Landa did not testify.

The only points presented by defendants' brief relate to procedural errors upon the trial. It is first urged that the court erred in admitting incompetent evidence over defendants' objection and in refusing competent evidence offered by defendants. None of the points presented to support this point is important. Defendants' counsel asked one of the witnesses whether there was anything unusual about a lady coming in and looking around and not buying anything. Objection was sustained. We think the witness might have been permitted to answer, but in any event the



substance of the question was of such common knowledge that it was more argumentative than an interrogation. There was no error in permitting a saleswoman to testify that she asked Josephine Warren and Vivian Martin whether they wished to be waited upon and they replied that they were waiting for the other lady. The court sustained an objection to this on behalf of Lillian May Douglas and told the jury to disregard it as to her. However, there is some evidence tending to show that Lillian May Douglas was present at the time. There was no error in this respect. The police officer testified that he started after the car in which defendants were riding as "it fitted the description that Mr. Friedman had given me." Objection to this was overruled. We attach no importance to this ruling. It is conceded that the police officer followed and stopped the car driven by the defendant Gregory. There was no error in the ruling on objections to the testimony of the police officer Evans that he had found a pair of black bloomers in the car that had been used and that Mrs. Douglas told him that she owned them. The officer was testifying as to what he found in the car. These are the type of alleged errors which should not work a reversal. The question is whether defendants had a fair trial and where conviction is based upon evidence establishing guilt beyond a reasonable doubt and if errors in rulings on evidence could not reasonably have affected the result, the judgment will be affirmed. The People v. Cardinelli, 297 Ill. 116; The People v. Murphy, 276 Ill. 304; The People v. Haensel, 293 Ill. 33; The People v. Miller, 278 Ill. 490; People v. Stavrakas, 335 Ill. 570; The People v. Moore, 334 Ill. 590; The People v. White, 338 Ill. 33.

Defendants' next point is that the State's Attorney was permitted to put leading and suggestive questions to witnesses. The general rule is that under certain circumstances such questions should not be allowed, but nothing of the sort appears in this

substance of the question was of such common knowledge that it was  
more appropriate to ask the witness. There was no error in  
permitting a witness to testify that she asked Josephine Warren  
and Vivian Martin whether they wished to be sworn upon and they  
replied that they were waiting for the other lady. The court  
sustained an objection to this on behalf of Lillian May Diggins and  
told the jury to disregard it as far as the law is concerned. There is some  
evidence tending to show that Lillian May Diggins was present at  
the time. There was no error in this respect. The police officers  
testified that he advised them that he was in with defendants were  
telling as "it fitted the investigation that Mr. Diggins had given  
me." Objection to this was sustained. We should be instructed in  
this matter. It is admitted that the police officers followed and  
stopped the car driven by the defendant's party. There was no error  
in the ruling on objection to the testimony of the police officers  
because that he had found a car of black color in the car lot  
had been used and that was. Diggins told him that was good thing.  
The officer was testifying as to what he found in the car. Those  
are the types of alleged errors which should not even be considered.  
The question is whether defendants had a fair trial and where com-  
petition is based upon evidence established earlier before a jury  
this doubt and if errors in rulings on evidence could be consid-  
ered have affected the result, the judgment will be affirmed. See  
People v. Martinelli, 207 Cal. 110; People v. Martinelli, 207 Cal. 111.  
204; The People v. Martinelli, 207 Cal. 111; The People v. Martinelli, 207  
Cal. 111; 100; People v. Martinelli, 207 Cal. 111; The People v. Martinelli, 207  
Cal. 111. 200; The People v. Martinelli, 207 Cal. 111.  
Defendants' case being in fact the State's attorney  
was permitted to put leading and suggestive questions to witnesses.  
The general rule is that under certain circumstances such questions  
should not be allowed, but nothing of the sort appears in this



record. The following are examples of alleged leading questions of which defendants complain: The witness Friedman was asked, "When you came back, did you see anyone leaving the store?" "Did you notice what kind of a car they got into?" And again, "Did you look at the bloomer counter? Answer: Yes, sir. Question: What did you find?" The police officer testifying concerning the dresses he took from the automobile was asked: "Did the dresses have any hangers?" And again: "Was Lillian May Douglas "one of the women found in the car?" And again: "Who identified this woman?" All of these questions are said to be leading and suggestive. We can not follow defendants' argument in this respect. Clearly, most, if not all of them, are neither. The general rule is that, unless there has been a palpable abuse of discretion in allowing leading questions, it will not be a ground for reversal. Maguire v. The People, 219 Ill. 16; The People v. Schladweiler, 315 Ill. 553. In this latter case the court said:

"Leading questions, to be incompetent, must refer to material matters and occur where no necessity for them appears. Whether or not such necessity exists is a matter resting largely in the discretion of the trial court."

See also 40 Cyc. pp. 2427-2429.

Defendants next assert error of the court in permitting police officer Evans to testify as to finding more dresses in the car than was alleged to have been stolen and that this had the effect of presenting evidence of other offenses. The indictment charges the larceny of 13 dresses and 64 pairs of bloomers. Friedman testified for The People that he found 13 dresses and 64 pairs of bloomers in defendants' car. Police officer Evans testified that he counted 64 or 65 pairs of bloomers and 13 dresses. The fact that Evans and Friedman did not agree in their count did not tend to prove defendants had been guilty of other offenses.

We know of no rule that forbids evidence of a theft



Page 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 8

"...the situation of the world today  
or not such necessity arises as a matter of course largely in  
matters and others which are usually the same in nature. These  
"binding relations" do not refer to material

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1944-1945

[illegible]

Since a 10 percent increase in the price of the product would result in a 10 percent increase in the price of the product, the price of the product is directly proportional to the price of the product.

of a larger number of articles than charged in the indictment, where the larger number does not affect the question whether the crime was petit or grand larceny. 36 C. J., p. 858; The People v. Greenberg, 222 Ill. App. 243; The People v. Dempsey, 283 Ill. 342. Defendants were charged with grand larceny but the jury fixed the value of the stolen goods as under \$15; therefore, proof of larger amount than the value charged in the indictment is immaterial. The People v. Jasicki, 301 Ill. 23. Cases cited by defendants are not in point. Applicable is the language in State v. Martin, 82 N. C. 672, sustaining a conviction for larceny, where the indictment charged larceny of 10 yards of jeans and the proof showed 30½ yards were stolen:

"This is so absurd that it looks like trifling with the court, and to cite an authority against the fallacy of the position would be attaching too much importance to the exception."

It is argued that by the improper conduct of the State's attorney upon the trial the jury was prejudiced against the defendants. Gregory was asked whether Lillian May Douglas had not lived under various other names. Defendants objected on the ground that such questions could not be asked on cross-examination. This objection was sustained. Defendant Douglas on cross-examination was asked whether or not she had any other name besides Douglas and Hartnett (the name of her first husband.) Objection to this was sustained. There followed a colloquy between the court and respective counsel upon this ruling, the State's attorney insisting that he had a right to get the history of the witness and the defendants' attorney insisting that "the question was not raised on direct and he had no right to go into it on cross-examination," to which the State's attorney replied: "I certainly have a right to get this woman's history. She has been traveling under eight or nine different names." Defendants' attorney objected to this as "not proper cross-examination." Thereupon the State's attorney withdrew the







question. There was no objection made on the ground that the character of the question tended to degrade the defendant Douglas, nor any ruling requested for this reason; neither was the court asked to instruct the jury with reference to these questions. Defendants in this court do not cite any cases holding that the antecedents, past history and occupation of a defendant may not be inquired into in the prosecution of a criminal case. As a general proposition, witnesses may be cross-examined as to such matters so as to enable the jury to determine the weight to be given to their testimony. The People v. White, 251 Ill. 67; The People v. Halpin, 276 Ill. 363; The People v. Bond, 281 Ill. 490. Cross-examination intended solely to defame the character of a witness is improper. The People v. Brown, 254 Ill. 260. But, in general, a witness may be compelled to answer questions which throw light upon his credibility, although his reply may impute disgrace. Waters v. West Chicago Street R. R. Co., 101 Ill. App. 265; Walden v. Burch, 12 Ill. 374. It was already in evidence that the defendant Douglas had told the police officer that she was "a respectable married woman with a family." Under the circumstances we cannot say there was any prejudicial error in the conduct of the State's attorney in asking the above questions.

Complaint is made of the conduct of the State's attorney in referring to defendant Douglas as his "lady friend" in questions put to the witness Gregory. The court properly sustained objection to this and admonished counsel to call the parties by their proper names.

There were frequent and often foolish objections made by the attorneys for the defendants, and the retorts and insinuations which followed were often improper, but it does not follow that there should be a reversal. The People v. Spira, 264 Ill. 243; The People v. Weizman, 296 Ill. 156. Misconduct of a State's

question. There was no objection made on the ground that the character of the question tended to degrade the defendant's character, nor any ruling requested for this reason; neither was the court asked to instruct the jury with reference to these questions. Defendant in this case is not also any more entitled than the witnesses, past history and reputation of a defendant may not be admitted into the presentation of a criminal case. As a general proposition, witnesses may be cross-examined as to their conduct as to moral character, the jury to determine the weight to be given to their testimony. The People v. White, 281 Ill. 47; The People v. Harkin, 274 Ill. 385; The People v. Bond, 282 Ill. 490. Cross-examination is not only to test the character of a witness is improper. The People v. Brown, 281 Ill. 481. But, in general, a witness may be compelled to answer questions which bear upon his credibility, although his reply may incriminate himself. Watkins v. West, 200 Ill. 274. People v. E. E. Co., 101 Ill. 407; Watkins v. Brown, 281 Ill. 481. It was already in evidence that the defendant had been married and that the police officer had also been married with a responsible married woman with a family. - Hence the circumstances we cannot say there was any prejudicial error in the refusal of the State's attorney to make the above question.

Defendant in case of the witness of the State's attorney in reference to defendant's character as his "friend" in connection with the witness's testimony. The court properly sustained objection to this and sustained counsel's refusal to answer by their proper means.

There were several other similar objections made by the attorney for the defendant, which the court sustained and those which followed were overruled, but it does not follow that there should be a reversal. The People v. White, 281 Ill. 385; The People v. Brown, 281 Ill. 481. Defendant at a State's

Attorney upon a trial should require a reversal where by such conduct the rights of defendants were prejudiced and the jury improperly influenced. This did not occur here, for, although the jury might have found defendants guilty of grand larceny, it fixed the value of the stolen goods at less than \$18.

The record before us calls for the application of the rule stated in The People v. Stokes, 334 Ill. 200:

"This court has held in many cases that where it can be said from the record that the errors assigned could not reasonably have affected the result of the trial the judgment of the trial court should be affirmed, and that a judgment in such case should not be reversed and the cause remanded so that a better record may be made on another trial."

The People v. Heard, 305 Ill. 319; The People v. Lloyd, 304 Ill. 23.

Defendants do not in their brief question the propriety of the verdict upon the evidence presented. We cannot agree with the contention that the errors committed upon the trial require a reversal. The judgment is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.



attorney asked a third witness to testify about the same facts  
and the rights of the witness were protected and the jury im-  
properly instructed. This has not been done, and, although the  
jury might have found otherwise, it is clear that the  
the value of the witness is not less than that.

The record reflects an error in the application of the  
rule stated in People v. Smith, 100 Cal. 221, 222.

"This error was held to be reversible error in the case of  
from the record that the witness testified that he was present  
have attended the trial of the witness at the trial of the trial  
court should be affirmed, and a judgment to that effect  
should not be reversed and the case remanded to that effect  
should not be made an error of law."

The People v. Smith, 100 Cal. 221, 222; People v. Smith, 100 Cal. 221, 222.

Defendant is not in a position to make the necessary  
of the verdict and the witness testimony. The court should with  
the conviction and the error committed with the trial judge a  
reversal. The judgment is therefore affirmed.

ATTORNEY

Witness, E. J., and E. J., County.

34542

DANIEL O. McGUIRE,  
Appellant,

vs.

HERMAN GUMBINSKY et al.,  
Appellees.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 L.A. 883<sup>4</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed an amended bill seeking certain relief, to which general demurrers were filed by defendants. Upon hearing these were sustained and it was ordered that the bill be dismissed for want of equity. Complainant appeals.

Complainant's brief in this court so far ignores our Rule 19 as to justify the entry of an order striking the same. We cannot too often repeat that this rule was written for the purpose of guiding attorneys in writing briefs so that the reviewing court may readily understand the salient points to be considered and the issues to be decided. The present brief gives us very little assistance towards these ends. However, in order to save complainant the considerable expense of writing a new brief, we have examined the merits of complainant's bill sufficiently to arrive at a conclusion that the demurrers thereto were properly sustained.

We gather that on September 11, 1924, complainant purchased from J. S. Bache & Co., a New York Stock Exchange house, which hereafter we shall call Bache, certain shares of the capital stock of the Daniel Boone Woolen Mills, Inc. (hereafter called Woolen Mills). The bill seeks to rescind this purchase and to recover back the purchase price paid by complainant for such shares on the ground that such sales were in violation of the Securities Act of Illinois and also on account of alleged fraud in procuring complainant as a purchaser.

PAUL O. BOWMAN

44

ALMA BOWMAN

ON YOUR LETTER

MR. JAMES BOWMAN WILLIAMSON

Complaint filed on November 11, 1934, captioned  
 "Paul O. Bowman, Plaintiff vs. Alma Bowman, Defendant."  
 Upon hearing there was adjourned and it was ordered that the  
 bill be dismissed for want of equity. Complaint appears.  
 Defendant's bill on this date on the 14th day of  
 June is as to finally the order of the court setting the same.  
 We cannot let other people and this was written for the  
 purpose of getting attention in writing which we had the re-  
 sulting result may result, which we had the result to be  
 considered and the answer to be decided. The present bill given  
 us very little assistance towards these ends. However, in order  
 to have something and something to be written a few lines  
 we have examined the bill of defendant's bill and it is  
 true at a conclusion that the defendant's bill is  
 enclosed.

As stated in the caption of the bill, defendant

presented from J. M. Jones & Co., a New York State business house,  
 which hereafter we will call Jones, certain number of the capital  
 stock of the Daniel Boone Woolen Mills, Inc. (hereafter called  
 Woolen Mills). The bill says we received this business and we  
 received from the business after bill by complaint for same reason  
 on the ground that such sales were in violation of the Securities  
 Act of 1933 and also on account of alleged fraud in procuring  
 complaint as a shareholder.



The bill alleges that in 1919 defendant Herman Gumbinsky and others entered into a conspiracy to form a fraudulent corporation with a view of converting its funds and assets to their own personal use; that the Woolen Mills was organized pursuant to this conspiracy and at the same time there was another conspiracy between certain of its directors to exploit the company in such a manner as to deceive and mislead the public as to its financial worth and to induce the public to purchase its stock at excessive prices.

In 1922 and again in 1923 the capital stock of the Woolen Mills was increased and "pursuant to said conspiracy" the officers fraudulently and unlawfully caused the company to file with the Secretary of State of Illinois certain statements designed to comply with the Illinois Securities act so that its stock could be sold to the public. The bill alleges that this statement misrepresented the values and assets of the company. The Secretary of State permitted the statement to be filed and authorized the sale of stock to the public.

Later in 1922 the officers of the Woolen Mills caused its stock to be listed for trading on the Chicago Stock Exchange, and it is alleged that the statement submitted to the Stock Exchange to secure its listing "was false and fraudulent." In 1924 the shares of the company were listed for trading on the New York Stock Exchange, and it is alleged that the contents of this application for listing "were false and fraudulent."

In April, 1924, Bache sent a form letter addressed generally to its customers, of which complainant received a copy. It contained no representations concerning the stock but said that "in view of the company's efficient management and bright outlook, we believe its stock merits consideration of the discriminating investor." The letter enclosed a circular sent out by the Woolen Mills containing pictures of its various plants and a statement





that the stock was listed on the Chicago and New York Exchanges. Subsequently complainant purchased 200 shares of this stock from Bache and the bill alleges that thereafter complainant received many communications from Bache advising him to buy more stock and representing that it was of great value and the company financially sound and would return handsome profits upon money that might be invested. Complainant alleges that on September 11, 1924, relying upon these representations, he purchased 1,000 shares of the stock from Bache; that in October or November, 1924, the company found itself in financial difficulties and later became insolvent. There is no showing that the company was insolvent at the time complainant purchased his stock. An audit of the company's books as of December 31, 1924, prepared by certified public accountants, shows that at the end of 1924 the company had a balance of assets over liabilities amounting to over \$2,000,000.

The bill alleges that the sale was in violation and contravention of the "Blue Sky Laws of the State of Illinois," and that by reason thereof complainant was entitled to the return of the consideration by him paid, together with reasonable attorneys' fees.

Defendants reply that at the time of complainant's purchase the stock in question was listed on the Chicago and New York Stock Exchanges and that by section 4 of the Securities Act it is provided that such securities shall be designated as Class "A" securities and that "securities in Class 'A' and the sale thereof shall not be subject to the provisions of this Act." In Stewart v. Brady, 300 Ill. 425, it was held that the Securities Act was designed only to prevent fraud in the sale of those securities which by reason of their inherent character are peculiarly liable to be the subject of fraudulent transactions; that listed securities which have an established and ascertainable value from day to day



that the stock was listed on the Chicago and New York Exchange.  
Subsequently to the purchase of the stock from  
Harris and the Hill Group, the defendant received  
many communications from Harris advising him to buy more stock and  
representing that it was of great value and the company financially  
sound and would return handsome profits upon money that might be  
invested. Defendant alleged that on September 11, 1934, he  
upon these representations, he purchased 1,000 shares of the  
stock from Harris; that in October or November, 1934, the company  
took issue in fractional shares and later became insolvent.  
There is no showing that the company was insolvent at the time com-  
plaint purchased his stock. An audit of the company's books on  
of December 31, 1934, prepared by certified public accountants,  
shows that at the end of 1934 the company had a balance of assets  
over liabilities amounting to over \$1,000,000.  
The Hill Group had the sale in violation and  
contravention of the "Blue Sky Law of the State of Illinois," and  
that by reason thereof defendant was entitled to the return of  
the consideration by him paid, together with reasonable attorney's  
fees.  
Defendant says that at the time of complaint's  
purchase the stock in question was listed on the Chicago and New  
York Stock Exchanges and that by section 4 of the Securities Act  
it is provided that such securities shall be designated as "blue  
sky" securities and that "securities in blue sky" and the sale  
thereof shall not be subject to the provisions of this act." It  
HARRIS V. HILL, 300 Ill. 447, it was held that the securities in  
was designed only to prevent fraud in the sale of these securities  
which by reason of their inherent character are essentially liable  
to be the subject of fraudulent transactions; that listed securities  
which have an established and ascertainable value from day to day

are not of this character; and that with respect to such listed securities it is the policy of the act to provide complete freedom of commerce without statutory regulation. The opinion says that the legislature had the right to take notice of the manner in which stock exchanges conduct their business of dealing in securities and that it recognized "the evil of the ephemeral security and the evanescent salesman but did not regard securities listed and dealt in on the exchanges as subject to that evil."

Complainant, however, argues that the Securities Act was violated because the stock was listed as the result of fraud practiced upon the New York and Chicago Stock Exchanges. This contention cannot prevail for the reason that there are no sufficient allegations of fraud said to have been practiced upon the Exchanges. No particulars are given. The allegations are merely conclusions of law and not allegations of fact. It has been repeatedly held that general allegations of fraud and conspiracy unsupported by specific allegations of fact are not admitted by demurrer. Doose v. Doose, 300 Ill. 134; Felt v. U. S. Mortgage & Trust Co., 231 Ill. App. 110; Wetherell v. Johnson, 203 Ill. 247.

Furthermore, there is no allegation that the defendant Bache was in any way connected with the alleged fraud said to be practiced upon the Exchanges. We are also unable to follow complainant in his argument that, if the securities in question were listed in the New York and Chicago Stock Exchanges through fraudulent representations, their sale violates the Securities Act. The better reasoning would seem to be that it is for the exchanges to guard themselves against fraud and to take corrective measures to prevent it. Doubtless such securities which are listed as a result of fraud may be stricken from the exchanges when the fraud is discovered, but while such securities are listed and traded in upon the New York and Chicago Exchanges their sale is not subject to





the provisions of the act.

Neither does the bill state any cause of action upon the general allegations of fraud as to the defendants General Fiber Company, Harry, Herman, and Nathan Gumbinsky. There were no contractual relations between them and the complainant at any time. As set forth in the bill, they were total strangers to each other and defendants never had any dealings with complainant and, so far as appears from the bill, had no knowledge that complainant had purchased any of the stock of the Woolen Mills from defendant Bache.

Neither is there any cause of action based on fraud stated against Bache, a broker dealing generally in listed securities. The first printed circular sent out in April which called complainant's attention to the stock of the Woolen Mills contained merely the suggestion that Bache believed the stock "merits consideration of the discriminating investor." So far as the bill shows, at the time complainant bought his stock, which was on September 11, 1924, the Woolen Mills was solvent. It was not until October that it found itself in financial difficulties and in November new officers were elected. Subsequently - the bill does not allege when - the company became insolvent. But complainant argues that the representations by Bache in the early part of November, 1924, that the stock was of great value and that the company was financially sound and returned handsome profits, were fraudulent representations upon which complainant relied. If the stock was listed, as it was, on the New York and Chicago Exchanges, its sales value was known to the public and the expression that its stock was of great value could have deceived no one. As to the representation that the company was sound and would return profits on money invested, this might be said to be merely an expression of opinion, but there is no showing that Bache knew that such representations were untrue. In order to

the provisions of the act.

Belmont also was told that any amount of action upon

the General allegations of fraud as to the defendant General

Robert Company, Harry, Newman, and Robert Newman. There were no

contractual relations between them and the complainant at any time.

As set forth in the bill, there were total strangers to each other

and defendant never had any relation with complainant and, as the

an appears from the bill, had no knowledge that complainant had

purchased any of the stock of the Robert Bill from defendant Robert.

Belmont is aware of action based on fraud

related against Robert, a broker dealing generally in listed securi-

ties. The first written complaint was set in forth which related

complainant's attention to the stock of the Robert Bill contained

merely the suggestion that Robert believed the stock "was a con-

sideration of the dissatisfying investment." So the on the bill

shows, as the first complaint brought his action, which was on

September 11, 1934, the Robert Bill was solvent. It was not

until October 1934 is found that in financial difficulties and

in November new efforts were directed. Subsequently - the bill

does not allege when - the company became insolvent. But com-

plainant argues that the representations by Robert in the early

part of November, 1934, that the stock was of great value and that

the company was financially sound and retained handsome profits,

were fraudulent representations when the company failed.

If the stock was listed, as it was, on the New York and Chicago

Exchanges, the sales price was known to the public and the ex-

pression that its stock was of great value could have deceived no

one. As to the representations that the company was sound and

would return profits on money invested, that might be said to be

merely an expression of opinion, and there is no ground for

Robert knew that such representations were untrue. In order to



show fraud the bill must allege not only that Bache made representations which were false but that it knew them to be false at the time they were made.

With reference to defendants General Fiber Company and the Gumbinskys, officers of the Woollen Mills, who it is alleged issued the fraudulent circular containing so-called misrepresentations of fact, it is doubtful whether complainant, who bought no stock from these defendants, can recover from them even though they may have issued a false prospectus. We only mention this point without deciding it. There is no allegation in the bill that Bache was a party to any representations made in this circular. The general weakness of complainant's allegations of fraud on the part of any and all of the defendants is that the allegations are general, amounting merely to conclusions of law.

The bill sets forth at length that in November, 1924, a contract was entered into between the Woollen Mills and the Gumbinsky brothers to settle their disputes and that arbitrators were selected and a settlement had and that such settlement was by collusion. These facts all took place after complainant bought his stock and after the cause of action, if any, had accrued. They have no relevancy to the cause of action asserted in the bill.

A final and sufficient answer to complainant's position is that he has been guilty of laches which bar his action, which is also barred by the statute of five year limitation.

(Chap. 83, para. 16, Illinois Statutes.) Complainant purchased his shares of stock in September, 1924. The amended bill, which is before us, was filed in March, 1930, more than five years after the purchase of the stock. The record is entirely silent as to the date of the filing of the original bill. We cannot presume that it was filed prior to the running of the statute. Neither can we presume that it stated a good cause of action. An amended





bill filed after the statute has run and stating for the first time a good cause of action is barred. Becker v. Billings, 304 Ill. 190. Section 39 of the Practice act, amended 1929, provides that an amended bill shall relate back to the filing of the original bill, if it shall appear that the cause of action asserted in the amended bill is "substantially the same" as that asserted in the original bill; but in the absence of the original bill we cannot say that the two causes of action were substantially the same; hence this amendment of Section 39 does not avail.

Complainant contends that the Statute of Limitations does not apply in equity cases, but it is a well known rule that equity follows the law and actions barred at law by the statute are deemed in equity to be barred by laches, except where a bill alleges fraud which was not discovered until the statutory bar was complete. This exception does not apply here. The stock was purchased in 1924. Within a short time thereafter the corporation issuing the stock went into a receivership. Complainant must then have known of the alleged fraud inducing him to purchase. There is no allegation that he did not know or discover the fraud until a later period. He did not act until more than five years had gone by and therefore must be held to be guilty of laches. As a general rule, an action in equity to rescind a contract for fraud must be commenced promptly after the discovery of the fraud, or else the remedy in equity will be barred and the injured party will be left to his legal remedy. Jorgason v. Hook, 234 Ill. 631; Crymes v. Sanders, 93 U. S. 55; Huiller v. Ryan, 306 Ill. 88; Hansen v. Gavin, 280 Ill. 354. The demurrers asserted, among other things, that the Statute of Limitations had run. Schoknecht v. Prassas, 320 Ill. 423.

For the reasons indicated we hold that the orders sustaining the demurrers were proper, and the decree dismissing the bill for want of equity is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.



Bill filed after the statute has run and stating the time  
time a good cause of action is barred. Johnson v. Williams, 206 Ill.  
100. Section 25 of the Practice Act, amended 1935, provides that  
an amended bill shall relate back to the filing of the original  
bill. It is shall appear that the cause of action asserted in the  
amended bill is "substantially the same" as that asserted in the  
original bill; but in the absence of the original bill we cannot  
say that the two causes of action were substantially the same;  
hence this amendment of Section 25 does not avail.  
Complaint contends that the statute of limitations  
does not apply in equity cases, but it is a well known rule that  
equity follows the law and actions barred at law by the statute  
are barred in equity as to parties by statute. Complaint states a bill  
alleges facts which was not discovered until the statutory bar was  
complete. This exception does not apply here. The claim was dis-  
covered in 1934. While a bill filed thereafter for enforcement  
insuing the stock went into a receivership. Complaint must then  
have known of the alleged fraud inducing him to purchase. There  
is no allegation that he did not know or discover the fraud until  
a later period. He did not act until more than five years had  
gone by and therefore must be held to be guilty of laches. As a  
general rule, an action in equity to rescind a contract for fraud  
must be commenced promptly after the discovery of the fraud, or  
else the remedy in equity will be barred and the injured party  
will be left to his legal remedy. Johnson v. Bush, 206 Ill. 421;  
Green v. Green, 23 W. 2. 52; Wright v. Ryan, 206 Ill. 52;  
Harmon v. Green, 230 Ill. 356. The doctrine asserted, among  
other things, that the statute of limitations had run. Johnson  
- but the court indicated we hold that the statute was not  
barred the claim was proper, and the statute limiting the bill  
for want of equity is affirmed.



34572

JOZEFA WROBLEWSKI,  
Appellee,

vs.

STANISLAW WROBLEWSKI,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 663<sup>5</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order denying the prayer of his petition to vacate a prior order providing for the payment of \$7.50 a week for the support of a minor child.

November 21, 1927, complainant filed her bill for divorce. Decree was entered June 13, 1928, awarding custody of the two minor children to the complainant and reciting that a property settlement had been made which complainant accepted in full for alimony, solicitors' fees and support of the children. February 4, 1929, on hearing an order was entered requiring defendant to pay \$7.50 a week for the support of Marian Wroblewski, one of the minor children. Defendant did not appeal from this order. More than a year thereafter, in May, 1930, defendant filed the instant petition asking that the court vacate the order of February 4, 1929. Complainant filed an answer and after hearing and taking of evidence the court refused to vacate the order.

Defendant in this court argues principally as to the propriety of the order of February 4, 1929, which required defendant to pay \$7.50 a week for the support of the minor. As this order was not appealed from, its merits are not before us. However, it should be mentioned that a father is not relieved of his obligation to support a minor child by a decree for divorce, although it may provide for a gross sum in lieu of alimony and support of the children. Minor children of divorced parents are wards of the court, which will not permit the children's rights to be impaired

STATE OF NEW YORK

vs.

CHARLES W. BROWN

Defendant.

IN SENATE

January 1, 1925

35314 603

REPORT OF THE COMMISSIONER OF THE LAND OFFICE

This is an appeal by the defendant from an order made by the court of his petition to vacate a prior order made for the payment of \$7.50 a week for the support of a minor child.

On November 11, 1924, defendant filed his petition for an order, whereupon was entered June 13, 1925, an order whereby of the two child included in the complaint was required to pay a stipend of \$7.50 a week for the support of the minor child named in the complaint. Defendant has been making payments in full for the same, and defendant's tax and support of the child, January 6, 1925, on holding an order was entered requiring defendant to pay \$7.50 a week for the support of William Brown, son of the minor child. Defendant has not moved from this order. He has a year's arrears, in fact, but defendant filed the return petition asking that the court vacate the order of February 4, 1925. Defendant filed an answer and after hearing and taking of evidence the court refused to vacate the order.

Defendant in his brief argues principally as to the propriety of the order of February 4, 1925, which required defendant to pay \$7.50 a week for the support of the minor. In his brief he has not requested that the order be set aside, but he has asked that a return be made to the defendant, although it may be argued that a return is a matter for the court, although it may provide for a gross sum in lieu of alimony and support of the child. When called on to answer defendant's return he has answered that, which will not permit the defendant's claim to be vacated.



by a bargain between the parents or by decree of court. Kelly v. Kelly, 317 Ill. 104; Para. 19, chap. 40, Divorce, Illinois Revised Statutes, Cahill. It was also so held in Panther Creek Mines v. Industrial Commission, 296 Ill. 565; Hilliard v. Anderson, 197 Ill. 549; Fresstate v. Fresstate, 244 Ill. App. 166; Mohenadel v. Steele, 237 Ill. 229.

The decisive question is whether the evidence upon the issue made in the petition filed in May, 1930, was sufficient to show that there had been a change in defendant's income, earning capacity or health since the entry of the order of February 4, 1929. As was said in Cole v. Cole, 142 Ill. 19, it was not intended that the court could subsequently alter an order upon the same state of facts existing at the time the order was entered and that the application for change in the amount of the award must be founded upon new facts which have occurred since the decree was originally made, and in the absence of such new facts the original decree is deemed to be res adjudicata between the parties. See also Pribyl v. Pribyl, 250 Ill. App. 349; Helkelkia v. Bonzinski, 223 Ill. App. 30. We do not think there was a sufficient showing made to have justified the chancellor in changing the order of February 4, 1929.

There was no showing as to what defendant's income was at the time this order was entered nor to what extent it had decreased since that time. He testified that he had been out of work for several months, that he has no money and is too weak to work; that he has been sick for the last four years, which would cover the time when the prior order was entered, so that there is obviously no change in his physical condition in the interim. There is no showing as to what effect his lack of employment has upon his income. His testimony gives no facts upon which a reasonable conclusion could be based that there had been a change in his



by a bargain between the parties as by decree of court. Id.  
Id., 217 Ill. 104; 1904, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The decisive question is whether the evidence upon  
the facts made in the petition filed in May, 1920, was sufficient  
to show that there had been a change in defendant's income, earning  
capacity or assets since the entry of the order of February 4,  
1920. As was said in Id., 142 Ill. 10, it was not intended  
that the court should automatically enter an order upon the mere  
state of facts existing at the time the order was entered and that  
the petitioner for change in the amount of the order shall be  
bound upon the facts which were entered since the change was  
originally made, and in the absence of facts new facts the original  
decree is deemed to be the controlling factor in the petition. See  
Id., 142 Ill. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

There was no showing as to what defendant's income was  
at the time this order was entered nor to what extent it had de-  
creased since that time. It is true that he had been out of work  
for several months, that he had no money and he was unable to work;  
that he had been sick for the last four years, which would cover  
the time when the order was entered, so that there is obviously  
no change in his financial condition in the interim. There is no  
showing as to what extent his loss of employment has upon his  
income. His testimony gives no facts upon which a reasonable  
conclusion could be reached that there had been a change in his

condition. The only change in the conditions is that the other child, Stanley, had not been working for four months prior to the hearing and was living with complainant, who testified it took about \$15 a week to support him. Complainant testified that she is working and earns \$18 a week. She also testified that the boy Marian is going to a private school and has been going there for the last year and a half and that it takes about \$10 a week with schooling to provide for him. Defendant's counsel criticises severely the expense of sending the boy to a private school, but this alone would not justify a change in the amount of the award allowed for his support, especially in view of the fact that evidently he was going to a private school at the time the order of February 4, 1929, was entered.

It is well settled that where a chancellor hears and sees all the witnesses his decree will not be reversed unless it clearly appears that the evidence manifestly preponderates in favor of the defeated party.

The order is affirmed.

AFFIRMED.

Watchett, P. J., and O'Connor, J., concur.

competition. The only reason in the evidence is that the other  
child, Elizabeth, had not been working for some months prior to the  
hearing and was living with her mother, who testified it took  
about 15 a week to support her. Complaints testified that she is

working and earns 15 a week. She also testified that the boy  
Marion is going to a private school and has been going there for  
the last year and a half and that he has about 15 a week with  
nothing he receives for his. Defendant's counsel stipulated  
severely the amount of money he pays to a private school, but  
this alone would not justify a finding in the amount of the money  
allowed for his support, especially in view of the fact that he  
himself he was living as a married man at the time the check of  
February 1, 1935, was returned.

It is well settled that with a presumption against him  
and all the evidence the jury will not be reversed unless it  
clearly appears that the evidence manifestly preponderates in  
favor of the accused party.

The crime is affirmed.

Affirmed.

Reaffirmed, 5. 11, and 12, 1935.



34582

JAMES MCGINNIS

Appellee,

vs.

CARLOS AMES, ARCHIBALD J. CAREY  
and EDWARD J. DENEMARK, as Civil  
Service Commissioners of the  
City of Chicago,  
Appellants.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 664

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

By this appeal the respondents seek the reversal of an order quashing the record of the Civil Service Commission of the City of Chicago finding the petitioner, James McGinnis, guilty of certain charges and ordering that he be discharged from the Police Department of the City of Chicago. The petitioner does not appear in this court to defend the order of the Circuit court, which found that the Civil Service Commission was without jurisdiction to order the discharge.

Petitioner was a patrolman in the Police Department of the City of Chicago. On February 16, 1922, he was notified that charges had been made against him of (1) intoxication, (2) conduct unbecoming a police officer, (3) willful maltreatment of any person, and the unlawful use of any weapon. The charges specified that on the evening of February 15, 1922, petitioner pulled a revolver and intimidated the driver of a Yellow taxicab and fired a shot at him, and that on the same evening he intercepted one John Roach, a fireman, drawing his revolver and commanding Roach to enter the taxicab; that he ordered Roach out again and threatened him by firing two shots and further threatened him by taking Roach to a patrol box, saying, "I will put a hole through you," and that he did this while under the influence of liquor. The record shows that upon the hearing of these charges the petitioner was present and represented by an attorney and pleaded not guilty.

3-13-35

JAMES HARRIS

VS.

CAROL ANN, ARRESTED BY CHIEF  
and HENRY J. HARRIS, as CIVIL  
Service Commission of the  
City of Chicago,  
Chicago, Ill.

353 I.A. 684

MR. JUSTICE ROBERT H. JACKSON AND OTHERS OF THE COURT.

By this appeal the respondents seek the reversal of an order denying the writ of the writ of habeas corpus of the City of Chicago. The respondents, James Harris, et al., claim certain charges and ordering that he be discharged from the Police Department of the City of Chicago. The respondents have not shown in this court in support of the writ of habeas corpus, which would entitle the respondents to the writ of habeas corpus, which would entitle the respondents to the writ of habeas corpus.

Petitioner was a policeman in the Police Department of the City of Chicago. On February 12, 1932, he was notified that charges had been made against him of (1) intoxication, (2) can- had unbecoming a police officer, (3) willful neglect of any person, and the unlawful use of any weapon. The charges specified that on the evening of February 12, 1932, petitioner pulled a re- volver and intimidated the driver of a Yellow taxi and fired a shot at him, and that on the same evening he intoxicated one John Hesch, a fireman, drawing his revolver and commanding Hesch to enter the building, that he ordered Hesch and again and threatened him by firing two shots and further threatened him by firing Hesch to a patrol box, saying, "I will put a hole through you," and that he did while under the influence of liquor. The respondents have not shown the denial of these charges. The respondents were present and represented by an attorney and appeared and testified.



The record also shows that evidence was heard and such evidence was material and relevant. Petitioner also testified in his own behalf and admitted that he was under the influence of liquor and had no recollection of the occurrences to which the complaining witnesses testified. Thereupon there was a finding by the commission that the petitioner was guilty of intoxication and it was ordered that he be discharged from the Police Department.

We are at a loss to understand the basis of the finding of the Circuit court that the Commission was without jurisdiction to enter this order. The record shows all the necessary legal steps under Section 12 of the Civil Service act, including the charges and specifications, proof of service, appearance of the accused with counsel, the evidence in the case and the finding that he was guilty. The Commission's record should recite the facts themselves upon which its jurisdiction depends. It is only where the jurisdictional facts do not appear of record that the Circuit court would be justified in quashing the record for want of jurisdiction in the Commission. Funkhouser v. Coffin, 301 Ill. 257; People ex rel. Holland v. Finn, 247 Ill. App. 53; Troxell v. Dick, 216 Ill. 98; and many other cases.

The petitioner was guilty of laches. He was discharged May 11, 1927, but did not file his petition for writ of certiorari until June 7, 1930, over three years thereafter. People v. Burdette, 295 Ill. 43. It has been repeatedly held that, where one is discharged by the Civil Service Commission and delays more than six months before filing his petition of certiorari, he is guilty of laches which bars his right to have the writ issue. People ex rel. Holland v. Finn, 247 Ill. App. 53, and cases there cited.

The judgment of the Circuit court of Cook county



The report also shows that evidence was heard and taken into account was material and relevant. The defendant also testified in his own behalf and admitted that he was under the influence of liquor and had no recollection of the events in which he was participating. The witness testified that the defendant was a drunkard by the name of [redacted] and that the defendant was guilty of intoxication and it was ordered that he be discharged from the Police Department.

On the 1st day of [redacted] the Court of the District of Columbia held a hearing on the motion of the defendant to set aside the verdict and judgment of the jury. The Court held that the defendant was not entitled to a new trial under Section 15 of the Civil Service Act, because the charges and specifications, proof of receipt, appearance of the accused with counsel, the evidence in the case and the finding that he was guilty. The Commission's report should advise the facts as set forth when the defendant depends. It is only where the defendant fails to meet a point of record that the Court would be justified in quashing the report for want of jurisdiction in the Commission. United States v. [redacted], 211 U.S. 107; People ex rel. [redacted] v. [redacted], 247 Ill. App. 52; People v. [redacted], 212 Ill. 42; and many other cases.

The defendant was guilty of [redacted]. He was discharged May 11, 1927, but did not file his petition for writ of habeas corpus until June 7, 1928, over three years thereafter. People v. [redacted], 222 Ill. 41. It has been repeatedly held that, where one is discharged by the Civil Service Commission and delays more than six months before filing his petition of habeas corpus, he is guilty of laches which bars his right to have the writ issue. People ex rel. [redacted] v. [redacted], 247 Ill. App. 52, and cases there cited.

The judgment of the District Court of Cook County

quashing the record of the Civil Service Commission is reversed  
and the writ of certiorari is quashed and the petition dismissed.

JUDGMENT REVERSED AND WRIT  
OF CERTIORARI IS QUASHED  
AND PETITION DISMISSED.

Katchett, P. J., and O'Connor, J., concur.

During the recent of the Civil Service Commission is revised  
and the will of editorial is changed and the position changed.

THE CHAIRMAN AND THE  
OF THE COMMISSION IS CHANGED  
THE POSITION CHANGED.

Washington, D. C., and Baltimore, Md., January 1, 1900.



34657

LEONARD A. SHADEBURN,  
Appellant.

vs.

ELIZABETH M. SHADEBURN,  
Appellee.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 684<sup>2</sup>

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

By this appeal complainant seeks the reversal of an order finding him guilty of contempt and committing him to jail for failure to pay alimony as ordered by the court.

Only a praecipe record is before us, but we gather that a decree of divorce was entered and the amount of alimony fixed. April 4, 1930, defendant and cross-complainant filed a petition representing that complainant had failed to pay the alimony and asking that he be adjudged in contempt of court for such failure. An order was entered that he appear and show cause why he should not be adjudged in contempt. April 29th an order was entered finding there was \$750 alimony due and unpaid and complainant was adjudged guilty of contempt and a writ of attachment was issued, directing that he be brought into court. Subsequently, on June 14th, complainant having been brought before the court, it was ordered that he furnish a bond to secure his appearance, which bond was furnished and approved. Further hearings were had and the final order, from which this appeal was taken, was entered, July 22, 1930, at which time the court found there was due and unpaid \$820 back alimony and that complainant had wholly failed to pay the same and was guilty of wilful contempt and it was therefore ordered that he be taken into custody by the sheriff and committed to jail for a period not to exceed six months unless he shall sooner purge himself of contempt by paying the amount of alimony due.

The gist of complainant's brief in this court is based

21827

LEONARD A. SHAWMUR,  
Appellant.

vs.

ALICE M. SHAWMUR,  
Appellee.

IN RE: ALICE M. SHAWMUR, THE CHILD OF THE COURT.

By this appeal appellant seeks the reversal of an order finding him guilty of contempt and committing him to jail for failure to pay alimony as ordered by the court.

Only a precise record is before us, but we gather that a decree of divorce was entered and the amount of alimony fixed. April 4, 1930, defendant and cross-complainant filed a petition representing that complainant had failed to pay the alimony and asking that he be adjudged in contempt of court for such failure. An order was entered that he appear and show cause why he should not be adjudged in contempt. April 20th an order was entered finding there was \$750 alimony due and unpaid and complainant was adjudged guilty of contempt and a writ of attachment was issued, directing that he be brought into court. Subsequently, on June 14th, complainant having been brought before the court, it was ordered that he furnish a bond to secure his appearance, which bond was furnished and approved. Further hearings were had and the final order, from which this appeal was taken, was entered, July 22, 1930, at which time the court found there was due and unpaid \$250 back alimony and that complainant had wholly failed to pay the same and was guilty of willful contempt and it was therefore ordered that he be taken into custody by the sheriff and committed to jail for a period not to exceed six months unless he shall sooner purge himself of contempt by paying the amount of alimony due.

The first of complainant's prior in this court is based



upon the assertion that no testimony was taken and that if testimony had been taken upon the hearing it would have shown that complainant's debts far exceeded his assets. The record not only shows that complainant was present in open court, represented by counsel, and filed his answer to the petition, but also that he presented evidence in support of his answer and the court also heard evidence and arguments of counsel on behalf of each and both of the parties. In view of this recital in the record, we fail to understand the assertion many times repeated in complainant's brief, that no evidence was heard.

The showing that complainant had failed to comply with the decree directing payment of alimony is prima facie evidence of contempt and complainant had the burden of satisfying the court that his failure to pay was entirely due to his inability. Shaffner v. Shaffner, 212 Ill. 492; Hengen v. Hengen, 271 Ill. 278.

As the order recites that the court heard evidence and the record contains no bill of exceptions showing what the evidence was, it will be presumed that the evidence supported the order. Poppers v. Poppers, 117 Ill. App. 498; The People ex rel. Jeske v. Burke, 247 Ill. App. 320; The People v. Elbert, 217 Ill. App. 394.

There is no merit in the assertion that there is a variance between the allegations of the petition and the amount found due in the order. The amount due at the time of the entry of the order, which was some months subsequent to the filing of the petition, had naturally increased in the meantime, so that it was proper for the court in the order to find the amount then due.

We find no reversible error in the proceedings and the order and judgment are affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.



upon the assertion that no testimony was taken and that it had been taken upon the hearing it would have shown that complainant's debts far exceeded his assets. The record not only shows that complainant was present in open court, represented by counsel, and filed his answer to the petition, but also that he presented evidence in support of his answer and the court also heard evidence and arguments of counsel on behalf of each and both of the parties. In view of this record in the record, we fail to understand the assertion many times repeated in complainant's brief, that no evidence was heard.

The showing that complainant had failed to comply with the decree directing payment of alimony is prima facie evidence of contempt and complainant had the burden of establishing the same. His failure to pay was entirely due to his inability. Shelton v. Shelton, 215 Ill. 482; Shelton v. Shelton, 215 Ill. 485. As the order recites that the court heard evidence and the record contains no bill of exceptions showing what the evidence was, it will be presumed that the evidence supported the order. Shelton v. Shelton, 215 Ill. 482; Shelton v. Shelton, 215 Ill. 485. There is no merit in the assertion that there is a variance between the allegations of the petition and the amount found due in the order. The amount due at the time of the entry of the order, which was some months subsequent to the filing of the petition, had naturally increased in the meantime, so that it was proper for the court in the order to find the amount then due.

We find no reversible error in the proceedings and the order and judgment are affirmed.

ATTORNEYS.

34672

W. H. BARDER & COMPANY,  
a Corporation,  
Appellee,  
vs.

JOHN WILLIS, Trading as Jurgelionis  
& Willis, and JOHN JURGELIONIS,  
Defendants.

JOHN WILLIS,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 664<sup>3</sup>

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by John Willis against whom, upon trial by the jury, plaintiff had a verdict and judgment for \$175 in an action claiming damages for breach of a contract to purchase a certain quantity of linseed oil from plaintiff. Plaintiff does not appear in this court to defend the judgment.

The suit was originally commenced against John Willis trading as Jurgelionis & Willis, and subsequently John Jurgelionis was made a party defendant and an amended statement of claim filed, which is indetical with the original statement of claim except that the word "defendants" appears instead of the singular "defendant." Jurgelionis was never served with summons and did not appear.

The contract was in writing and calls for the sale by plaintiff of 25 drums of approximately 50 gallons each of linseed oil. It is dated December 2, 1925, and purports to be accepted by "Jurgelionis & Willis by John Jurgelionis."

For at least two reasons this judgment cannot stand. Defendant Willis testified that John Jurgelionis, who signed the contract, was not his partner when the contract was signed and had not been a partner since October, 1925, and that he had no authority to sign the contract so as to bind Willis. In section 35, chap. 106a, Partnerships, it is provided that after dissolution a partner may not bind the partnership except where the third party "had ex-



24675

W. A. LARSEN & COMPANY,  
a Corporation,  
Appellants,  
vs.

JOHN WILLIS, Trading as Jurgelionis  
& Willis, and JOHN JURGELIONIS,  
Defendants.

JOHN WILLIS,

Appellant.

259 I.A. 074

MR. JUSTICE MCKENNEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by John Willis against whom, upon

trial by the jury, plaintiff had a verdict and judgment for five

in an action claiming damages for breach of a contract to purchase

a certain quantity of dressed oil from plaintiff. Plaintiff does

not appear in this court to defend the judgment.

The suit was originally commenced against John Willis

trading as Jurgelionis & Willis, and subsequently John Jurgelionis

was made a party defendant and an amended statement of claim filed,

which is identical with the original statement of claim except that

the word "defendant" appears instead of the original "defendants."

Jurgelionis was never served with summons and did not appear.

The contract was in writing and calls for the sale by

plaintiff of 25 drums of approximately 50 gallons each of dressed

oil. It is dated December 2, 1928, and purports to be executed

by "Jurgelionis & Willis by John Jurgelionis."

But at least two persons this judgment cannot stand.

Defendant Willis testified that John Jurgelionis, who signed the

contract, was not his partner when the contract was signed and had

not been a partner since October, 1928, and that he had no authority

to sign the contract so as to bind Willis. In section 25, chap.

102A, R.S.B.C., it is provided that after dissolution a partner

may not bind the partnership except where the said party "had ex-



tended credit to the partnership prior to the dissolution and had no knowledge or notice of the dissolution." The record fails to show that plaintiff had extended credit to Jurgelionis & Willis, a partnership, prior to the dissolution of the partnership.

The price of the oil given in the contract is "ninety-seven cents per 7 $\frac{1}{2}$  Gallon." This figures approximately thirteen cents a gallon. Witnesses, whose qualifications as experts were doubtful, testified for plaintiff that at the time of the alleged breach of contract the market price was eighty-three cents a gallon. It follows that there would be no resulting damage to the plaintiff if the goods were not taken. Apparently, the price named in the contract is incorrect and probably was intended to be ninety-seven cents a gallon. To show this, however, would require some explanation. Contracts must be enforced as written, where the language is plain and unequivocal, even though the parties may have failed to express their real intention. Clark v. Mallory, 185 Ill. 227. If a mistake is made in an essential matter by one of the parties in a written contract, there has been no mutual assent to its terms and consequently it is non-existent. Steinmeyer v. Schroepnel, 226 Ill. 9; Schaefer v. Menze, 337 Ill. 41.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

tended credit to the partnership prior to the dissolution and had no knowledge or notice of the dissolution." The record fails to show that plaintiff had extensive credit in Louisiana & Mississippi, or to the dissolution of the partnership. The price of the oil given in the contract is "ninety-seven cents per 7 1/2 gallon." This figure approximately fifteen cents a gallon. Witnesses, whose qualifications as experts were doubtful, testified that plaintiff sold at the time of the alleged breach of contract the market price was slightly more than a gallon. It follows that there would be no credit to the plaintiff if the goods were not taken. Generally, the price named in the contract is incorrect and probably was intended to be ninety-seven cents a gallon. It was said, however, would require some explanation. Contracts must be enforced as written, where the language is plain and unambiguous, even though the parties may have failed to express their true intention. Gibbs v. Railway, 188 Ill. 237. If a mistake is made in an essential matter by one of the parties in a written contract, there has been no mutual assent to the terms and consequently it is non-existent. Winters v. Winters, 188 Ill. 3; Winters v. Winters, 188 Ill. 3. For the reasons indicated the judgment is reversed and the case remanded.

REVEREND AND HONORABLE

Witness: J. L. and J. L., court.

34744

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

vs.

FRANK J. NEENING,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 664<sup>4</sup>

MR. JUSTICE McSHEELY DELIVERED THE OPINION OF THE COURT.

Defendant, charged with carrying on or about his person a concealed weapon, in violation of the statute (chapter 38, paragraph 155, Smith-Murd), upon trial by the court was found guilty and fined \$100. By this writ of error a reversal is sought.

A few days prior to the primary election of April, 1930, in Chicago, defendant was distributing a political pamphlet called "Lightning" in aid of one of the candidates for ward committeeman. Several boys, to whom defendant had given the paper for distribution, reported to him that a Mr. Wachholtz had forcibly taken the papers from them. Defendant went with the boys and, finding Wachholtz with the copies of <sup>the</sup> paper in his possession, took them away from him. An altercation arose and police officers arrived on the scene. Defendant was arrested and charged with assault with a deadly weapon and also with carrying a concealed weapon. Both cases were tried by the court, which found defendant not guilty of the charge of assault but found him guilty on the other charge.

It is first contended that the court erred in allowing the pistol to be admitted in evidence, citing The People v. Castree, 311 Ill. 392. In that case it was held that a search warrant describing only one room in a building did not authorize search of the rest of the building. This case is not in point. The pistol would be incompetent as evidence only if it was taken by the officer in violation of section 6 of article 2 of the State constitution,



THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

vs.

FRANK J. KELLY,  
Plaintiff in Error.

EX. JUDITH ROBERTS KELLY, THE SISTER OF THE DEFT.

Defendant, charged with carrying on or about the car-

bon a concealed weapon, in violation of the statute (chapter 12,

paragraph 122, Section 122), upon trial by the court was found

guilty and fined \$100. He has since served a term in prison in 1934.

A few days prior to the primary election of 1934,

1934, in Chicago, defendant was distributing a political pamphlet

entitled "Alliance" in aid of one of the candidates for ward com-

missioner. Several papers, in some defendant had given the name

for distribution, presented to him that a St. Valentine had been

given him by the St. Valentine. Defendant was with the papers and

presented them to the St. Valentine. In his possession,

one of the papers from the St. Valentine was and police officers

arrived on the scene. Defendant was arrested and charged with re-

ceiving with a deadly weapon and with carrying a concealed

weapon. Both cases were tried by the court, which found defendant

not guilty of the charge of receiving but found him guilty on the

other charge.

It is first contended that the court acted in allowing

the right to be admitted in evidence, citing The People v. Kelly.

311 Ill. 208. In that case it was held that a person without dis-

cussing only one room in a building did not authorize search of the

rest of the building. This case is not in point. The stated would

be incompetent as evidence only if it was taken by the officer in

violation of section 2 of article 2 of the State constitution,

which secures to every person the right against unreasonable seizures. In North v. The People, 139 Ill. 81, it was held that the offense of carrying a concealed weapon is a continuous one and that it is necessary under such circumstances for an officer to arrest the offender at once and without delay to prevent apprehended dangerous consequences and the "guaranty of the constitution in regard to search warrants applies only to cases where the purpose of obtaining the warrant is to make a search for goods. It has no application to arrests for particular offenses consisting wholly or in part in having particular property in possession, nor to the seizure of dangerous weapons in the possession of the party arrested. In such cases the right of seizure is incidental to the right to arrest." Recognizing this rule are: The People v. Nord, 329 Ill. 117; The People v. Swift, 319 Ill. 359; The People v. Caruso, 339 Ill. 258. In this last case the court said: "It is the well settled rule in this State that where an arrest is made by an officer who has reasonable ground for believing that the person arrested is implicated in the commission of a crime such officer has a right to arrest without a warrant and to search the arrested person without a search warrant." Here, defendant was arrested at the instance of Wachholtz and charged with an assault with a deadly weapon, and incidental to that arrest the officer found the pistol in question.

It is next contended that the judgment of the court is the result of passion and prejudice and it is argued that defendant is a law-abiding citizen and had no intention to violate the spirit of the statute, which, it is said, the legislature intended to apply only to those persons who were on mischief bent and likely to perpetrate crimes of violence. The statute makes certain exemptions, such as officers engaged in the discharge of their official duties, but no exemptions are permitted any other class. It was evidently







the legislative intention absolutely to prohibit the carrying of concealed weapons on or about the person regardless of the purpose for which they were carried, except as to those classes of persons specifically exempted by statute.

It is next said that the guilt of defendant was not proved beyond a reasonable doubt, and it is argued that the evidence failed to show that the pistol was in defendant's possession. An officer testified for the People that he found a pistol fully loaded with six shells in a pocket on the front door at the left-hand side of the automobile alongside the driver; that this pocket was about 9 inches deep and 8 inches wide and extended about 3 or 4 inches beyond the seat, the pocket being in a position about opposite the knee of defendant; that there was no flap on the pocket; that there were gloves alongside the pistol and papers on top of it; that he could not see the pistol until he opened the door of the car and looked inside the pocket. Another officer testified the pistol was in the pocket alongside the seat of the driver; that the top of the pocket was elastic.

It is stated several times by defendant's counsel that there is no evidence that the pistol was in the possession of defendant or that defendant was driving the automobile. We think the evidence is to the contrary. Officer Dyer testified he found the pistol in the possession of the defendant; that he "found the gun alongside him in the pocket of the car," and that the pocket with the pistol in it would be "about opposite the knee of the defendant." Defendant testified in his own behalf and made no denial of ownership of the automobile or of the pistol, but described the position of the pocket in which the pistol was found much as the officers had described it. We think it was sufficiently proven that the pistol was within reach of the defendant as he sat in the automobile and easily available by simply reaching his hand



in the pocket. In The People v. Kismoth, 322 Ill. 51, cited by defendant, it was held that guns lying on the floor of the automobile behind the driver's seat, where they could not be reached by the accused, were not concealed on or about his person, but the decision in this case also held that the legislature intended to prohibit carrying<sup>a</sup>/concealed weapon "on or about the person, in a place so accessible as to allow its immediate use as a deadly weapon when wanted." The evidence abundantly justifies the conclusion that the place of concealment of the pistol in question comes within this description as readily accessible.

Defendant's counsel seems to have admitted on the trial that his client was guilty and suggested to the court that a smaller fine would satisfy the requirements of the law. We think the fine of \$100 was large, considering the record of the defendant as a law-abiding citizen who had never been in such trouble before. However, as there is no reversible error in the record, the judgment must be affirmed.

AFFIRMED.

Katchett, P. J., and O'Connor, J., concur.





34284

IDA SLAVIK, EMMA DICUS, BERTHA  
E. DICUS, Complainants, and  
JOHN B. DICUS, Administrator  
of the Estate of Henry Scherer,  
Deceased,

Appellants,

vs.

CENTRAL TRUST COMPANY OF  
ILLINOIS et al.,

Defendants  
and Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 665'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The Central Trust Company of Illinois, a corporation, filed its petition for the allowance of executor's and attorney's fees. Objections were filed and the matter was referred to a master in chancery who took the evidence and made up his report. The report was approved by the chancellor and a decree entered. By the decree the executor was allowed \$7,500 for its services and \$6,000 for its attorneys' fees.

Complaint is made to the allowance of these two items by the heirs and administrator of the estate of Henry Scherer, deceased, and they further contend that the decree entered should have charged The Central Trust Company with interest at the rate of six per cent per annum on the funds which came to its hands while acting as executor, and that The Central Trust Company should also be charged "with waste, and the reasonable rental" of a certain piece of real estate belonging to the estate.

The record discloses that on March 3, 1925, Henry Scherer executed his last will and testament, and that he died on October 28, 1925. The will was admitted to probate by the Probate court of Cook county on December 29, 1925. The Central Trust Company was named as executor and upon the probating of the will entered into the performance of its duty administering the estate.





The deceased left him surviving three married daughters and an incompetent son. In May, 1926, the three daughters filed a bill to construe the will. Considerable evidence was taken in that suit, but it was never determined apparently for the reason that on December 29, 1926, the daughters filed a bill to set aside the will on the ground that their father lacked testamentary capacity. In May, 1927, the administration of the estate was transferred from the Probate to the Superior court of Cook county. The suit attacking the will was heard November 21, 1928, and there was a verdict and a decree finding the will invalid.

The Central Trust Company administered the estate for about three and one-half years, viz., from the date of the probating of the will until it was declared invalid. The value of the personal estate at the time of Scherer's death was more than \$162,000 and in 1928, when the will contest was disposed of, it was valued at more than \$296,000. At the time of the hearing in the instant matter it had a value of more than \$249,000. The recommendation of the master that the Trust Company be allowed \$7,500 for its services as executor was the minimum amount shown by the evidence for the services rendered in administering the estate. Nothing was allowed it for the services rendered in defending the suit to construe the will or the suit to contest the will, in both of which the executor appeared with counsel. Counsel for the executor were allowed \$6,000 for services rendered in probating the estate, in defending the suit of the construction of the will and in defending the will contest.

There is no contention that the allowance to the executor or to its attorneys was more than the services rendered were reasonably worth, but the contention is, as we understand it, that neither the executor nor its attorneys ought to be paid out of the estate because "The Trust Company is in the position of

The deceased left his surviving three married daughters and an incompetent son. In May, 1936, the three daughters filed a bill to contest the will. Competent evidence was taken in that case, but it was never determined apparently for the reason that on December 22, 1937, the daughters filed a bill to set aside the will on the ground that their father lacked testamentary capacity. In May, 1937, the administration of the estate was transferred from the probate to the Superior Court of Cook County. The said bill setting the will was heard November 21, 1938, and there was a verdict and a decree finding the will invalid.

The Central Trust Company administered the estate for about three and one-half years, viz., from the date of the probate of the will until it was declared invalid. The value of the personal estate at the time of father's death was more than \$100,000 and in 1933, when the will contest was brought on, it was valued at more than \$200,000. At the time of the hearing in the instant matter it had a value of more than \$200,000. The recommendation of the master that the Trust Company be allowed \$1,000 for its services as executor was the minimum amount shown by the evidence for the services rendered in administering the estate. Nothing was allowed to the executor because it is believed the will is invalid and the services rendered in following the will to contest the will or the suit to contest the will, in both of which the executor appeared with counsel. Counsel for the executor were allowed \$5,000 for services rendered in following the estate, in defending the suit of the contestation of the will and in defending the will contest.

There is no objection that the allowance be made executor or to his attorney was more than the services rendered were reasonably worth, and the limitation is, as we understand it, that neither the executor nor his attorney shall be paid out of the estate because "The Trust Company is in the position of



having defended its own interests." The argument in support of this contention is that the purported will of Henry Scherer, deceased, was drawn by an attorney who caused Henry Scherer to name the Trust Company as the executor and trustee of the will, and that the attorney knew that he would be retained to handle the estate. There is no merit in this contention. The evidence shows that Henry Scherer was a stockholder of The Central Trust Company and carried an account with the bank; that he was acquainted with some of the officers of the bank; that he went to his attorney, who had been representing him for some two years, and directed that a will be drawn; that this was done; and The Trust Company was named in the will as executor and trustee at Scherer's request.

All of the evidence shows that the Trust Company competently performed its duties as executor of the estate; that it defended the two suits brought, and having acted in good faith it was entitled to receive reasonable compensation for the services rendered, and that it was also the executor's duty to be represented by counsel and that counsel should be paid. This is the settled law of this state. Godfrey v. Phillips, 209 Ill. 584; Butler v. Hecock, 160 Ill. App. 501; Ingraham v. Ingraham, 169 Ill. 432; In re Estate Crumbaker, 217 Ill. App. 411.

A further point is made by the objectors that under the terms of the will The Central Trust Company, as trustee, was given title to a piece of real estate belonging to Henry Scherer, and that it was the trustee's duty to take charge of it upon the death of Scherer, and not having done so it should be charged with waste and the reasonable rental value of the premises. It seems that the property was a vacant house to which some of the objectors had the key; that the objectors who had the key refused to turn it over to The Trust Company. The master found that The Trust Company was kept out of possession by the objectors. We



having deleted its own interests." The argument in support of  
this contention is that the purported will of Henry Scherer, de-  
ceased, was drawn by an attorney who caused Henry Scherer to sign  
the Trust Company as the executor and trustee of the will, and  
that the attorney knew that he would be retained in connection with  
the estate. There is no merit in this contention. The evidence shows  
that Henry Scherer was a stockholder of the General Trust Company  
and carried an account with the bank; that he was acquainted with  
some of the officers of the bank; that he went to his attorney,  
who had been representing him for some two years, and discussed  
that a will be drawn; that this was done; and the Trust Company  
was named in the will as executor and trustee of Scherer's personal  
estate. All of this evidence shows that the Trust Company conge-  
nially petitioned the court as executor of the estate; that it in-  
tended the two wills brought, and moving asked in good faith to  
be admitted to receive personal administration for the estate  
deceased, and that it was also the executor's duty to be re-  
sented by counsel and that counsel should be paid. This is the  
settled law of this state. Roberts v. Phillips, 200 Ill. 144;  
Miller v. Smith, 188 Ill. 401; Lawrence v. Lawrence, 188  
Ill. 422; in re Estate of Scherer, 217 Ill. 404, 405.

A further point is made by the respondent that what  
the terms of the will The General Trust Company, as trustee, was  
given title to a share of real estate belonging to Henry Scherer,  
and that it was the trustee's duty to take charge of it upon the  
death of Scherer, and not having done so it should be removed  
with waste and the reasonable rental value of the premises. It  
seems that the property was a vacant house in which some of the  
officers of the bank; that the respondent was not very reliable  
to have it over to the Trust Company. The answer shows that the  
Trust Company was not out of possession by the respondent, to

see no reason for disturbing this finding of the master, which was approved by the chancellor. We think the finding was warranted by the evidence and certain it is that we could not say such finding is manifestly against the weight of the evidence. The Trust Company having been kept out of the premises through the fault of the objectors, they will not now be heard to complain that the property was not rented.

A further contention is made that The Central Trust Company as executor should not be permitted to use trust funds in its banking business and issue certificates of deposit bearing interest at three per cent per annum and account for interest at only three per cent per annum; that it should be charged with interest at six per cent per annum. The evidence is to the effect that when moneys belonging to the estate were received they were deposited in The Central Trust Company bank and certificates of deposit were issued which bore interest at three per cent, and it appears to be the contention of the objectors that the money should have been loaned out at six per cent, and that the trustee sought not be permitted in a court of equity to make money out of the estate. Of course a trust company or bank will not be permitted to make six per cent on the money belonging to an estate and pay but three per cent to the beneficiaries; but the record does not disclose that this was the situation in the matter before us.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

see no reason for dissenting this finding of the master, which was approved by the Chancellor. We think the finding was warranted by the evidence and certain it is that we could not say much more. It is manifestly against the weight of the evidence. The Trust Company having been kept out of the premises through the fault of the executor, they will not now be heard to complain that the property was not rented.

A further contention is made that the Central Trust Company as executor should not be permitted to use trust funds in its general business and issue certificates of deposit bearing interest at three per cent per annum and account for interest at only three per cent per annum; that it should be charged with interest at six per cent per annum. The evidence is to the effect that when money belonging to the estate was received they were deposited in the Central Trust Company bank and certificates of deposit were issued which bore interest at three per cent, and it appears to be the contention of the executor that the money should have been loaned out at six per cent, and that the trustee ought not be permitted in a court of equity to make money out of the estate. Of course a trust company or bank will not be permitted to make six per cent on the money belonging to an estate and pay out three per cent to the beneficiaries; but the record does not disclose that this was the situation in the matter before us. The issue of the proper rate of such money is affirmed.

ATTEST.

Witness, E. J. ... and Secretary, E. J. ...



34304

JOHN M. JOHNSON,  
Appellee,

vs.

M. MONTELONGO,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 665<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against the defendant to recover possession of a radio. The radio was taken on the writ by the bailiff and delivered to the plaintiff. On the trial of the case before a jury, at the close of all the evidence the court directed a verdict for the plaintiff. The verdict was that the plaintiff was entitled to possession of the property and plaintiff's damages for its detention were assessed at one cent. To reverse this judgment defendant appeals.

Counsel for the defendant say in their brief that it is error for the court to direct a verdict for the plaintiff "if there is any evidence upon which, considered in its most favorable light to the defendant, the jury could reasonably find a verdict for him." This is not the law. It is more favorable to the defendant than he states. The law is that upon a motion for a directed verdict, if there is any evidence in the record which, standing alone, tends to prove the material allegations of the declaration, a motion of the defendant for a directed verdict should be denied; and obviously where there is any evidence in the record tending to show a defense, a motion to direct a verdict for the plaintiff should be denied even though the court is of the opinion that in denying the motion, a verdict if given for the defendant must be set aside. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

Upon a careful consideration of all the evidence in

W. A. ...  
...

vs.

W. ...  
...

...

Plaintiff brought an action of replevin against the defendant to recover possession of a radio. The radio was taken on the writ by the sheriff and delivered to the plaintiff. In the trial of the case before a jury, at the close of all the evidence the court directed a verdict for the plaintiff. The verdict was that the plaintiff was entitled to possession of the property and plaintiff's damages for its detention were assessed at one cent. To reverse this judgment defendant moved.

Ground for the defendant was in brief that it is error for the court to direct a verdict for the plaintiff if there is any evidence upon which, considered in its most favorable light to the defendant, the jury could reasonably find a verdict for him. This is not the law. It is more favorable to the defendant than he states. The law is that upon a motion for a directed verdict, if there is any evidence in the record which standing alone, tends to prove the material allegations of the declaration, a motion of the defendant for a directed verdict should be denied; and obviously where there is any evidence in the record tending to show a defense, a motion to direct a verdict for the plaintiff should be denied even though the court is of the opinion that in denying the motion, a verdict is given for the defendant must be set aside. Elphy, McNeill & Elphy v. Cook, 222 Ill. 306.

There is a careful consideration of all the evidence in



the record, we are clearly of the opinion that the court was in error in directing a verdict for the plaintiff. The case should have gone to the jury.

The evidence was to the effect that plaintiff was conducting a music store and that a man who went by the name of Devonshire had called at plaintiff's store and talked with plaintiff's manager, Harris, stating that he thought he could sell some radios which were carried in the stock in plaintiff's store. The evidence further is to the effect that it was understood between Devonshire and plaintiff that Devonshire might obtain purchasers for plaintiff's radios, for which he would be paid a commission of ten to twelve per cent. A few days after this understanding was reached, Devonshire, learning through an advertisement placed in the "Tribune" by the defendant that he was in the market for a radio, took the matter up with the defendant, told him he had a radio for sale, and took him to plaintiff's store. There was evidence tending to show that Devonshire talked to Harris, the manager of the store, in the presence of plaintiff and defendant, and as a result of this talk the radio in question was sent by plaintiff from his store and delivered to defendant in his home. A day or so thereafter defendant paid Devonshire \$118 for the radio and took a receipt or bill of sale which recited that defendant had paid \$475 for the radio.

The testimony of the defendant was that Devonshire said the radio belonged to him, that he was in financial difficulties and would sell it to defendant for the amount he, Devonshire, still owed on the radio, which was \$118.

The testimony of the plaintiff and of his manager, Harris, is not at all satisfactory, but in view of the fact that the case must be tried again, we refrain from discussing it in detail here. There was evidence offered on behalf of the plaintiff



the record, we are clearly of the opinion that the error was in error in disposing a verdict for the plaintiff. The case should have gone to the jury.

The evidence was to the effect that plaintiff was conducting a music store and that a man who went by the name of Defendant had called at plaintiff's store and talked with plaintiff's manager, stating that he thought he could sell some radios which were wanted in the stock in plaintiff's store. The evidence further is to the effect that it was understood between Defendant and plaintiff that Defendant would return to plaintiff for plaintiff's radios, but when he failed to call a statement of ten to twelve per cent. A few days after this understanding was reached, Defendant, leaving through an advertisement placed in the "Times" by the defendant that he was in the market for a radio, took the matter up with the defendant, told him he had a radio for sale, and took him to plaintiff's store. There was evidence tending to show that Defendant failed to return, the manager of the store, in the presence of plaintiff and defendant, and as a result of this fact the radio in question was sent by plaintiff through his agent and delivered to defendant in his car. A day or so thereafter defendant called Defendant and told him that he had sold the radio for \$45.00 and took a receipt of bill of sale which recited that defendant had paid for the radio.

The testimony of the defendant was that Defendant told the radio belonged to him, that he was in financial difficulties and would sell it to defendant for the amount he, Defendant, owed on the radio, which was \$115.00.

The testimony of the plaintiff and of his manager, Harris, is not at all satisfactory, but in view of the fact that the case must be tried again, we refrain from discussing it in detail here. There was evidence offered on behalf of the plaintiff

to the effect that the radio was delivered by plaintiff to the defendant the day before Thanksgiving and was to be paid for by the defendant, who was to call at plaintiff's store on the Saturday evening following. Defendant denied that there was anything said, when he was at plaintiff's store with Devonshire, about his calling to pay for the radio on Saturday evening.

The law is, as conceded by both parties, that the owner of property may so act as to clothe another with apparent authority to sell it so that the owner will be precluded from denying that there was a sale made without his authority. Moreover, the evidence is to the effect that plaintiff actually sold the radio to the defendant.

The case should have been submitted to the jury under proper instructions. The judgment of the Municipal court of Chicago is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

to the effect that the radio was delivered by plaintiff to the defendant the day before Thanksgiving and was to be paid for by the defendant, who was to call at plaintiff's store on the Saturday evening following. Defendant denied that there was anything said, when he was at plaintiff's store with plaintiff, about his calling to pay for the radio on Saturday evening. The law is, as conceded by both parties, that the owner of property may not sue to enforce another with authority to sell it so that the owner will be prejudiced from denying that there was a sale made without his authority. However, the evidence is to the effect that plaintiff actually sold the radio to the defendant.

The case should have been decided in the affirmative under proper instructions. The judgment of the trial court of Chicago is reversed and the case remanded for a new trial.

Reversed and remanded. 3, 1934.



34440

CHARLES J. CARLSTROME and GEORGE  
H. AUER, Doing Business as  
CARLSTROME AND AUER,

Appellees,

vs.

ALFRED B. GRUNDER,

Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 665<sup>3</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit against the defendant to recover \$1,000 claimed to be due for real estate broker's commission under the terms of a written agreement. There was a jury trial and a verdict and judgment in plaintiffs' favor for the amount of their claim, and defendant appeals.

The record discloses that plaintiffs were real estate brokers, and as such were endeavoring to sell a tract of land containing about 21 acres in Des Plaines, Illinois, belonging to Robert I. and Edwin J. Brown, and through plaintiffs' efforts there was a contract of sale entered into between the Browns and defendant, Albert B. Grunder, whereby the latter agreed to buy the property for \$86,100, the price to be \$4,100 per acre and the contract provided that "In the event that the property is more or less than twenty-one (21) acres, at the time of closing, the purchase price shall be increased or decreased according to the actual acreage, as shown on the surveys exhibited to the purchaser or such new surveys as shall be procured."

The contract contained the usual provisions for the examination of title, curing defects, etc. Three thousand dollars was paid as earnest money and \$17,000 more was to be paid within 60 days from the date the title was shown to be good. The evidence shows that the property was bought by the defendant for the purpose of subdividing and he caused a syndicate to be formed and sold certain interests in the real estate to members who joined

24440

ALBERT J. BROWN, Plaintiff,  
vs.  
ALBERT J. BROWN, Defendant.

Appeals.

10.

ALBERT J. BROWN, Plaintiff,

vs.  
ALBERT J. BROWN, Defendant.

ALBERT J. BROWN, Plaintiff,

vs.  
ALBERT J. BROWN, Defendant.

2591 A. 832

AL. J. BROWN, Plaintiff, vs. AL. J. BROWN, Defendant.

Plaintiff's motion was granted and the defendant is re-

covered \$1,000 claimed to be due for real estate broker's commission under the terms of a written agreement. There was a jury trial and a verdict and judgment in plaintiff's favor for the amount of \$1,000, plus interest and defendant appeals.

The record discloses that plaintiff's were real estate

brokers, and as such were endeavoring to sell a tract of land containing about 21 acres in Des Plaines, Illinois, belonging to Robert I. and Edwin A. Brown, and through plaintiff's efforts there was a contract of sale entered into between the Browns and defendant, Albert J. Brown, whereby the latter agreed to buy the property for \$24,100, the price to be \$4,100 per acre and the contract provided that "in the event that the property is more or less than twenty-one (21) acres, at the time of closing, the purchase price shall be increased or decreased according to the actual acreage, as shown on the survey exhibited to the purchaser or such new survey as shall be presented."

The contract contained the usual provisions for the examination of title, survey, etc. Three thousand dollars was paid as earnest money and \$17,000 more was to be paid within 60 days from the date the title was shown to be good. The evidence shows that the property was bought by the defendant for the purpose of speculation and he caused a syndicate to be formed and sold certain interests in the real estate to members who joined



the syndicate, upon payment of the price agreed upon. The money thus obtained was deposited with a bank and a plat of the property was prepared by which it was intended to subdivide it into lots. When the time came for payment by defendant of the \$17,000, it was not made and the deal fell through. The document on which plaintiffs place their claim is as follows:

"October 15th, 1926.

Messrs. Carlstrom & Auer,  
Chicago, Illinois.

Gentlemen: I hereby agree to pay you the sum of \$2250.00 as compensation for your services in the purchase of 21-acres in DesPlaines, Illinois, as evidenced by contract dated October 15th, 1926, between Alfred B. Grunder and Robert I. and Edwin J. Brown.

Said \$2250.00 is to be paid by delivery to you of a judgment note for this amount, to be made payable six months from date of delivery of deed, said note to bear interest at the rate of six per cent per annum payable at maturity.

In the event of my wilful default of the herein mentioned contract, I agree to pay you the sum of \$1000.00 six months from such default time; however, in the event that this contract is not consummated for any other reason than my wilful default, it is understood that there is to be no liability on my part to you.

Yours very truly,  
Alfred B. Grunder."

Plaintiffs' position was and is that the deal for the purchase of the real estate had not been consummated through the wilful default of the defendant in failing to pay the money as provided in his contract with the Browns, and plaintiffs' evidence is further to the effect that the failure was brought about through the inability of the defendant to raise the \$17,000.

The theory of the defendant was and is that he refused to go through with the purchase of the property because there were defects in the title which the Browns refused to remove. The Chicago Title and Trust Company rendered their written opinion of the title to which they specified two objections:

- "(8) Roads and highways.
- "(9) Grant, permitting the maintenance of electric light poles and wires along Rand Road in accordance with a document recorded in the recorder's office of Cook County."





On the trial these were the two objections that the defendant relied upon as his reason for not consummating the purchase. The 21 acres mentioned in the contract lay between Ballard Road on the northerly end and Rand Road and Dempster street on the southerly end.

Defendant offered evidence to the effect that he had made a re-survey of the property and that there was about 35/100 of an acre less than a survey submitted to him by the Browns and that the Browns were insisting that defendant pay for the property to the middle of Ballard Road on the north and to the middle of Rand Road on the south; that he refused to pay for this land which was in the two roads; and at the rate per acre mentioned in the contract the total of these three items made \$6,445.

The defendant gave testimony to the effect that when the parties had a meeting with a view of closing the deal he stated he would not pay \$6,445 because that was not warranted by the contract and that the Browns insisted it must be paid and that therefore defendant abandoned the contract. Plaintiff's produced a number of witnesses who were present at this meeting and who testified in substance that no question concerning the \$6,445 was mentioned by anyone; that no objection was made to the title and that the defendant stated he was unable to get the money and wanted further time, which the Browns refused to give unless a further cash payment was made.

The jury was instructed specifically on the theory of the two contentions. It found in favor of the plaintiffs and we think its finding is in accord with the greater weight of the evidence. Any other verdict on this question would have to be set aside.

The contract for the sale of the property specifically described the property as facing on Ballard and Rand roads; that



On the trial, there were two objections that the defendant relied upon as his reason for not communicating the purchase. The first was mentioned in the contract lay between Highland Road on the north and the second road and highway street on the south and.

Defendant offered evidence to the effect that he had made a re-survey of the property and that there was an area of 10/100 of an acre less than a survey submitted to him by the State and that the known were including that defendant pay for the property to the title of Highland Road on the north and to the title of Highland Road on the south; that he refused to pay for this land which was in the two roads; and as the title was mentioned in the contract the total of these three items made \$4,445.

The defendant gave testimony to the effect that when the parties had a meeting with a view of closing the deal he offered he would not pay \$4,445 because that was not warranted by the contract and that the known included it must be paid and that defendant abandoned the contract. Plaintiff produced a number of witnesses who were present at this meeting and who testified in substance that no mention concerning the \$4,445 was mentioned by anyone; that no objection was made to the title and that the defendant stated he was unable to get the money and wanted further time, when the money refused to give release a further sum of money was made.

The jury was instructed specifically on the theory of the two contentions. It found in favor of the plaintiff and we think the finding is in accord with the greater weight of the evidence. Any other verdict on this question would have to be set aside.

The contract for the sale of the property specifically described the property as being on Highland and Rand roads; that



provision is, "Approximately twenty-one (21) acres more or less in the town of Maine with frontages on Rand Road and Ballard Road." We think it obvious that the property the Browns was selling to the defendant and for which the defendant had agreed to pay, was the 21 acres more or less that bordered on the two roads. The evidence showed that electric light or other poles were constructed in the road and not on the property in question. In view of the contentions of both parties in this case, and of the evidence introduced, we are clear that neither of the two objections urged by the defendant was of any moment.

A careful consideration of all the evidence in the record, much of which we have not referred to, leads us to the conclusion that the failure of the defendant to purchase the real estate was not caused by the two objections made by him.

A great deal is said in the briefs as to whether the evidence warranted the finding that the default, if any, on the part of the defendant was "willful" and a great many authorities are cited defining this term. The jury was instructed and complaint is made of some of the instructions in this respect, but we think the jury would not be misled by any inaccuracy in any instruction; and we think it would serve no useful purpose to discuss the various meanings of the term "willful" because we believe it is obvious that if the deal fell through, as we have indicated above, it was on account of the willful default of defendant. He refused to carry out the deal for the reason that he was unable to do so or for some other reason of his own; but, as stated, we think it clear that he was wholly unwarranted in placing his refusal upon the objections to the title.

A great many documents are in the record and a great many more were offered and refused. Complaint is made to the admission and exclusion of evidence, but we are clearly of the

provision is, "Approximately twenty-one (21) acres more or less in the town of Maine with boundaries on Main Road and Belvidere Road." We think it obvious that the property the Brown was willing to pay, was the defendant and for which the defendant had agreed to pay, was the 21 acres more or less that bordered on the two roads. The evidence showed that electric light or other poles were constructed in the road and not on the property in question. In view of the conditions of both parties in this case, and of the evidence indicated, we are clear that neither of the two objections urged by the defendant was of any moment.

A careful consideration of all the evidence in the record, none of which we have not referred to, leads us to the conclusion that the failure of the defendant to introduce the real estate was not caused by the two objections made by him.

A great deal is said in the briefs as to whether the evidence warranted the finding that the estate, if any, on the part of the defendant was "willful" and a gross waste. The estate was also being sold. The fact was indicated and admitted in each of some of the instructions in this respect, but we think the jury would not be misled by any inconsistency in any instruction; and we think it would serve no useful purpose to discuss the various meanings of the term "willful" because we believe it is obvious that it has been said through, as we have indicated above, it was an account of the willful default of defendant. He refused to carry out the deal for the reason that he was unable to do so or for some other reason of his own; but, as stated, we think it clear that he was wholly unexcused in placing his refusal upon the objection to the sale.

A great many arguments are in the record and a great many more were offered and refused. Complaint is made in the admission and exclusion of evidence, but we are clearly of the

opinion that any error in this respect would not affect the result. We think the defendant was not prejudicially affected by the ruling of the court on the exclusion or admission of evidence nor in the instructions, and since the result reached was the only one, we think, that could be sustained, we do not stop to discuss the argument of counsel for the defendant in these respects.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.



opinion that any other in this respect would not affect the  
 said. We think the defendant was not prejudicially affected by  
 the ruling of the court on the exclusion of evidence at witness  
 not in the instruction, and also the result reached was the  
 only one, we think, that could be sustained, we do not stop to  
 discuss the argument of counsel for the defendant in favor  
 of the same.

The judgment of the Honorable court of Chicago is  
 affirmed.

WATSON.

Witness, W. J., and February, J. J. Watson.

34477

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

vs.

FRANK GORMAN,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 665<sup>y</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant, Frank Gorman, seeks to reverse a judgment of the Municipal court of Chicago finding him guilty of a wilful and malicious assault with a deadly weapon commonly called a pocket knife upon one Meyers. Defendant was sentenced to one year in the House of Correction.

The record discloses that on February 7, 1930, leave was given to file an information against Frank Gorman. The information was signed and sworn to by Billie Meyers and it charged that Billie Meyers had been assaulted by the defendant, Frank Gorman, on February 6, 1930, with a pocket knife. Upon filing the information it was ordered that the cause be transferred to the jury calendar and thereupon, being transferred, it was set for hearing February 18th. The trial began on February 18th and the order, as appears from the common law record, shows that the defendant pleaded not guilty, waived his right to a jury trial, and it is recited that the defendant was represented by counsel. The case was finished on the next day, February 19th, and the record again recites that the defendant appeared in person and was represented by counsel and that after the testimony was all heard the court found the defendant guilty as charged and the sentence as stated was imposed. The judgment order commanded that the bailiff take the defendant from the bar of the court to the House of Correction and the latter was to keep him for a period of one year.

THE PEOPLE OF THE STATE OF  
ILLINOIS,  
Defendant in Error,  
vs.  
BRAIN BOWMAN,  
Plaintiff in Error.

WRIT OF HABEAS CORPUS  
IN CHIEF.

MR. JUSTICE S. JOHNSON DELIVERED THE CHIEF OF THE COURT.

By this writ of error the defendant, Brain Bowman,

seeks to reverse a judgment of the municipal court of Chicago  
finding him guilty of a willful and malicious assault with a deadly  
weapon commonly called a pocket knife upon one Keyers. Defendant  
was sentenced to one year in the House of Correction.

The record discloses that on February 7, 1881, leave  
was given to file an information against Brain Bowman. The infor-  
mation was signed and sworn to by Willie Keyers and is charged that  
Willie Keyers had been assaulted by the defendant, Brain Bowman, on  
February 6, 1881, with a pocket knife. Upon filing the information  
it was ordered that the cause be translated to the July calendar  
and thereupon, being translated, it was not for hearing February  
18th. The trial began on February 18th and the other, as appears  
from the common law record, shows that the defendant pleaded not  
guilty, waived his right to a jury trial, and it is recited that  
the defendant was represented by counsel. The case was finished on  
the next day, February 18th, and the record again recites that the  
defendant appeared in person and was represented by counsel and that  
after the testimony was all heard the court found the defendant  
guilty as charged and the sentence as stated was imposed. The  
judgment order commanded that the bailiff take the defendant from  
the bar of the court to the House of Correction and the latter was  
to keep him for a period of one year.

253 L.A. 532



The next that appears in the record was the order of, March 17th, in which it is stated that the defendant, being represented by counsel and present in open court, moved for a new trial and in arrest of judgment, both of which motions were overruled. A stay bond was authorized in the sum of \$2500 pending a writ of certiorari to this court, and thirty days were allowed for the filing of the bill of exceptions, and the cause was continued for thirty days. The stay bond was filed and approved. Afterwards the bill of exceptions was filed and approved. It purports to recite in narrative form what was testified to by the six witnesses who appeared and testified in the cause on the trial. The trial Judge states in the bill of exceptions that "The defendant, Frank Gorman, was not represented by counsel at the hearing of said cause." And this finding must be taken to state the fact, although contrary to the recitation written by the clerk in the common law record.

Substantially, the only point made by the defendant is that the evidence fails to prove that he was guilty beyond a reasonable doubt. And after a careful consideration of all the evidence in the record, we are of the opinion that the contention must be sustained. The evidence as preserved in the bill of exceptions is very unsatisfactory.

The testimony of the complaining witness, Billie Meyers, was to the effect that when he returned to his room where he lived, about three or four o'clock in the morning of November 6th, he found the defendant, Frank Gorman, and Mamie Griffin in the room; that both had been drinking and were under the influence of liquor; that an argument started and that Gorman drew a knife and cut him "on the mouth;" that Meyers then went downstairs, apparently on flight, although we are not certain on this point, and testified that he then called the police; that the police did not arrive "until about two or three hours later;" that while the witness was

The next day appeared in the report was the other of March 1901, in which it is stated that the defendant, being present, was not represented by counsel and present in open court, moved for a writ of habeas corpus, and in arrest of judgment, both of which motions were overruled. A stay bond was authorized in the sum of \$2500 pending a writ of certiorari to this court, and thirty days were allowed for the filing of the bill of exceptions, and the same was continued for thirty days. The stay bond was filed and approved. The bill of exceptions was filed and approved. It purports to recite in narrative form what was testified to by the six witnesses who appeared and testified in the case on the trial. The trial judge stated in the bill of exceptions that "The defendant, Frank German, was not represented by counsel at the hearing of said motion." And this finding must be taken as true, although contrary to the recitation written by the clerk in the common law record. Substantially, the only point made by the defendant is that the evidence fails to prove that he was guilty beyond a reasonable doubt. And after a careful consideration of all the evidence in the record, we are of the opinion that the motion must be sustained. The evidence as presented in the bill of exceptions is very unsatisfactory. The testimony of the complaining witness, Willie Brown, was to the effect that when he returned to his room where he lived, about three or four o'clock in the morning of November 21st, he found the defendant, Frank German, and Willie Brown in the room; that both had been drinking and were under the influence of liquor; that an argument started and that German drew a knife and cut him "on the mouth"; that Brown then went downstairs, apparently to fight, although we are not certain on this point, and testified that he then called the police; that the police did not arrive until about two or three hours later; that while the witness was



standing in front of a restaurant, downstairs from where he lived, the defendant came down and pushed him through a window in the restaurant, breaking the glass.

A witness who was employed in the restaurant testified that there was a quarrel between defendant and Meyers, and that Meyers was pushed through a window in the restaurant; "that there was blood on the back stairway leading to the second floor." Whether this was the stairway down which Meyers is supposed to have walked after the assault, as he testified, the record is uncertain.

The defendant and Mamie Griffin gave testimony to the effect that they were standing on the street corner talking when Meyers appeared and called Gorman some vile name; that Gorman pushed Meyers away as he was approaching in a threatening attitude, and that Meyers "fell into the plate glass window" of the restaurant. There is nothing in the record as to whether the defendant or Mamie Griffin were asked if they had been in defendant's room. The two police officers who made the arrest, testified that they received a call and responded; that they found the defendant and Meyers at Ashland avenue and Madison street; that there was a plate glass window broken in the restaurant; that they put defendant and Meyers in the patrol wagon and that Mamie Griffin wanted to go along, which she did; that when they got to the station and got out of the patrol wagon Mamie Griffin told the officers she had been assaulted by Meyers with a knife while they were riding in the patrol wagon; that the woman was cut on the face at that time and was bleeding; that Mamie Griffin was cut by Billie Meyers and that when Meyers got into the patrol wagon he was not cut.

The evidence is so unsatisfactory and contradictory that we are unable to say that defendant was proven guilty beyond all reasonable doubt.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Hatchett, P.J., and McSurely, J., concur.



standing in front of a restaurant, communicating from where he lived, the defendant came down and passed him through a window in the restaurant, breaking the glass.

A witness who was employed in the restaurant testified that there was a quarrel between defendant and Meyer, and that Meyer was pushed through a window in the restaurant; that there was blood on the back staircase leading to the second floor. Whether this was the staircase down which Meyer is supposed to have walked after the assault, as he testified, the record is uncertain.

The defendant and Marie Galtin were testifying in the effect that they were standing on the street corner at the time Meyer appeared and called Galtin some vile name; that Galtin pushed Meyer away as he was attempting to enter the restaurant, and that Meyer "fell into the glass window" of the restaurant. There is nothing in the record as to whether the defendant or Marie Galtin were asked if they had been in defendant's room. The two police officers who made the arrest, testified that they received a call and responded; that they found the defendant and Meyer at Ashland avenue and Madison street; that there was a glass window broken in the restaurant; that they put defendant and Meyer in the patrol wagon and that Marie Galtin wanted to go along, which she did; that when they got to the station and got out of the patrol wagon Marie Galtin told the officers she had been assaulted by Meyer with a knife which she said which in the patrol wagon; that the woman was not on the floor at that time and was bleeding; that Marie Galtin was not by Marie Meyer and that when Meyer got into the patrol wagon he was not tall.

The evidence is so uncontradictory and contradictory that we are unable to say that defendant was proven guilty beyond all reasonable doubt. The judgment of the Municipal Court of Chicago is reversed and the case is remanded.

34510

THEODORE KINOWSKI,  
Defendant in Error,

vs.

BARBARA OSWALD et al.

NORTHCENTER FEDERAL FINANCE CO.,  
an Illinois Corporation,  
Plaintiff in Error.

ERROR TO CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 666'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the Northcenter Federal Finance Company, one of the defendants in a foreclosure suit, seeks to reverse a decree of foreclosure by which it was decreed that the Finance Company had a lien on the premises being foreclosed, subject to two prior mortgages. The contention of the Finance Company is that its lien should have been decreed to be inferior to only one of the mortgages.

The case was referred to the master who took the evidence, made up his report, and recommended a decree of foreclosure, and found that the Finance Company had a third lien on the premises. Objections were filed by the Finance Company and they were overruled by the master. The matter then came before the chancellor and a decree was entered confirming the master's report. No order was entered or suggestion made that the objections to the master's report stand as exceptions and indeed the objections filed are more in the nature of legal authorities cited than objections to the master's report. No exceptions having been filed on the coming in of the master's report, it is final as to all questions of fact, (Dagatur Coal Co. v. Clokey, 332 Ill. 253) so that in this view of the record the decree must be affirmed. But in any view of the case, there is no merit in the Finance Company's contentions.

The record discloses that on November 15, 1927, a trust

THEODORE ROOSEVELT  
PRESIDENT OF THE UNITED STATES

TO

HARRISON G. HARRIS

AMERICAN TRADING COMPANY  
OF CHICAGO, ILLINOIS  
INCORPORATED IN ILLINOIS

BY YOUR Obedient  
SERVANT

2551 A. 668

AN. THEODORE ROOSEVELT

By this record the undersigned Theodore Roosevelt  
 one of the defendants in a libel suit, made to reverse a de-  
 cre of the Supreme Court in which it was decided that the American  
 had a lien on the premises being libeled, subject to the same  
 mortgage. The decision of the Supreme Court in that case  
 would have been reversed if the majority had only one of the  
 cases was decided in the manner that the majority  
 decided, and to his credit, and recommended a decree of libel  
 and found that the American Company had a lien on the premises.  
 Objections were filed by the American Company and they were overruled  
 by the court. The court then made before the commission and a  
 decree was entered confirming the majority's report. In other  
 cases on application made from the defendant in the majority's re-  
 port and on application and in fact the objection filed was made in  
 the nature of legal objections and then objections to the majority's  
 report. In application made from filed on the basis of the  
 majority's report, it is found on all questions of fact. (REMARKS)  
Bill No. 10,000, 22d Ill. 22d as found in this case by the court  
 the decree was affirmed. But in any case of the case, there is  
 no merit in the American Company's contention.  
 The record shows that on November 11, 1917, a decree



deed securing an indebtedness of \$2300 was executed by the owner of the premises, the same being the trust deed to foreclose which the complainant filed in the instant suit. On January 7, 1928, the owner of the premises gave another trust deed to secure an indebtedness of \$3700, and on the same day the owner of the incumbrance secured by the first trust deed executed a document by which the first trust deed was subordinated to the lien of the second trust deed. This was not filed for record until July 28, 1928. On November 14, 1927, the mortgagor executed her note for \$1200 payable to Harry H. Wusterhausen, who had been theretofore employed by the mortgagor to make certain improvements on the premises. The note bore the endorsement, "This note is secured by a lien on the property located at 5000 Metropole Avenue, Chicago," which is the premises being foreclosed. At the same time the mortgagor executed a document in writing which has been designated a "Property Lien," which referred to the \$1200 note then executed and provided that the owner would not sell or transfer the property while any part of the \$1200 remained unpaid and it was provided that the \$1200 or any portion which remained unpaid should be a lien and charge upon the premises until paid. This document was acknowledged and filed for record on November 30, 1927. The day prior, which was November 29, 1927, Wusterhausen, the owner of the note and document above mentioned, executed an assignment of the "Property Lien" to the Finance Company and on August 21, 1928, the Finance Company caused judgment to be entered against the mortgagor for \$1135, being the balance remaining due on the note.

The evidence further shows that three days before the assignment was made <sup>by</sup> Wusterhausen to the Finance Company, namely, November 26, 1927, he, Wusterhausen, made and delivered to the mortgagor a waiver of all mechanic's liens he might have against

deed securing an indebtedness of \$2500 was executed by the owner  
 of the premises, the same being the first deed to be recorded  
 which the commitment filed in the public office, on January 7,  
 1938, the owner of the premises gave another deed to secure  
 an indebtedness of \$2500, and on the same day the owner of the  
 indebtedness secured by the first deed executed a document  
 by which the first deed was subordinated to the lien of the  
 second deed. This was not filed for record until July 28,  
 1938. On November 14, 1937, the mortgage executed but note for  
 \$1800 payable to Harry H. Waterhouse, who had been previously  
 employed by the mortgagee to make certain improvements on the  
 premises. The note bore the endorsement, "This note is secured  
 by a lien on the property located at 2800 West Chicago Avenue,  
 Chicago," which is the premises being foreclosed. At the same  
 time the mortgage executed a document in which it was stated  
 designated a "Property Lien," which referred to the \$1800 note  
 then executed and provided that the owner would not sell or  
 transfer the property while any part of the \$1800 remained unpaid  
 and it was provided that the title to any portion which remained  
 unpaid should be a lien and charge upon the premises until paid.  
 This document was acknowledged and filed for record on November  
 25, 1937. The day prior, which was November 24, 1937, Water-  
 house, the owner of the note and document above mentioned, exe-  
 cuted an assignment of the "Property Lien" to the Finance Company  
 and on August 11, 1937, the Finance Company caused payment to be  
 entered against the mortgage for \$1800, being the balance remaining  
 due on the note.

The following document was filed for record on November 25, 1937, and delivered to the  
 assignment was made by Waterhouse to the Finance Company, namely,  
 November 25, 1937, Mr. Waterhouse, made and delivered to the  
 mortgagee a power of attorney to sell the premises and to execute



the premises on account of any labor or material furnished the mortgagor in the improvement of the premises. And on the same day Wusterhausen made and delivered a contractor's affidavit to the mortgagor in which he swore that all bills for labor and material had been paid and discharged and that he made the affidavit for the purpose of procuring from a savings bank "on behalf of Barbara Oswald (the mortgagor) a final payment of Fifteen Hundred and no/100 Dollars (\$1500.00) upon said contract for said labor or material or both."

A great many points are made by the Finance Company, all of which we think are entirely without merit. One is that the decree is erroneous in that it fails to make findings of fact. This is unnecessary because the case was heard before the master and the evidence is in the record. This has been so long the law that we are unable to see why the point should be now made.

The evidence shows that the lien of Wusterhausen was waived before the second mortgage became a lien on the premises. The owner of the first mortgage had a right to agree with the owner of the second mortgage to have the first mortgage subordinated to the one that was secondly recorded. This in no way affected the rights of the Finance Company. The Finance Company was given a lien for the amount of the judgment in the Municipal court, and from what we have said it is obvious that this lien was inferior to the two mortgage liens.

There is no merit in this writ of error and the decree of the Circuit court of Cook county is affirmed.

**AFFIRMED.**

Matchett, P. J., and McSurely, J., concur.



The promise on account of any labor or material furnished the party-  
gator in the improvement of the premises. And on the same day the-  
contractor made and delivered a certificate of completion to the party-  
gator in which he swore that all bills for labor and material had  
been paid and discharged and that he made the affidavit for the  
purpose of procuring from a savings bank "on behalf of himself and  
wife (the contractor) a first payment of fifteen hundred and no/100  
Dollars (\$1500.00) upon said contract for said labor or material or  
cost."

A great many points are made by the Finance Company,  
all of which we think are entirely without merit. One is that the  
deed is erroneous in that it fails to state the date of sale.  
This is unnecessary because the date was stated before the deed was  
the evidence is in the record. This has been so long the law that  
we are unable to see why the point should be now made.

The evidence shows that the firm of Robertson and  
others before the second mortgage became a lien on the premises. The  
owner of the first mortgage had a right to agree with the owner of  
the second mortgage to have the first mortgage subordinated to the  
one that was secondly recorded. This in no way affected the rights  
of the Finance Company. The Finance Company was given a lien for  
the amount of the judgment in the municipal court, and then when we  
have said it is obvious that this lien was inferior to the two  
mortgage liens.

There is no merit in this writ of error and the decree  
of the Circuit Court of Cook County is affirmed.

Attest:  
Notary Public for Cook County, Ill., January 1, 1901.

34522

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

JEFFARDO PICKET,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 666<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant, Jeffardo Picket, seeks to reverse a judgment of the Municipal court of Chicago which adjudged him guilty of carrying a revolver concealed on his person, and imposing a sentence of 180 days in the county jail.

We have only the common law record before us; the evidence that was heard on the trial is not in the record. It appears from the record that on June 12, 1930, the defendant was arrested without a warrant and taken before the court and by leave of court an information was filed charging that defendant; on June 19th, 1930, unlawfully carried a revolver concealed on or about his person, in violation of the statute. The case went immediately to trial, defendant being represented by counsel. He was arraigned and entered a plea of not guilty. Thereupon the court advised defendant of his right to a trial by jury but defendant elected to waive a trial by jury and by agreement the trial was before the court without a jury. The court heard the evidence and argument of counsel, found the defendant guilty of carrying a revolver concealed on his person as charged in the information, and he was sentenced as above stated.

It is contended that the information is defective in two particulars: (1) that it charged the commission of the offense to have occurred "on the 19 day of June A.D. 19230;" that this was an impossible year; and (2) that even if the information be construed to have charged the defendant with having committed the offense on the 19 day of June, 1930, yet it is defective because it



REPORT OF THE STATE OF ILLINOIS  
Defendant in Error.

VS.

HERNANDO PIERCE,  
Plaintiff in Error.

THE JUDGE OF THE COURT OF COMMON PLEAS OF THE COUNTY OF COOK.

By this writ of error the defendant, Hernando Pierce, seeks to reverse a judgment of the Circuit Court of Cook County adjudged him guilty of carrying a revolver concealed on his person, and imposing a sentence of 180 days in the County Jail.

It is shown by the record that the defendant was arrested on the 12th day of June, 1930, and taken before the court and by leave of court an information was filed charging him with carrying a revolver concealed on his person.

The record shows that on June 12, 1930, the defendant was arrested and taken before the court and by leave of court an information was filed charging him with carrying a revolver concealed on his person.

1930, unlawfully carried a revolver concealed on or about his person, in violation of the statute. The case went immediately to trial, defendant being represented by counsel. He was arraigned and entered a plea of not guilty. Thereupon the court advised the defendant of his right to a trial by jury but defendant elected to waive a trial by jury and by agreement the trial was before the court without a jury. The court heard the evidence and rendered a verdict of guilty and sentenced the defendant to 180 days in the County Jail.

It is contended that the information is defective in two particulars: (1) that it charged the commission of the offense to have occurred "on the 12 day of June A.D. 1930;" that this was an impossible year; and (2) that even if the information be construed to have charged the defendant with having committed the offense on the 12 day of June, 1930, yet it is defective because it on his person as charged in the information, and he was sentenced as above stated.

It is contended that the information is defective in two particulars: (1) that it charged the commission of the offense to have occurred "on the 12 day of June A.D. 1930;" that this was an impossible year; and (2) that even if the information be construed to have charged the defendant with having committed the offense on the 12 day of June, 1930, yet it is defective because it



was sworn to on the 12th of June, 1930. The first contention is answered by the State's Attorney but no reply is made to the second point. We think there is no merit in the first contention. It appears that the information was on an old form or printed blank which stated the year to be "A. D. 192\_\_" and there was written in the blank the figures "30". It is obvious that the year mentioned in the information was 1930. But there is no explanation by the State's attorney as to why the information should not be held to be defective on account of the second objection, and we think no answer can be made. The information, which is sworn to on June 12th, charges that defendant seven days after that date was carrying a revolver concealed on his person. The case of The People v. Weinstein, 255 Ill. 530, cited by counsel for the defendant, is in point. In that case it was held that the information was defective because it was sworn to on July 3, 1909, while it charged the offense to have been committed on July 18, 1909. The court there said (531): "At the trial the date averred means any time within the Statute of Limitations, but in determining the sufficiency of the indictment the date alleged must be taken as the true one. (Dwyer v. The People, 176 Ill. 590.)" The court then pointed out that section 27 of the Municipal Court act required an information presented by a person other than the State's attorney should be verified by such other person's affidavit and, continuing, said: "This information showed on its face that it was presented by a person other than the State's attorney and was verified by such person's affidavit on July 3, 1909, but it charged no offense because it stated that the defendant committed the acts with which he was charged on July 18, 1909. It was impossible the verification could apply to future acts."

In the instant case the information is sworn to on the 12 of June; not only that, but the trial was had on the 12 of June and the defendant was found guilty and sentenced on that date while

was sworn to on the 10th of June, 1900. The first communication  
answered by the State's Attorney but no reply is made to the second  
point. We think there is no merit in the first communication. It ap-  
pears that the information was on the 10th of June 1900. It is  
stated the year to be "A. D. 1898" and there was written in the  
place the figure "1898". It is evident that the year mentioned is  
the information was 1900. The fact is no explanation by the State's  
attorney as to why the information should not be held to be correct  
the statement of the second question, and we think no answer can  
be made. The information, which is sworn to on June 10th, 1900,  
that defendant never saw after that date and carrying a revolver  
concerned on his person. The case of State v. Williams, 1898  
111. 250, cited by counsel for the defendant, is in error. In that  
case it was held that the information was defective because it was  
sworn to on July 1, 1900, while it charged the offense to have been  
committed on July 10, 1900. The court there said (111): "as the  
trial the defendant never saw after that date and carrying a re-  
volver, but in determining the sufficiency of the indictment, the  
date alleged must be taken as the date." (Ex parte v. Williams,  
115 Ill. 250.) The court then stated that the indictment of the  
defendant could not be treated as information presented by a person  
other than the State's Attorney should be verified by some other  
person's affidavit and, accordingly, said: "This indictment could  
on its face be said to be presented by a person other than the State's  
Attorney and was verified by some person's affidavit on July 3,  
1900, but it charged no offense because it stated that the defendant  
committed the same after which he was charged on July 10, 1900. It  
was inadmissible the verification could be by a person other than  
the State's Attorney and the indictment is void on its  
face; but this does not make the State's Attorney void on the  
10th of June; but this does not make the State's Attorney void on the  
10th of June and the defendant was sworn on June 10th and

the information charged the offense to have occurred on the 19 of June, an impossible date.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded to that court.

REVERSED AND REMANDED.

Katchett, P. J., and McGuirely, J., concur.



the information changed the office to have occurred on the 15th  
 June, an impossible date.

The judgment of the Criminal Court of Chicago is

reversed and the case is remanded to said court.

REVEREND AND HONORABLE

WILLIAM W. W. and J. J. W.

34530

SAM MARGOLIS, sometimes known as  
Samuel Margolis, and GOLDIE MARGOLIS,  
Defendants in Error,,

vs.

LOUIS ROSS et al.

LOUIS ROSS,

Plaintiff in Error.

ERROR TO SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 666<sup>3</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Complainants filed their bill to remove two contracts for the sale of real estate which were alleged to be a cloud upon the title of the premises. The defendant Ross after answer filed his cross-bill seeking the return of his earnest money he had paid complainants under one of the contracts. The cause was referred to the master, who made up his report recommending the relief prayed for in the bill and also recommending that the cross-bill be dismissed. The report was approved by the chancellor and a decree entered in accordance with the report of the master. Defendant Ross alone has prosecuted this writ of error, his contention being that the court should have awarded him the return of his earnest money.

The record discloses that complainants were the owners of a flat building known as numbers 531 to 539 Addison street, Chicago, which they purchased from George H. Reppie and wife on August 3, 1923, and on January 15, 1924, they entered into a contract of sale with defendant Ross, whereby they were to sell the apartment building to Ross for \$194,000, \$5,000 of which was to be paid in cash and a provision was also made for deferred payments. At the time the contract was executed Ross did not have the \$5,000 earnest money but he paid this by giving \$2,500 and a note for \$2,500 due in fifteen days.





The contract contained the usual provisions about the examination of title, an opinion on which was to be given by the Chicago Title and Trust Company. Afterwards this opinion was delivered to counsel for complainants and there is evidence to the effect that he sent it to defendant or his counsel so that the latter could make any objections he might have to the title and consummate the deal. There is evidence in the record to the effect that the note for \$2,500 not having been paid when due, demand for payment was made on defendant, and not having been paid complainants caused judgment by confession to be entered on the note in the Municipal court of Chicago. The evidence also tends to show that on March 3rd following complainants sent a notice by registered mail to the defendant, declaring the contract forfeited by the failure of defendant to consummate the transaction and notifying defendant that complainants would retain the earnest money as liquidated damages as provided in the contract.

The defendant offered evidence to the effect that he had not failed to carry out the terms of the contract, but that on the contrary he was ready, able and willing at all times to do so but that the failure was caused through the default of complainants; that the complainants failed "to comply with the contract and remove the \$8500 mortgage which had come to his knowledge for the first time in the letter of opinion by the Chicago Title & Trust Co.;" that this mortgage was not mentioned in the contract of sale but appeared in the opinion of the Chicago Title & Trust Co., and that since the defendant did not purchase the property subject to this mortgage, it was complainants' duty to remove the mortgage, and complainants not having done this they had breached the contract.

Complainants' solicitor, who had withdrawn before the trial, testified that the day before the contract was made the parties met in his office and discussed the terms of sale; that it was there stated to defendant that there was a mortgage on the

The contract contained the usual provisions about the execution of title, an opinion on when was to be given by the Chicago Title and Trust Company. After this opinion was delivered to counsel for complainants and when it was given the effect that it was to be delivered on the contract as then the latter would have any objection he might have to the title and consummate the deal. There is evidence in the record to the effect that the note for \$2,500 not having been paid demand for payment was made on defendant, and not having been paid complainants caused judgment by contract to be entered on the note in the Municipal Court of Chicago. The evidence also tends to show that on May 27 following complainants sent a notice by registered mail to the defendant, advising the subject involved by the failure of defendant to consummate the transaction and notifying defendant that complainants would retain the entire money as liquidated damages as provided in the contract.

The defendant offered evidence to the effect that he had not failed to carry out the terms of the contract, but that on the contrary he was ready, able and willing at all times to do so; but that the failure was caused through the failure of complainants; that the complaint failed to comply with the contract and that the \$2500 mortgage which had come to his knowledge for the first time in the latter of October of the Chicago Title & Trust Co., that this mortgage was not mentioned in the contract as such but appeared in the opinion of the Chicago Title & Trust Co., and that since the defendant did not purchase the property subject to this mortgage, it was complainants' duty to remove the mortgage, and that complainants not having done this they had breached the contract.

Complainants' testimony, not having been taken in the trial, involved that the defendant was ready and willing to do his best in his efforts and agreement was made to sell; that it was later stated to defendant that there was a mortgage on the



property of \$17,000, being the one in question, on which there was an unpaid balance of \$8500, and that defendant was also advised at that time that provision for the payment of this \$8500 had been made by Heppie, the former owner of the premises, by depositing \$9600 worth of notes secured by a mortgage on the property with the Chicago Title & Trust Co., the arrangement being that the \$8500 would be taken care of in that manner. The defendant denies that he was at counsel's office the day before the contract was made and denies any knowledge of this mortgage. And the defendant contends that this testimony of counsel for the complainants was inadmissible because it tended to vary the terms of the written contract. This contention cannot be sustained. In the first place, the defendant's contention was that he first learned of this encumbrance when he received the opinion of the Chicago Title & Trust Co. Therefore, it was entirely competent to offer evidence tending to show that such was not the fact but that he knew of the encumbrance before the contract was signed. Moreover, when counsel for complainants testified before the master and went into all this matter in detail and was cross-examined at considerable length, no objection was made that the evidence was incompetent nor was any objection made to this testimony. It is elementary that the competency of this evidence cannot be raised now. There is much other evidence in the record touching the question as to whether the defendant had knowledge of the \$8500 encumbrance, but which we think it unnecessary to mention here. The master found that the defendant was fully informed about this encumbrance. His finding was approved by the chancellor and we think the finding is warranted by the evidence. Certain it is that we would be unable to say that the finding of the master, approved by the chancellor, is against the manifest weight of the evidence. There is also controversy as to whether complainants sent and defendant received



property of \$11,000, being the net in question, on which there was an unpaid balance of \$400, and that statement was also revised at that time that provision for the payment of this \$400 had been made by Lasker. The House came at the provision, by resolution \$2000 worth of sales covered by a mortgage in the property and the Chicago Title & Trust Co., the arrangement being that the \$2000 would be taken care of in that manner. The defendant denies that he was at Lasker's office the day before the contract was made and denies any knowledge of this mortgage. All the defendant contends that this testimony of Lasker for the purpose of the contract is inadmissible because it tends to show the truth of the statement. This defendant cannot be impeached. In the first place, the defendant's statement was that he had been in Lasker's office and he produced the statement of the Chicago Title & Trust Co. Therefore, it was entirely competent to offer evidence tending to show that such was not the fact and that he was of the defendant's belief the matter was cleared. However, when counsel for defendant testified before the jury and said that all this matter is settled and was established by Lasker's statement, on objection was said that the witness was incompetent and was not competent to make this statement. It is obviously that the competency of this witness cannot be raised now. There is much other evidence in the record bearing the question as to whether the defendant had knowledge of the \$2000 movement, but with the fact it is necessary to mention here. The matter being that the defendant was truly informed about this movement, his trial was assisted by the defendant and he knew the thing is warranted by the evidence. Certainly it is that he would be entitled to say that the trial of the matter, covered by the defendant, is against the weight of the evidence. There is also some testimony as to whether complainant sent and defendant received

the notice declaring the forfeiture of the contract, and whether defendant returned the opinion of the Title & Trust Co. to complainants or their counsel. These questions were also found by the master in favor of the complainants. The decree approved the findings of the master and we are unable to say that the finding is not warranted by the evidence.

Complaint is also made that counsel who represented the complainants in the transaction (but who withdrew before testifying) had a direct interest in the suit and that he was therefore disqualified as a witness; that he would gain or lose by the decree that might be entered in the case. We think this contention is untenable. The fact that counsel represented the complainants in preparing the contract and in preparing and filing the bill, would affect the weight to be given to his testimony but would not disqualify him, nor would any money that he might receive as a result of the suit disqualify him. He was not directly interested in any decree that might be entered.

A further complaint is made to testimony of Samuel G. Muffett on the ground that Muffett was not the agent of the defendant. There was evidence to the effect that Muffett had represented the defendant in this matter as his counsel. And there is other evidence tending to show that Muffett himself had a direct interest. There is evidence to the contrary, but we think the evidence was all admissible and obviously the relationship of the parties was all taken into consideration by the master.

There is other evidence in the record concerning defendant's ability to carry out the contract and the fact that he endeavored to sell the property after he had entered into the contract with complainants, but we think it would serve no purpose to discuss this evidence. We have carefully examined all of it and all of the evidence in the record, and upon a careful considera-



the nation holding the position of the witness, and whether defendant retained the opinion of the latter as to the guilt of each accused. These questions were also asked by the master in favor of the complainant. The answer returned the language of the master and we are unable to say that the latter is not warranted by the evidence.

Complainant is also made that counsel the respondent the complainant is the respondent (but who withdrew before the trial) had a direct interest in the suit and that he was therefore disqualified as a witness; that he would have to take the oath that he was not a witness in the case, to which this court is not bound. The fact that counsel represented the complainant in presenting the evidence and in presenting and filing the bill, would not prevent him from being sworn to his testimony and would not disqualify him, and we do not say that he is not competent to testify as a result of the rule disqualifying him. He was not directly interested in any dispute that might be raised.

A further complaint is made to testimony of counsel as to the fact that counsel was not the agent of the defendant. There was evidence in the case that counsel had no interest in the outcome of the suit as his counsel. And there is other evidence tending to show that counsel himself had a direct interest. There is evidence in the master's report that the evidence was all admissible and obviously the relationship of the parties was all taken into consideration by the master.

There is other evidence in the record concerning defendant's ability to testify and the evidence and the fact that he withdrew to call the property after he had entered into the contract with complainant, but we think it would serve no purpose to discuss this evidence. To have carefully examined all of it and all of the evidence in the record, and upon a careful consideration



tion of all the record, we are of the opinion that we would not be warranted in disturbing the decree on the ground that it is against the manifest weight of the evidence.

The decree of the Superior court of Cook county is affirmed.

AFFIRMED.

Ketchett, P. J., and McSurely, J., concur.

tion of all the present, as far as the evidence that we could get  
be warranted in assuming the same on the ground that it is  
against the manifest weight of the evidence.

The record in the present case of this party is  
entirely.

THE COURT.

Witness, P. J., and District, J., present.

34563

E. F. NEWMAN, Doing Business  
as The Chicago Real Estate Publishing Co.,  
Appellee.

vs.

ARTHUR MICHEL, Doing Business as  
Arthur Michel & Co.,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 666<sup>4</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover \$200 claimed to be due him under the terms of a written contract. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor for the amount of his claim, and the defendant appeals.

The material parts of the written contract are, "The Chicago Real Estate Board is hereby authorized to insert our advertisement in the ONE YOUR HOME EXPOSITION ISSUE to occupy space of One page, for which we agree to pay \$200.00, \*\*\*

Accepted by  
E. F. Newman  
for The Chicago Real  
Estate Board.

Arthur Michel & Co.  
By Arthur Michel."

The above contract was not assigned by the Chicago Real Estate Board to plaintiff and the defendant contends that the contract is a contract between himself and the Chicago Real Estate Board and therefore plaintiff cannot maintain this action. The defendant admits that the contract on its face is between the Chicago Real Estate Board and the defendant but he contends that he is the undisclosed principal and that the Chicago Real Estate Board was his agent and therefore under a well established law, he being the undisclosed principal, can maintain the action. The difficulty with plaintiff's contention is that his own testimony shows that the Chicago Real Estate Board was not his agent, but shows, on the contrary, that he was the agent of the Chicago Real Estate Board. Plaintiff testified that he was the owner of the "Chicago Realter" which was the magazine in which the



U. S. DEPARTMENT OF JUSTICE  
 DISTRICT OF COLUMBIA  
 DIVISION OF INVESTIGATION  
 WASHINGTON, D. C.  
 ARTHUR MICHAEL, alias "Bugs"  
 ARTHUR MICHAEL, alias "Bugs"  
 ARTHUR MICHAEL, alias "Bugs"

RE. JAMES C. HANCOCK, JR. (DECEASED) - WILLIAMS

Plaintiff moved to set aside the verdict in favor of \$5000 claimed to be due him under the terms of a written contract. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor for the amount of his claim, and the defendant appealed.

The material facts of the case are stated as follows: Chicago Real Estate Board is a duly organized corporation and is licensed to do business in the State of Illinois. One page, the whole of which is set out in full, is as follows:

Accepted by  
 J. J. Hancock  
 for the Chicago Real  
 Estate Board.  
 Arthur Michael & Co.  
 by Arthur Michael.

The above contract was not admitted by the Chicago Real Estate Board to plaintiff and the defendant contends that the contract is a contract between plaintiff and the Chicago Real Estate Board and that plaintiff cannot maintain this action. The defendant claims that the contract on the face is between the Chicago Real Estate Board and the defendant but he contends that he is the undisclosed principal and that the Chicago Real Estate Board was his agent and therefore can a well established law, he held the undisclosed principal, can maintain the action. The difficulty with plaintiff's contention is that his own testimony shows that the Chicago Real Estate Board was not his agent, but merely, on the contrary, that he was the agent of the Chicago Real Estate Board. Plaintiff's contention that he was the owner of the "Chicago Real Estate Board" and that the corporation is under his

advertisement was printed, and "that the Chicago Real Estate Board directed him to publish the paper by a written instrument which he could produce, if necessary." This testimony indicates to us that the Chicago Real Estate Board was the principal and directed plaintiff, its agent, to publish the magazine. Under the evidence in this case, we think plaintiff cannot recover.

The plaintiff further contends that this being a fourth class case in the Municipal court, the judgment will not, under the law, be reversed where substantial justice has been done between the parties, and that since the defendant's advertisement was printed in the magazine, the defendant had value received for the \$200. This argument overlooks the testimony of the defendant to the effect that at the time he was solicited by plaintiff for the advertisement, plaintiff agreed to buy a corner lot which defendant had for sale and in consideration of this purchase by plaintiff the defendant agreed to have the advertisement printed in the magazine and to make an allowance on the lot in payment of the advertisement; that the defendant personally took the plaintiff out to see the lot but plaintiff never afterwards came to defendant's office. No objection was made that this evidence was incompetent and we are unable to find any denial of it. So that if the agreement was that plaintiff was to be paid for the advertisement by being given the allowance in the purchase of a lot from the defendant, the equities would not be all on one side, as plaintiff contends.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

advertisement was written, and "then the Chicago Real Estate Board directed him to prepare the paper by a written instrument which he could produce, if necessary." This testimony indicates to me that the Chicago Real Estate Board was the principal and directing party in this case, in calling the magazine. Under the evidence in this case, we find a liability cannot be denied.

The plaintiff further contends that this being a public place in the Municipal Court, the defendant will not, under the law, be required to produce evidence which he has in his possession, and that since the defendant's advertisement was placed in the magazine, the defendant had value received for the same. This argument overlooks the testimony of the defendant to the effect that at the time he was solicited by plaintiff for the advertisement, plaintiff agreed to pay a certain fee which defendant had for sale and in consideration of this payment he furnished the defendant agreed to have the advertisement placed in the magazine and in case an allowance on the fee in payment of the advertisement, that the defendant personally took the plaintiff's fee for the fee for his gift never returned same to defendant's office. He refused to make that this evidence was inconsistent and we are unable to find any basis at all. It is clear that the agreement was that plaintiff was to be paid for the advertisement by being given the allowance in the purchase of a lot from the defendant, the evidence would not be all on one side, as plaintiff testified.

The judgment of the Municipal Court of Chicago is reversed and the cause remanded.

REVEREND AND HONORABLE

Respectfully, J. J. ...



34350

193  
JOHN W. KEOGH,  
Plaintiff in Error,

vs.

ROBERT B. PECK,  
Defendant in Error.

7  
ERROR TO SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 666<sup>5</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

The issues involved in this cause have been fully discussed in the companion case of Keogh, plaintiff in error, v. Peck, defendant in error, Gen. No. 34349, in an opinion this day filed. That opinion covers the facts and the law applicable. Plaintiff cannot recover in that action, much less can he recover in this one. For the reasons therein stated the judgment of the trial court in this case will also be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

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34547

PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

ALBERT GOODMAN,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 667

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

Defendant Goodman filed a plea of not guilty to an information in the Municipal court of Chicago which charged that on January 21, 1927, while residing in the State of Illinois, not being regularly licensed to practice law, defendant held himself out as an attorney at law and then and there represented himself verbally and in writing, directly and indirectly, as being authorized to practice law in the courts of the state, contrary to the statute. Upon trial by the court he was found guilty and was sentenced to pay a fine of \$500 and costs and committed to the county jail for three months. Defendant seeks by this writ of error to reverse that judgment.

The controlling question in the case is whether defendant is upon this record guilty beyond a reasonable doubt. People v. Wallace, 279 Ill. 139; People v. Koelling, 284 Ill. 118.

The prosecution of defendant was brought under "An act to prevent and punish frauds in the practice of law," approved May 16, 1905 (Smith-Hurd's Ill. Rev. Stat. 1929, chap. 38, secs. 298 and 299, p. 1006). Section 1 of that act provides:

"That any person residing in this State not being regularly licensed to practice law in the courts of this State, who shall in any manner hold himself out as an attorney at law or solicitor in chancery or represent himself either verbally or in writing, directly or indirectly, as authorized to practice law, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five (\$25.00) dollars, nor more than five hundred (\$500.00) dollars, or imprisonment in the county jail not exceeding one year, or by both fine and imprisonment, at the discretion of the court,



REPORT OF THE BOARD OF EXAMINERS  
JANUARY 11, 1934.

REPORT TO THE BOARD OF EXAMINERS  
ON THE EXAMINATION OF THE CANDIDATE

ALBERT W. BROWN  
JANUARY 11, 1934.

555 I.A. 668

ALBERT W. BROWN  
JANUARY 11, 1934.

Albert W. Brown filed a petition for admission to the bar in the County of Cook, Illinois, on January 11, 1934, which petition is on file in the office of the Clerk of the County of Cook, Illinois. He is not being regularly licensed to practice law, but is being admitted to practice law on an emergency basis as an attorney at law and then and there represented himself orally and in writing, directly and indirectly, as being authorized to practice law in the courts of the State of Illinois. He was tried by the court on the issue of his guilt and was sentenced to pay a fine of \$500 and costs and committed to the County Jail for three months. Defendant seeks by this writ of error to reverse that judgment.

The controlling question in the case is whether defendant is upon this record fully qualified to practice law. People v. Wallace, 279 Ill. 120; People v. Keeling, 284 Ill. 112.

The petition of defendant was brought under "an act to prevent and punish frauds in the practice of law," approved May 16, 1908 (Smith-Burd's Ill. Rev. Stat. 1908, ch. 89, sec. 208 and 209, c. 1, sec. 1 of that act provided:

"That any person residing in this State and being regularly licensed to practice law in the courts of this State, who shall in any manner hold himself out as an attorney at law or solicitor in the practice of law, or who shall in any manner hold himself out as an attorney at law or solicitor, directly or indirectly, as authorized to practice law, shall be deemed guilty of a misdemeanor and upon conviction shall be confined by a term of not less than one year, nor more than five years (but not exceeding five years) in the County Jail or in the State Prison, at the discretion of the court."

for each and every offense, said misdemeanor to be prosecuted and costs assessed as in other cases of misdemeanor under chapter 38 of the Revised Statutes of Illinois."

Section 2 provides:

"The use of the words 'attorney at law,' 'lawyer,' 'solicitor in chancery,' 'counselor at law,' 'law office,' 'attorney and counselor,' or other equivalent words by any person not licensed as such, in connection with his own name on any sign, advertisement, business card, letter head, circular, notice or other writing, document or design, the evident purpose of which is to induce others to believe and understand such person to be an attorney at law, shall be taken and held to be a 'holding out' within the meaning of section one of this act."

The finding of the court was that defendant was guilty in manner and form as charged in the information, but the judgment itself adjudges defendant to be guilty of the criminal offense of practicing law without a license, which would appear to be a violation of "An act to revise the law in relation to attorneys and counselors," in force July 1, 1874 (Smith-Hurd Ill. Rev. Stat. 1929, chap. 13, sec. 1, p. 182), but defendant does not urge this variance, asserting his purpose to be rather to argue the matter upon its merits. As defendant points out, the evidence upon which the state relies consists, first, of proof offered tending to show that at the time in question defendant made oral statements to the effect that he was an attorney, and, second, of proof of an advertisement by defendant which appeared in a classified telephone directory of the City of Chicago published by Reuben H. Donnelley & Company.

The evidence as to the oral statements of defendant consists of the testimony of Anna Douglas, who worked at the Broadview hotel and who made a claim against her employer on the ground that while in his service she had been hit on the head by an elevator door. She says that she wanted someone to take up her claim; that she looked in the classified telephone directory issued by the Donnelley corporation; that after reading the adver-



"The first thing I noticed when I stepped out of the plane was the cold, crisp air. It was a relief after the warm, humid air of the tropics. I looked around and saw a vast, open landscape stretching out before me. The ground was a mix of brown and green, with patches of dry grass and small, scattered trees. In the distance, I could see a range of mountains, their peaks shrouded in a light mist. The sky was a pale blue, with a few wispy clouds scattered across it. I felt a sense of awe and wonder at the beauty of the natural world. It was a moment of pure tranquility, a moment where I felt completely at one with the universe. I took a deep breath and let it out slowly, savoring the fresh air. I knew that this was a special moment, one that I would never forget. It was a reminder of the beauty and majesty of the world around us, a reminder that we are all part of something much larger than ourselves. I smiled and looked up at the sky, feeling a sense of peace and contentment. I was home."

frustrated to moderate late 80's or 90's.

consists of the testimony of Anne Bergman, who worked at the Broadway Hotel and who made a claim against her employer on the ground that while in his service she had been hit on the head by an elevator door. She says that her wound caused her to lose claim; that she tested in the classified telephone directory for and by the following conversation; that after reading the reply-



tisement of defendant therein she had some doubt whether he was a lawyer; that she called up his office by telephone and on January 21, 1928, visited him at his office. She says that she asked him at that time "if this was the lawyer Goodman and he said yes; that he told her that he had filed a complaint for her before the Industrial Commission; that he wished her to go to see a Dr. Scott and have X-rays taken; that when she asked him what lawyer would represent her at the Industrial Board he said, "I will represent you. I am your lawyer. I represent you." She says that she went to see Dr. Scott the next day; that about February 3th a lawyer for her employer offered her a settlement; that she called defendant on the 'phone and informed him of this offer and that he said, "Well, don't talk to him; tell the man to see your lawyer, Mr. Goodman. I am your lawyer, and I am handling your case, and if you talk with him he will just block the way so you won't get anything.\* \* \* \* I am handling your case, and I am your lawyer."

Miss Douglas further testifies that thereafter defendant called her on the 'phone and asked her to come to his office; that he then gave her an X-ray picture and told her to take it over to a Dr. Mitchell; that she went to see Dr. Mitchell, who asked her a few questions and said that he would study the X-ray and would write defendant a letter; that on the following day she called defendant again and asked him about Dr. Mitchell's report, and that defendant said, "Dr. Mitchell thinks that there is not anything the matter with you;" that thereafter she went to see defendant about Dr. Mitchell's report; that when she visited the office of defendant a lady went there with her. However, the name of this lady is not given and the lady was not produced as a witness by the State.

The witness on cross-examination admitted that she was unfriendly to defendant for the reason, as she says, that he had made improper advances to her and "insulted me in his office." At any

statement of defendant therein and had some doubt whether he was a lawyer; that she called up the office by telephone and on January 11, 1932, visited him at his office. She says that she asked him at that time "if this was the lawyer mentioned and he said yes; that he told her that he had filed a complaint for her before the Industrial Commission; that he wished her to go to see a Mr. Scott and have X-ray taken; that when she came she said lawyer would represent her at the Industrial Board he said, "I will represent you. I am your lawyer. I represent you." She says that she went to see Mr. Scott the next day; that about February 22nd a lawyer for her employer offered her a settlement; that she called defendant at the phone and informed him of this offer and that he said, "Well, don't talk to him; tell the man to see your lawyer, W. J. Goodman. I am your lawyer, and I am handling your case, and if you talk with him he will just block the way so you won't get anything." She says I am handling your case, and I am your lawyer."

Miss Douglas further testified that thereafter defendant called her on the phone and asked her to come to his office; that he then gave her an X-ray picture and told her to take it over to a Mr. Mitchell; that she went to see Mr. Mitchell, who asked her a few questions and said that he would study the X-ray and would write defendant a letter; that on the following day she called defendant again and asked him about Mr. Mitchell's report, and that defendant said, "Mr. Mitchell claims that there is not anything the matter with you; that thereafter she went to see defendant again. Mr. Mitchell's report; that when she visited the office of defendant a few days later, defendant, her name is Miss Ivy, is not given and she lady was not produced as a witness by the State. The witness on cross-examination admitted that she was actually so identified for the reason, as she says, that he had said lawyer advanced to her and "handled me in his office." It was



rate, after this occurrence and after defendant had told her that she had no claim, she went to the Legal Aid Society; that an attorney of that Society took up her claim and upon presentation of it to the Industrial Commission she was given an award of \$167.34 for her injuries. Defendant, on the contrary, testifies that he never talked with Miss Douglas on the 'phone; that she came to him claiming she had a skull fracture and that she was totally disabled by her injury; that he sent out two doctors from his office; that one of the doctors reported that he could not find anything the matter with her. Defendant says he told Miss Douglas after hearing the other doctor's report that he could not handle the claim because the doctor reported that her injury was due to syphilis; that she had threatened to fix him and the doctors for that. He says that he never at any time told her that he was a lawyer, and denies in toto the conversations to that effect to which she testified.

At this time Mrs. Baskin, daughter of defendant, was his secretary. She testifies she was present at the first conversation between her father and Miss Douglas; that defendant did not say that he was a lawyer nor did Miss Douglas ask him if he were; that the subject was not discussed at all. On the contrary, she says that the first information that the office had with reference to the injury of Miss Douglas was when a man called on the 'phone and talked with her (Mrs. Baskin) defendant not being in the office at this time; that she told this man that defendant was not a lawyer; that she did this because "the Legal Aid was sending in men to try to get us to say that he was a lawyer, and sending in people that are not even injured, so we know that and we are on our guard."

Proof of an ultimate fact which rests upon the understanding of different witnesses as to oral conversations, is



...after this conversation and after looking at the ...  
...and he said, "I am not a lawyer; I am a ...  
...of that society took up her claim and upon presentation of  
it to the Industrial Commission she was given an award of \$187.50  
for her injuries. Defendant, on the contrary, testifies that he  
never talked with Miss Douglas on the phone; that she came to  
him claiming she had a small fracture and that she was severely  
disabled by her injury; that he sent out two doctors from his  
office; that one of the doctors reported that he could not find  
anything the matter with her. Defendant says he told Miss  
Douglas after hearing the other doctor's report that he could  
not handle the claim because the doctor reported that her injury  
was due to syphilis; that she had threatened to file him and the  
doctor for that. He says that he never at any time told her that  
he was a lawyer, and denies in fact the conversation in that  
fact to him and still is.  
At this time Mrs. Harkin, daughter of defendant, was  
his secretary. The testifies she was present at the first con-  
versation between her father and Miss Douglas; that defendant did  
not say that he was a lawyer nor did Miss Douglas say so. It is  
true; that the subject was not discussed at all. On the contrary,  
she says that the first information that she office had with re-  
ference to the injury of Miss Douglas was when a man called on the  
phone and talked with her (Mrs. Harkin) defendant not being in  
the office at this time; that she told this man that defendant was  
not a lawyer; that she did this because "the legal aid was sending  
in now to say to get to say that he was a lawyer, and sending  
in people that she not even injured, so we know that and we are  
on our guard."

...of an affidavit that which reads as follows:  
...at different witnesses as to oral conversations, as

at the best quite uncertain, even when the witnesses are disinterested, without bias and endeavoring to tell the truth about the matters concerning which they testify. Here, the proof as to these oral representations by defendant seems to be based upon the uncorroborated testimony of a hostile witness. Whether she is justified in that hostility we do not inquire, but she admits that she is hostile. The one disinterested witness, whose testimony so far as the record indicates might have been obtained by the State, was not produced. The testimony of Miss Douglas is contradicted by that of defendant and by that of his daughter, both of whom are, of course, very much interested in the result of the case. Everything in the record indicates that the witness, Miss Douglas, was endeavoring by exaggerating the injury she received to obtain an unconscionable award therefor, and while this fact, as the State points out, has no material bearing upon the question of defendant's guilt or innocence, it does have some weight in determining the amount of credence which should be given Miss Douglas's testimony. The story as narrated by her also seems quite improbable in view of the uncontradicted testimony to the effect that defendant was aware that the claim that he was representing himself to be a lawyer had been made. In view of the hostile attitude of Miss Douglas, that her evidence is improbable, is wholly uncorroborated, is denied by two witnesses, and that the State did not produce the one disinterested witness from whom the truth might have been obtained, or give a reason for not producing that witness, it would seem that this court cannot say that this part of the charge is established beyond a reasonable doubt.

It is apparent from an examination of the record that the trial court based its finding of guilt upon an advertisement of the business of defendant which appeared in the Donnelley company directory. Detached printed pages of this directory are in the



at the first witness stand, even when the witness was called  
into the witness stand and asked to tell the truth about the  
subject concerning which they testify. Now, the fact that the  
trial proceedings by reference to the fact that the witness  
concerned testimony of a hostile witness. Whether or not the  
witness in fact testifies as a hostile witness, the fact that the  
witness is hostile. The one disinterested witness, whose testimony is  
as the record indicates might have been subject of the trial, was  
not produced. The testimony of Miss Douglas is corroborated by  
that of witnesses who by that of his daughter, both of whom are, of  
course, very much interested in the result of the trial. Everything  
in the record indicates that the witness, Miss Douglas, was not  
dissatisfied by examining the facts and finding to believe as she  
conclusively found. Now, the fact that, as the facts  
showed out, that no witness testified against the witness of interest  
and a guilt or innocence, it does have some weight in determining  
the amount of evidence which should be given Miss Douglas's  
testimony. The fact that the witness of interest was not produced  
in view of the amount of evidence testified to the effect that defendant  
was aware that the witness was a witness against himself to be a  
lawyer, had been made. In view of the hostile attitude of Miss  
Douglas, that her evidence is hostile, is really unimpeachable,  
it needed by the witness, and that the state did not produce the  
one disinterested witness that the fact that the witness was not  
called, or that a witness was not produced that witness, it would  
seem that this court cannot say that this part of the charge is  
corrected beyond a reasonable doubt.  
It is suggested that an examination of the record will  
show that the trial court based its finding of guilt upon an advertisement  
of the business of defendant which appeared in the Honolulu company  
directory. Defendant printed copies of such directory and in the



record, and the evidence shows that three different advertisements of defendant's business appeared therein. One of these was as follows:

"PUBLIC BUREAU OF INVESTIGATION & ADJUSTMENTS THE  
10 N Clark.....STATE 5631  
(See Advertisement This Page)"

At the lower right-hand corner of the page appears the following statement enclosed within heavy black lines:

"We adjust PERSONAL INJURY CLAIMS of all kinds  
FOR THE PUBLIC

NO CHARGE UNTIL YOUR CLAIM  
IS SATISFACTORILY ADJUSTED

We Employ The Best Doctors,  
Investigators, and Adjusters, to  
render you first class service.  
95% of the claims we handle  
are adjusted out of court.

THE PUBLIC BUREAU OF INVESTIGATION  
AND ADJUSTMENTS  
10 N. Clark St. (Room 608)  
Telephone STATE 5631"

In the center and on the left side of this ad appears the picture of defendant, underneath which is his name, "Albert Goodman" and the word "Superintendent."

There is nothing in either of these advertisements from which an inference that defendant was representing himself to be a lawyer might be drawn. Such inference in this case is further negatived by the fact that at the head of the column in which these two advertisements appear is the word "Adjusters" in large type.

Another advertisement (and the one of which complaint is made) appears on another page of the directory immediately beneath the word "Lawyers," which is printed in large type. Here, again, the advertisement is surrounded by heavy black lines. In the left side of this advertisement again appears the picture of defendant, underneath which is his name, followed by the word "Superintendent." The advertisement states:

...and the evidence ...  
of ...  
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"A - 1 ADJUSTMENT BUREAU  
10 N. Clark St.  
(Room 605)

STA te 5631  
We Adjust Personal Injury  
Claims for the Public ONLY

We SPECIALIZE IN WORKMAN'S  
COMPENSATION Claims

No charge unless claim is  
satisfactorily adjusted."

Following this ad are the names of members of the Chicago Bar arranged alphabetically, but the name of this defendant does not appear in that list.

Defendant argues that from the absence of his name in that list a fair inference may be drawn that he did not intend to represent himself to be a lawyer; that it might just as easily be said that a coke dealer who advertised his product at the head of a list of coal dealers, or a masseur who arranged to have his advertisement appear at the head of a list of physicians thereby represented themselves in the one case to be a coal dealer and in the other a physician. Miss Douglas testifies that she read the advertisement and after reading it doubted whether defendant was a lawyer. The word "lawyer" does not appear in the advertisement, but it does appear above the advertisement and is separated therefrom by heavy dark lines. It may perhaps well be doubted whether the publication of this advertisement discloses a specific purpose of defendant to represent himself to be a lawyer, and the language of the statute, as above set forth, makes "evident purpose" a material element in the definition of the crime which the statute sets forth. It, of course, is elementary that ordinarily conduct is not criminal where the facts are such as to negative a criminal intention. 16 Corp. Juris 80. That is the general rule and has been repeatedly stated by the courts of this State and in particular where the statute defining the crime, as here,



U.S. DEPARTMENT OF JUSTICE  
WASHINGTON, D.C.  
JANUARY 10, 1934

TO THE ATTORNEY GENERAL  
FROM THE ATTORNEY GENERAL  
RE: [illegible]

TO THE ATTORNEY GENERAL  
FROM THE ATTORNEY GENERAL  
RE: [illegible]

TO THE ATTORNEY GENERAL  
FROM THE ATTORNEY GENERAL  
RE: [illegible]

Following this we have the record of the proceedings of the  
trial, which, in the case of this particular case, was  
held in the year 1931.  
The record shows that the evidence in this case is  
that first a false statement was made by the witness to  
represent himself to be a lawyer; that it was not  
until some time later that the witness admitted the fact of  
a list of such persons, at a certain time, and that he was  
represented as being at the head of a list of persons, namely  
represented himself to the jury as being a lawyer and in  
the year 1931. The witness testified that the fact that  
development and that nothing is needed to develop the fact that  
fact. The word "lawyer" does not appear in the development,  
but it does appear when the development was in the year 1931  
from the year 1931. It may perhaps be the fact that  
the position of this development is that a lawyer, and the fact  
of defendant to represent himself to be a lawyer, and the fact  
of the witness, as shown in the "false statement".  
A material element in the definition of the crime when the  
charge was made, is, of course, the element that the  
defendant is not a lawyer, and the fact that he is not a  
lawyer is the general. In 1931, this is the general.  
This was the case, and the fact that the crime of this case  
and in particular where the statute defining the crime, as here,

makes purpose an essential element of it. It was so held in McDonald v. The People, 47 Ill. 533, where the charge against defendant was that of burning his own property with the intention of defrauding an insurance company; in Moore v. The People, 146 Ill., 600, where defendant was indicted for an assault with an intent to commit murder; in Friederich v. The People, 147 Ill., 318, where defendant was tried under an indictment charging assault with a deadly weapon; and, again, in Mai v. People, 234 Ill. 614, where defendant was charged with arson with the intention of defrauding an insurance company. This court applied the rule in People v. Cohen, 147 Ill. App., 393, where the charge against defendant was that of obtaining property by false pretension. The court held proof of such specific intention necessary in Addison v. The People, 193 Ill. 405, a prosecution for rape; in Price v. The People, 109 Ill. 109, where the charge was burglary; in The People v. Kelley, 274 Ill. 556, where defendant was tried <sup>a</sup> on burglary charge also; and in People v. Kratz, 311 Ill. 118, where defendant was charged with the confidence game.

In this case the agent for the company which published the directory was called as a witness by the State and testified that he was interviewed defendant with reference to advertising and wished "to get as much out of him" as he possibly could; that he therefore suggested to defendant that "if he had an advertisement under the heading of lawyers that it probably would be valuable to him;" that he knew that Goodman was not a lawyer but just a claim adjuster; that they had some argument as to whether it was proper to place the advertisement in the lawyers' column. The witness says, "I rather overpowered him on the suggestion that that did not necessarily make him a lawyer; that that simply was a good place to put it, because when people were having trouble they looked for lawyers."

The contracts for this advertising signed by defendant





were received in evidences. One dated June 8, 1928, which is partly printed and partly in longhand, expressly cancels prior signed contracts. It is in the form of a letter to the Donnelley company and is signed by defendant on the front side of the paper. There is also written and printed matter concerning the contract on the back, and the salesman testified that the notations upon the back were there at the time defendant signed the contract. There is, however, no proof that defendant ever saw these notations, as finally published that he ever read the proofs of the advertisements/ or that he ever approved of and paid for them. On the back of each contract in the left-hand corner appears the printed letters "L.C." which evidently refers to the list classification. After these letters there appears in longhand in one of the contracts the word "Adjusters," in two of the contracts the words "Claim Adjusters," and in the other "no L. C."

Defendant's original brief points out that the evidence is uncontradicted to the effect that when the advertisement, presumably the proof, was submitted to defendant for his approval, he scratched off the heading "L" and marked the classification "Claim Adjusters." It is also pointed out there is no evidence indicating that defendant in any way subsequently ratified this listing or that he ever paid for it. This evidence, which we regard as important, in view of the necessity that a specific intent should be shown, is not mentioned or discussed in the brief for the State. In other words, the uncontradicted evidence seems to indicate that although when persuaded by the agent of the directory company, defendant authorized the placing of this advertisement in the lawyers' column, before the publication had actually been made defendant struck out the letter "L" and wrote in its stead "Claim Adjusters." We are agreed that a specific intent to publish this advertisement in the lawyers' column would violate the law.

[illegible]



As already stated, the State does not discuss this evidence, which we cannot but regard as important. We are cited by the State to two decisions of our Supreme court construing this statute. People v. Schreiber, 250 Ill. 343; People v. Hubbard, 313 Ill. 346. It would serve no useful purpose to discuss these cases in detail. Both of them are clearly distinguishable upon the facts, and the same may also be said of People v. Erbaugh, 94 Pac. 349; People v. Taylor, 130 Pac. 762; and People v. Bailey, 143 Pac. 1101, also cited by the State. These last named cases not only differ as to the facts but also the prosecution in those cases was under dissimilar statutes.

The defendant in this case was charged with an offense against a statute which the legal profession has a personal interest in enforcing. The Judges of this court are members of that profession. We do not overlook the larger interests which the public has in the enforcement of the statute to the end that it may not be deceived by those who hold themselves out as duly licensed to practice law when they are not so licensed. However, the courts should be careful to see to it that no bias is manifested in this class of cases. The business of investigating and adjusting claims is a necessary and rightful one. The claim which Miss Douglas presented to defendant was one which defendant had a perfect right to handle for her although he was not licensed to practice law. The arbitration and industrial commissions are purely administrative bodies; they have no judicial functions. Savoy Hotel Co. v. Industrial Board, 279 Ill. 329; Grand Trunk Western Ry. v. Industrial Commission, 291 Ill. 167. That fact, of course, would not give defendant the right to represent falsely that he was a member of the bar in connection with his employment, but it would seem that if it is true that in connection with his





work he has made such representations, much stronger evidence than any which has been submitted in this case would have been easy to obtain. Upon the whole record we are persuaded to the view that there is a reasonable doubt of defendant's guilt. For that reason the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.

with the fact that such representations, when taken into consideration, show that the statements made by the witness are not only true but also that the witness is a person of high character and integrity. The fact that the witness is a person of high character and integrity is a fact which is not in dispute. The fact that the witness is a person of high character and integrity is a fact which is not in dispute. The fact that the witness is a person of high character and integrity is a fact which is not in dispute.

O'Connor and Company, 111, North.



34578

ROFIE MALO,  
Appellee,

vs.

THE EQUITABLE LIFE ASSURANCE  
SOCIETY OF THE UNITED STATES,  
a Corporation, and C. R. GAVE,  
Appellants.

APPEAL FROM COUNTY COURT  
OF COOK COUNTY.

259 I.A. 667<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by two defendants from a judgment for \$900 entered upon the verdict of a jury, after motions for a new trial and in arrest of judgment had been overruled. At the close of plaintiff's evidence and again at the close of all the evidence, there was a motion by each defendant for a peremptory instruction which was denied.

It is urged that the judgment should be reversed because the declaration did not allege nor the proof show a joint liability against defendants, because the instrument sued on did not constitute a contract, because there was no evidence tending to prove any liability of defendants or either one of them, and further because the court erred in the admission and exclusion of certain evidence. It is further urged that a new trial should have been granted and that the court erred in refusing defendants' motion to strike certain similiters of plaintiff.

The declaration is in assumpsit and is based upon a certificate in writing executed by the defendant Assurance Society on March 30, 1921. The declaration avers that defendants made and issued a certificate of insurance whereby they insured the life of one Albert W. Malo, delivered the certificate to Albert W. Malo, and for the consideration therein expressed promised to pay plaintiff, the wife of Albert W. Malo, the sum of \$500 under and by virtue of a policy of group life insurance.





represented by individual certificate No. 5916960; that the policy provided for an increase automatically of \$100 each year until the maximum of \$1500 was attained. The material parts of the policy or certificate are as follows:

"THE EQUITABLE LIFE ASSURANCE SOCIETY of the United States (Individual Certificate (Life) No. 5 916 960) Hereby Certificates that C. R. Cave, South Chicago, Ill. (hereinafter called the employer) has contracted to insure the life of Albert W. Male (hereinafter called the employee) for the sum of Five Hundred Dollars with The Equitable Life Assurance Society of the United States by a policy of Group Life Insurance. The insurance is to be payable to the beneficiary designated as entitled to receive the same, if death occur while in the employment of the said Employer, during the continuance of said policy and subject to the terms and conditions thereof. Beneficiary, Sofia Male-- wife.

Subject to the right of the Employee to change the beneficiary in accordance with the policy provisions.\*\*\*

Upon termination of employment for any reason whatsoever as shown by the employer's records, the insurance terminates automatically, but the employee shall be entitled to have issued to him by the Equitable, without further evidence of insurability and upon application made to the Equitable within thirty-one days after such termination and upon the payment of the premium applicable to the class of risk to which he belongs and to the form and amount of the policy at his then attained age, a policy of Life Insurance, in any one of the forms customarily issued by The Equitable, except term insurance, in an amount equal to the amount of his protection under such Group Insurance Policy at the time of such termination. For purposes of insurance, re-employment will be classed as new employment. This individual certificate is furnished in accordance with the terms of said Equitable Group Insurance policy, which policy, together with the Employer's application therefor and the insurance register therein referred to constitute the entire contract between the parties (For total and permanent disability provision see panel on back page hereof)

THE EQUITABLE LIFE ASSURANCE SOCIETY  
OF THE UNITED STATES

New York, March 30, 1921.

W. A. Day  
President."

On the back of this certificate appears the following:

"C. R. Cave, South Chicago, Ill.  
Life Insurance Plan.

The amount of insurance for all Employees is graded according to length of continuous service as follows:

\*\*\*\*\*

The amount of insurance will be automatically increased each year until the maximum amount \$1500 is attained. A supplemental certificate will be issued to each Employee at the end of each year of continuous service stating the increase in the amount of insurance."





This is followed by a statement of defendant, C. R. Cave, which in its material parts is as follows:

"Greetings to our Employees:

Any success which this Company may have obtained has been contributed to in no small degree, I believe by the faithfulness and efficiency of my Employees.

Desiring to show my appreciation in some manner, I have decided that from March 30th, 1921, to furnish and maintain for every employee in the store, when he or she has been in the service of the Company for six months, Life Insurance in a substantial sum without expense to you.

I call your attention to the opposite page outlining the plan of insurance. The plan is dated back so that the amount of insurance at the present time is determined by your past service, i. e., those who have been in the employ of the Company for ten and a half or more, are insured at the outset for \$1500, the maximum amount, and the others in accordance with the foregoing table. An increase of \$100 will be added automatically at the completion of each additional year of service.

The insurance is entirely for the benefit of your family and your dependents, and is given without charge. In the event of death while in the employ of this Company, your beneficiary will be paid the amount of this certificate. If you become permanently disabled while in the employ of this Company, the insurance will be paid to you either in one lump sum or in annual installments, as I shall decide.

I am interested not only in you but also in the welfare of those dependent on you, and feel in this manner, I can show that interest to be real and substantial and at the same time acknowledging the intelligent and zealous service which has characterized your work in the past and the service which I have every confidence will continue in the future. On behalf of this store, I sincerely hope the relations existing between us will long be continued.

Very truly yours,  
C. R. Cave."

The declaration sets up verbatim notices from the defendant Assurance Society to C. R. Cave increasing the original amount of Albert W. Malo's certificate by \$100 upon February 17th of the years 1922, 1923, 1924 and 1926 each respectively.

It is further averred that Albert W. Malo died at Chicago, Cook County, Illinois, on October 21, 1926, while in the employment of C. R. Cave; that notice thereof was given defendants, and that they refused to furnish the usual and customary blanks for the purpose of making formal proof of death; that they denied their responsibility under the certificate or policy of insurance on the ground that it had lapsed prior to the death of Albert W. Malo.







The declaration avers that the certificate had not lapsed; that Albert W. Male at the time of his death was still an employee of Cave and that the certificate or policy was still in full force and effect. To this declaration each of the defendants filed a plea of the general issue and a further plea denying any joint liability.

The evidence was heard and the cause submitted to a jury who returned a verdict, upon which judgment was entered as hereinbefore stated. There was evidence for plaintiff tending to establish the averments of the declaration, and the only issue of fact between the parties upon the trial appears to have been whether the employment of Albert W. Male by Cave had ceased prior to the time of his death. There was no evidence tending to show a joint liability, unless it may be held that the documents, which have been already recited as being a part of the declaration, amount to an averment of such liability. The plea cast upon plaintiff the burden of proving such liability. Powell Co. v. Finn, 198 Ill. 567. In International Packing Co. v. Tena, 165 Ill. App. 248, this court held that in an action of assumpsit against certain defendants the trial court was right in excluding the testimony and peremptorily instructing the jury, stating:

"No other course was proper unless there was evidence tending to show a joint liability of all the parties defendant. They were sued jointly in assumpsit and a verdict or judgment against one or more could not be given unless the plaintiff dismissed against the others."

In Hamilton v. Century Mfg. Co., 180 Ill. App. 100, it was stated:

"In actions ex contractu against two or more defendants, it must appear from the evidence that there was a joint contract by all the defendants; otherwise there can be no recovery against any one of them. This is the general rule."

In Imperial Hotel Co. v. Claflin Co., 175 Ill., 119, the Supreme court said:

The declaration avers that the certificate was not signed: that  
Albert W. Weiss at the time of his death was still an employee of  
Grove and that the certificate or policy was still in force  
and effect. In this declaration each of the defendants filed a  
plea of the general issue and a motion was made for judgment  
nisi.

The evidence was taken and the issues submitted to a  
jury who returned a verdict, upon which judgment was entered as  
hereinafter stated. There was evidence for liability tending to  
establish the statements of the declaration, and the only issue of  
fact between the parties upon the trial appears to have been  
whether the assignment of Albert W. Weiss by Grove had ceased prior  
to the time of his death. There was no evidence tending to show a  
joint liability, unless it was to call for the documents, which  
have been already recited as being a part of the declaration,  
amount to an averment of joint liability. The plea was upon which  
the the parties of general issue. VERDICT, LIABILITY, NO  
LI. GROV. IS INSURANCE COMPANY, N. YORK, INC. 1911, 1912, 1913,  
this court held that it is a matter of fact which depends upon the  
evidence the trial court was held in favoring the testimony and  
consequently instructed the jury, saying:

"No other issue was presented upon the evidence before  
the jury as to the liability of the parties defendant.  
They were held liable in accordance with a verdict on the issue  
which was given upon the evidence."  
Directed against the verdict.

In Appeal v. GROV. INC. 1911, 1912, 1913, 1914, 1915.

It was stated:

"In appeal it was held that the evidence was not sufficient  
to show that the evidence that there was a joint and  
several liability in accordance with a verdict on the issue  
which was given upon the evidence. This is the general rule."  
Directed against the verdict.

In Appeal v. GROV. INC. 1911, 1912, 1913, 1914, 1915.

no evidence was shown:



"In an action of ex contractu against several, it must appear that their contract was joint and that fact must be averred by the pleadings and shown by the proof on the trial, otherwise no recovery can be had; and this is the rule where the evidence shows the contract is several, although none of the parties have put their joint liability in issue by a plea in abatement or plea in bar verified by affidavit. (Supreme Lodge A.O.U.W. v. Euhke, 129 Ill. 298.)"

These cases, which are cited in defendants' brief, are not referred to or discussed by plaintiff in her reply. Whatever (if any) the rights of plaintiff may be against these defendants, we think it is clear that there is no joint liability. The contract of insurance obligates the Assurance Society, not the defendant Cave. If there is any liability upon him by reason of the representations made under his name upon the back of the certificate, the obligation is not one of actual insurance. The facts as stated in the declaration and as they appear in the proof indicate a contract of insurance between Cave and the defendant Assurance Society made for the benefit of Male, but the obligations, if any, of these two defendants, so far as this plaintiff is concerned, are entirely different in their nature. This has been the construction put upon similar insurance contracts by the courts of other states. Wheeler v. Monsanto Chemical Works, 263 S. W. 881; Gallagher v. Simmons Hardware Co., 214 Mo. App. 111; 258 S. W. 16; Carpenter v. C. & E. I. R. R. Co., 21 Ind. App. 90; 51 N. E. 493; Myerson v. New Idea Hosiery Co., 115 So. 94. Moreover, the certificate sued on is only a part of the entire contract and distinctly states that "The insurance is to be payable \*\*\* during the continuance of said policy and subject to the terms and conditions thereof." It further states that the policy, the application therefor, and "the insurance register" therein referred to constitute the entire contract. Plaintiff could not recover without proof of the entire contract. Seavers v. Metropolitan Life Insurance Co., 230 N.Y. Supp. 366; New York & Oriental E. S. Co. v. Automobile Insurance Co., 37 Fed.





(2nd) 461; Leach v. Metropolitan Life Insurance Co., 124 Kas.  
584; 261 Pac. 603.

As the alleged errors already considered compel a reversal, it is unnecessary to discuss others assigned and argued.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor and McSurely, JJ., concur.





34598

GENEVIEVE McMULLEN,  
Appellee,

vs.

CHARLES W. BROWN,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 667<sup>3</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

Defendant Brown appeals from a judgment in the sum of \$1500 entered upon the verdict of a jury. The verdict was for \$5,000, but upon defendant's motion for a new trial the court required a remittitur, to which plaintiff consented. Thereupon motions of defendant for a new trial and in arrest were overruled.

At the close of plaintiff's evidence and again at the close of all the evidence, there was a motion by defendant for an instructed verdict in his favor, both of which motions were denied. Defendant offered no evidence.

The declaration, which is in a single count, charges that on February 18, 1916, plaintiff was a pedestrian near the intersection of 56th and Halsted streets in Chicago; that she was then a minor of the age of twelve years and in the exercise of due care and caution for her own safety; that defendant was then and there the owner of, and possessed of, drove and controlled through himself, his agents and his servants, a certain horse and wagon at or near said intersection; that he managed, drove and controlled the same so carelessly that the horse violently ran into, upon and over plaintiff, injuring her.

The declaration further avers that plaintiff started suit in the Superior court of Cook county on January 3, 1921, for the same cause, which was brought to issue and placed on the trial calendar, and that on November 20, 1923, plaintiff suffered

1998/1999

437

WILLIAM W. WILLIAMS

THE UNIVERSITY OF CHICAGO

Volume 10, Number 1, 1999

STANDARD SERVICE TRAINING, INC.  
10000 100th Ave. N.E. Minneapolis, MN 55438

There are no records of defendant for a new trial and in effect  
court received a verdict, it was immediately convicted.  
for \$2,000, but upon defendant's motion for a new trial the  
of \$2,000 entered upon the verdict of a jury. The verdict was  
delivered from which it was a judgment in the sum  
were overruled.

At the close of Winkler's evidence and again at the close of all the evidence, there was a motion by defendant for an instructed verdict in his favor, based on which verdict was denied. Defendant offered no evidence.

The Commission, which is in a highly confidential position, has been asked to investigate the activities of the various groups and individuals who are active in the field of international relations. The Commission is composed of representatives of the various countries and is working to establish a system of international relations which will be based on the principles of justice and equity. The Commission is also working to establish a system of international relations which will be based on the principles of justice and equity.

The following report was received from the  
 Bureau of the Federal Reserve Bank of New York  
 on January 2, 1931.  
 For the same reason, which was brought to light and placed on the  
 table, the Bureau of the Federal Reserve Bank of New York  
 was held on January 2, 1931, and the following letter

an involuntary non-suit therein; that the present suit was started within a year following the said non-suit and dismissal for want of prosecution.

The two questions to be determined upon the evidence are whether the court erred in refusing the instruction at the close of all the evidence to find for the defendant, and whether the evidence justified the damages allowed.

Plaintiff testifies in her own behalf that she was twelve years old on February 13, 1916; that in the evening of that day she was walking with her mother on the sidewalk near the north-east corner of 56th and Halsted streets; that a runaway horse came between her mother and herself and dragged her along the street, and that was all that she remembers of the actual occurrence. She says that the streets were dry; that there was no snow; that she can just remember seeing the horse's head coming between her mother and herself; that she was dragged 60 or 70 feet and then lost consciousness.

The mother of plaintiff, Nora McMullen, testifies that she was with plaintiff at the time of the accident and had hold of her arm. She says: "A horse came with a shaft on it, threw me to one side and dragged her about 50 feet. She was carried into the grocery store and then two men carried her home.\*\*\* I couldn't see the horse and did not see it before we were struck."

A brother of plaintiff, Thomas McMullen, testifies that at the time of the accident he was near the boulevard, 55th and Halsted, on the east side of the street; that he was 200 feet south of the corner; that he saw a runaway horse going north on Halsted street right up against the building; that at that building there was an alley with a drop of a foot and a half; that when he turned around the shafts on the horse flew up in the air and he just got out of the way of the horse; that the horse ran towards



an involuntary non-suit thereon; that the present suit was started  
within a year following the said non-suit and dismissal for want  
of prosecution.

The two questions to be determined upon the evidence  
are whether the court erred in refusing the instruction as to the  
close of all the evidence to find for the defendant, and whether  
the evidence justified the damages allowed.

Plaintiff testified in her own behalf that she was  
twelve years old on February 12, 1911; that in the evening of that  
day she was walking with her father on the sidewalk near the corner  
east corner of Fifth and Walnut streets; that a runaway horse came  
between her father and herself and struck her along the street,  
and that she and all that she remembers of the actual occurrence. She  
says that the streets were dry; that there was no snow; that she  
can just remember seeing the horse's head coming between her  
father and herself; that she was looking up at the last and then  
lost consciousness.

The mother of plaintiff, Mrs. William, testified  
that she was with plaintiff at the time of the accident and that  
she said: "A horse came with a wheel on it,  
threw me to one side and dragged her about 50 feet. She was car-  
ried into the street about 100 feet and was carried to her home."  
I don't see the horse and she says she is afraid to say anything.  
A brother of plaintiff, Thomas William, testified

that at the time of the accident he was near the boulevard, Fifth  
and Walnut, on the west side of the street; that he was then  
south of the corner; that he saw a runaway horse going north on  
Walnut street which he believed was carrying a wheel; that at that time  
there was an alley with a drop of a foot and a half; that when he  
saw the horse on the street he was in the air and he  
lost his hat at the top of the horse; that the horse ran towards

the street; that he chased the horse down Halsted street; that the horse ran out on the boulevard, turned south on Emerald avenue and fell under a fence; that the horse was galloping as fast as a horse could run and was not dragging a chain; that he did not see the horse collide with anybody and did not see the accident. The witness says that he was sixteen years old at the time of the accident.

Eva Streit, a witness for plaintiff, testifies that she was present at the time of the accident; that at that time she was going to a jeweler's at 55th and Halsted streets and saw plaintiff struck by a horse; that she, the witness, saw people looking, and that as she turned the horse was ten feet away from her and then she didn't know anything. She says, "I did not see the horse strike Genevieve. I saw the horse's feet in the air. I was knocked unconscious. I did not see the accident to Genevieve. The horse was going very fast."

This is all the evidence as to the occurrence. There is other evidence in the record as to the injuries which plaintiff sustained at this time. There is no direct proof in the record tending in any way to show that this particular defendant was in any way responsible for the accident. There is no proof that he owned the horse or that he or any servant employed by him was driving the horse, or that the horse ran away on account of any negligent act on the part of defendant or any servant of defendant.

Defendant has cited a number of cases, including Hunting v. Baldwin, 6 Ill. App. 547; Swafford v. Rosenbloom, 102 Ill. App. 579; Newman v. Barber Asphalt Paving Co., 190 Ill. App. 636; Williams v. Frank Parmelee Transfer Co., 194 Ill. App. 468; Crane Co. v. Hogan, 228 Ill. 338; Peterson v. Sears, Roebuck & Co., 242 Ill. 38. These cases in substance hold that when a plaintiff sets out in his declaration the negligent acts of the defendant







which entitle him to recover, he must prove such acts; that he cannot recover because of negligent acts not averred in the declaration, even if such acts caused the injury; and applying this rule to cases where horses have run away, it seems to have been held that in order that a plaintiff may recover there must be some proof of actual act of negligence on the part of the owner of the horse. Here there is no proof that any one owned the horse, but plaintiff contends that since defendant relies alone upon the plea of the general issue, this plea admits the ownership and control of the horse on the part of defendant. Carlson v. Johnson, 263 Ill. 556; Benninghoff v. Futerer, 176 Ill. App. 579, and Smith v. Tappen, 203 Ill. App. 433, are cited to this point.

The rule announced in Carlson v. Johnson, seems to be well settled. The only departure from it that we have been able to find is in Clark v. Wisconsin Central Ry. Co., 261 Ill. 407. However, in the comparatively recent case of Mueller v. Haven, 321 Ill. 275, that case is distinguished; and our Supreme court again laid down the rule that whether an action on the case be against an individual or a corporation, the plea of the general issue denies only the wrongful act alleged to have been committed and does not put in issue the ownership, possession or operation of the property or instrumentalities which have caused the injury. The reason stated for the rule is that such matters are considered only as matters of inducement and that if the defendant desires to raise such issue he should do so by special plea. This authority, we think, compels us to hold that in the absence of a special plea it must be conceded upon this record that defendant was the owner of the horse and that its management and control were with him at the time it ran away.

Plaintiff also contends on the authority of Bollenbach v. Bloementhal, 255 Ill. App. 303; Hart v. Washington Park Club,





157 Ill. 9; Strup v. Edens, 22 Wisc., 432; and Unger v. 42nd St. R. R. Co., 51 N. Y. R. 497, that the ownership, control and management of the horse being conceded, the doctrine of res ipsa loquitur is applicable, and that therefore in the absence of explanation by defendant, it can reasonably be inferred from the accident itself that it arose from want of due care of the horse on the part of the defendant. It has never been held in any of the cases cited that the doctrine of res ipsa loquitur is applicable to facts such as appear here, and we hold it not applicable. However, in Strup v. Edens and in Unger v. 42nd St. R. R. Co., there is dicta to the effect that the happening of an accident in case of a runaway horse is some evidence of want of due care on the part of the owner, and it would not seem to be unreasonable to so hold.

This judgment, however, must be reversed for another reason. The accident occurred February 18, 1916; the cause came on for trial in the Superior court fourteen years thereafter, namely, on June 2, 1930. Plaintiff was twelve years old when the accident happened. The mother testified that immediately after the accident plaintiff was carried home by two men; that she didn't "come to" all night; that before the accident plaintiff was healthy; that off and on now she goes to a doctor "when she gets real bad;" that doctors treat her for nervousness; that prior to the accident "Genevieve was always a healthy girl." Plaintiff testified that after the accident she was confined to her bed a couple of weeks and was treated by a Dr. Fair for about a week, and that "she went to different doctors;" that after the accident she "had terrible headaches" which she still has two or three times a week; that she is still under the treatment of a physician.

The only medical testimony was given by a Dr. Ricardo, who states that he examined plaintiff "eight or nine years ago," which would be five or six years after the accident. He also



THE JURY: JOHN A. LEE, JR., 1890; and JOHN A. LEE, JR., 1891.  
 N. A. LEE, JR., 1892, that the defendant, plaintiff and  
 defendant of the same being deceased, the plaintiff of the same  
 defendant is entitled, and that therefore in the absence of an  
 admission by defendant, it was reasonably to be inferred from the  
 evidence that it was the fact that at the time of the death  
 on the part of the defendant, it was never seen that in any way  
 the cause of the death of the defendant of the same defendant in relation  
 to the same as a matter of fact, and we hold it was defendant. Now  
 even, in John A. LEE, JR. vs. John A. LEE, JR., there is  
 held to the effect that the happening of an accident in case of a  
 defendant is held evidence of proof of the cause on the part of  
 the owner, and it would not seem to be unreasonable in the case.  
 This defendant, however, must be treated the same  
 reason. The accident occurred February 18, 1918; the same case on  
 for trial in the Supreme Court between years 1918, 1919, 1920,  
 on June 1, 1920. Plaintiff will receive credit for the accident  
 happened. The accident occurred that immediately after the accident  
 plaintiff was treated for two days; that the wife's name is  
 all right; that before the accident plaintiff was healthy; that all  
 and on the day of the accident "when she took her bath" that day  
 was found for the defendant; that after the accident "when  
 there was a change of the day." Plaintiff testified that after  
 the accident she was confined to bed for a number of weeks and was  
 treated by a Dr. John Lee, a wife, and that "she was in  
 different shape" and after the accident and "was unable to  
 work" and she will not get to work; that a week; that she is  
 still under the treatment of a physician.  
 The only medical testimony was given by a Dr. Lee, who  
 who states that he examined plaintiff "within six years ago,"  
 when he was 17 or 18 years after the accident. He also

states: "I found the girl five feet seven or eight inches tall, weighing a hundred pounds, emaciated; pupils uneven, twitching of the muscles of the base of the tongue; trembling of the hands and knee reflexes exaggerated; Romberg sign present; ankle clonus reflex present. She was suffering from neurasthenia, a nervous condition. I did not find any bruises or cuts on her body. I prescribed for her. I treated her off and on for about four or five years. In the beginning once a week, then once a month, then several months apart."

When recalled for further examination and in response to the question, "You went to Dr. Ricardo to treat you for some trouble that you were in after the accident?" plaintiff answered, "yes, sir."

At the beginning of the examination of Dr. Ricardo defendant objected to his evidence unless there was some relation shown between the conditions which the doctor found and the injury plaintiff received at the time of the accident. The court stated that if there was no connection between the conditions found and the accident, the evidence would not be competent, and further stated, "If it is connected up and shown to relate back, it may go in," and upon that condition it was admitted.

The evidence, however, was never connected up and there is therefore no competent evidence in the record which will justify damages in the amount for which the judgment was rendered. Defendant contends that the verdict and judgment is excessive, and since the condition of the record is as stated, the point must be sustained.

The judgment will therefore be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

[illegible]

"Yes, sir."

[illegible]

and since the condition of the record is as stated, the said copy  
be maintained.

THESE AND THE FOLLOWING ARE THE RESULTS OF THE INVESTIGATION:



34597

PERSONAL LOAN & SAVINGS BANK,  
a Corporation

Appellant,

vs.

BERNARD HENRY FORD,

Appellee.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 667<sup>4</sup>

MR. PRESIDING JUSTICE HATCHETT  
DELIVERED THE OPINION OF THE COURT.

This appeal is by the plaintiff bank from an order denying its motion to strike a petition of defendant and granting the motion of defendant to vacate a judgment in favor of plaintiff and against defendant theretofore entered on January 16, 1930. The motion to vacate the judgment was made March 19, 1930, more than thirty days after the entry of the judgment. The motion was therefore governed by section 21 of the Municipal court act (Smith-Hurd Ill. Rev. Stat. 1929, chap. 37, sec. 376.)

The facts as disclosed by the record are that the plaintiff bank on November 19, 1929, caused a judgment by confession to be entered against defendant and other signers of a note which contained power of attorney to confess such judgment. The other signers of the note, Helen Marie and Edmund James Ford, filed petitions in bankruptcy and secured a stay of the judgment as against them. December 6, 1929, defendant filed a written motion, supported by an affidavit, asking that the judgment be opened up with leave given him to plead to the declaration. This motion was allowed, and an order was entered reciting that the petition of defendant stand as an affidavit of merits. This petition recited that defendant, Bernard Henry Ford, received no part of the money borrowed from the bank at the time the note in question was given; that the same did not represent necessities furnished to him; that he was a minor, and that the date of his birth was June 9, 1909.

*[Faint, illegible markings]*

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THE UNIVERSITY OF CHICAGO PRESS

1. On 10/10/50, the defendant was arrested at his home in the city of New York, New York, and taken to the New York City Jail. He was held there for a period of 30 days, during which time he was interrogated by the New York City Police Department. He was then released on bail and returned to his home.



When the cause came on for trial on January 16, 1930, defendant did not appear. An ex parte hearing was had, and the court made a finding in favor of plaintiff and against defendant and entered a judgment thereon. March 19, 1930, defendant made a motion to vacate the judgment and to allow defendant to plead. In support of this motion he filed an affidavit which was in substance the same as the petition which the former order allowed to stand as an affidavit of merits. On April 4th plaintiff bank made a motion to strike this petition and the hearing on same was continued until April 19th, at which time an order was entered denying plaintiff's motion to strike and again allowing defendant's motion to vacate the judgment and for leave to plead.

There is no dispute between the parties as to the facts and little generally as to the propositions of law, but the briefs disclose a wide divergence of opinion as to the applicability of the law to the undisputed facts appearing in this record.

There is no doubt that the order is final and appealable; (Imbrie v. Bear, 230 Ill. App. 155; Central Bond & Mtg. Co. v. Roesser, 323 Ill. 90); that a judgment against an infant is not absolutely void because no guardian ad litem was appointed to defend him; (Lemon v. Sweeney, 6 Ill. App. 507); that a defendant filing a plea of infancy has a remedy by appeal or writ of error; (Beaubien v. Hamilton, 3 Scam. 213; Peak v. Schanted, 21 Ill. 137; McKindley v. Buck, 43 Ill. 438; Manis v. Cosner, 62 Ill. 465); that a minor defendant may not be defaulted nor may a decree be entered against him without proof; (Thomas v. Adams, 59 Ill. 223; Crane v. Stafford, 217 Ill. 21); that courts will protect the interest of a minor even against neglect of those representing such minor; (Gibbs v. Andrews, 299 Ill. 510; Mason v. Truitt, 257 Ill. 18) that a judgment entered against a minor without the appointment of a guardian ad litem is erroneous and may be set aside on motion even





after term and at any time within five years; (White v. Kilmartin, 205 Ill. 525; Simpson v. Simpson, 273 Ill. 90.)

But none of these cases decide the exact point arising on this record. Here it appears that the judgment entered was set aside on motion of defendant and that he was allowed to present the defense that he was a minor. The cause came on for hearing, defendant did not appear in support of his plea, and the finding and judgment was entered against him on that issue. On elementary principles this would seem to be an adjudication that he was not in fact a minor, and the precise question which arises upon the record is whether a defendant who has pleaded his minority, when the issue is found against him can at any time within five years have a second trial of that issue. Plaintiff was not obligated to have a guardian ad litem appointed for defendant, who claimed to be a minor, when the theory of plaintiff was that defendant was not in fact a minor. Minority is not presumed in the absence of proof. Obviously, the practice in a case where the minority of a defendant is conceded (which was a fact in most of the cases cited) would not be the same as in a case where it was denied and contested by the plaintiff and where, as here, the issue had been decided in plaintiff's favor. Under the practice of the Municipal court the affidavit of merits performed the function of a plea at common law. The affidavit of merits was before the court when the cause was heard and when judgment was entered. The proceeding under section 89 of the Practice act is applicable where there has been some error of fact unknown to the court which, if known by the court, would have prevented the entry of the judgment. Here, the affidavit of merits informed the court at the time of the trial of the fact which defendant now undertakes for a second time to set up. The rule for which defendant





contents would make it possible for a defendant claiming to be a minor to present an endless chain of motions within a period of five years from each judgment.

For the reasons indicated the judgment is reversed.

REVERSED.

McSurely and O'Connor, JJ., concur.



34606

JAMES H. HOOPER,  
Appellant,

vs.

VICTOR X-RAY CORPORATION,  
and A. D. GASH,  
Appellees.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 668'

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

Hooper, complainant in the trial court, filed a second amended bill of complaint as amended. He made defendants thereto Victor X-Ray Corporation, Central Trust Company of Illinois, and A. D. Gash. Defendants demurred generally and specially. The demurrers were sustained, and complainant electing to stand by his amended bill, etc., the court entered a decree dismissing the bill for want of equity. To reverse that decree complainant has perfected this appeal.

The second amended bill was filed May 19, 1929. The bill was verified and demanded answer under oath. The material facts alleged were that on June 16, 1916, Hooper was the owner of 71.8 shares of stock in the Scheidel-Western X-Ray Co., an Illinois corporation. The certificates representing this stock had been issued by mistake on old blanks printed for the Scheidel-Western X-Ray Coil Co., the former name of the Scheidel-Western X-Ray Co., its name having been changed. The Scheidel-Western X-Ray Co. gave due notice and called a meeting of its stockholders, which agreed upon a plan for the sale of the assets of this corporation to the Victor Electric Corporation of the state of New York. The special meeting of the stockholders of the Illinois corporation which authorized this sale was held in Chicago on June 16, 1916, and the resolution authorizing its officers and directors to sell all the assets according to an agreement with the Herbert S. Blake Co., bearing date September 25, 1915, was carried unanimously, every



This was verified and confirmed by other reliable sources. The material  
 lastly alleged were that on June 10, 1918, Bender was the owner of  
 A. S. number of stock in the National-Banknote Company, Inc. No 11111111  
 corporation. The certificate representing this stock had been  
 issued by Alaska on old claims which the National-Banknote  
 Company had sold to the General-Banknote Company, Inc. The  
 name of the stock was changed. The National-Banknote Company, Inc.  
 had notice and called a meeting of its stockholders, which was  
 upon a plan for the sale of the assets of this corporation to the  
 Alaska Electric Corporation at the state of New York. The special  
 meeting of the stockholders of the Alaska Electric Corporation was  
 advertised and was held in Chicago on June 10, 1918, and the  
 resolution authorizing its officers and directors to sell all the  
 assets according to an agreement with the National-Banknote Company, Inc.  
 dated June 10, 1918, was passed unanimously, every

share of stock being represented by its owner or by proxy. Complainant says that he did not have actual knowledge, but that he was represented in person or by proxy is apparent from the facts stated in the bill.

On June 25, 1917, the Scheidel-Western X-Ray Co., by its president, notified complainant that the registrar of the Victor Electric Corp. was about ready to issue stock in the new corporation to take the place of the stock which complainant held in the Scheidel-Western X-Ray Co. The notice stated that the records showed that complainant held 71.8 shares of such stock and that he would receive in the new corporation 19½ shares of first preferred stock, 15 shares of second preferred stock and 60 shares of common stock. It also stated that arrangements had been made with the Central Trust Co. of Illinois to accept the old Scheidel-Western certificates of stock and upon receipt of such certificates to turn over to complainant the above mentioned number of shares of stock in the Victor Electric Corp.

On September 29, 1928, the Victor Electric Corp. of New York merged with another New York corporation, forming the Victor X-Ray Corporation, defendant herein, and under the terms of the consolidation agreement stockholders of the Victor Electric Corp., upon surrender of their stock were to receive certain shares of stock in the Victor X-Ray Corp.

The amended bill further avers that at all times since June 16, 1916, until May 19, 1928, Hooper had in his possession one certificate for 50 shares and one certificate for 21.8 shares of the capital stock of the Scheidel-Western X-Ray Co., and that these were the same certificates which had been issued theretofore to complainant by the corporation. It is also averred by an amendment filed January 11, 1930, that the Scheidel-Western X-Ray Co. delivered the stock certificates received from the Victor Electric Corp. to

... of stock being represented by its owner as by proxy. ...  
... that he had not been called to account, and that he  
... was represented in person at the meeting of the Board and that  
... stated in the bill.

On June 28, 1917, the General-Manager of the

the president, notified complainant that the register of the  
Victor Electric Corp. was about ready to issue stock in the new  
organization to name the names of the stock which complainant held  
in the General-Manager Corp. The said stock was  
recorded under that complainant held 71.8 shares of said stock and  
that he would receive in the new corporation 100 shares of that  
preferred stock, 10 shares of second preferred stock and 40 shares  
of common stock. It was stated that arrangements had been made  
with the General-Manager Corp. to eliminate its name from the  
Western certificate of stock and upon receipt of said certificate  
to turn over to complainant the above mentioned number of shares  
of stock in the Victor Electric Corp.

On September 11, 1917, the Victor Electric Corp. of

the said corporation with certain New York corporation, forming the  
Victor Electric Corporation, to whom certain, and under the terms  
of the consolidation agreement stockholders of the Victor Electric  
Corp., upon surrender of their stock were to receive certain shares  
of stock in the Victor Electric Corp.

The said bill further states that at all times since  
June 10, 1916, until May 10, 1920, Hooker had in his possession and  
control for 80 shares and one certificate for 21.8 shares of  
the said stock of the General-Manager Corp., and that there  
were the same certificates which had been issued to Hooker by  
complainant by the corporation. It is also stated by the complainant  
that the said bill, when the General-Manager Corp. was delivered  
the stock certificates received from the Victor Electric Corp. to



the Central Trust Co. as its agent, and directed and instructed the Central Trust Co. to deliver these stock certificates to the respective persons and for the respective amounts to which the stockholders of the Scheidel-Western X-Ray Co. were entitled as above set forth.

The second amended bill by another amendment avers that about one week prior to August 1, 1916, complainant secured from defendant, A. D. Gash, a loan of \$300 and pledged to Gash as security therefor his said certificate for 21.8 shares, which was to be held by Gash as collateral for the loan; that Gash, in violation of his agreement, surrendered it and caused the Scheidel-Western X-Ray Co. to reissue to him in his own name a new certificate; that on the day of its issue Hooper paid Gash the \$300 loan in full and demanded the return of the collateral, whereupon Gash endorsed this last reissued certificate, which was signed by the president of the corporation and by Gash as its secretary, and handed to complainant in lieu of said collateral.

It is further averred that there were issued in the name of Gash stock certificates representing 54 shares of the first preferred stock, 41 shares of the second preferred stock and 164 shares of the common stock of the Victor Electric Corp.; that Gash appeared on the stock book of Scheidel-Western X-Ray Co. as the holder of 136.8 shares of the capital stock of the Scheidel-Western X-Ray Co., in which were included 21.8 shares of said stock owned by complainant and pledged to Gash and which were issued to him on August 1, 1916; that the Scheidel-Western X-Ray Co. delivered this certificate to the Central Trust Co. as its agent, and directed its said agent to deliver the stock certificates to the respective persons in whose names said stock certificates were issued, but only upon the surrender by said persons to the Central Trust Co. of their equivalent stock certificates of the Scheidel-Western X-Ray





Co.; that Scheidel-Western X-Ray Co. directed its agent, the Central Trust Co., to deliver 54 shares of first preferred stock, 41 shares of second preferred stock, and 164 shares of common stock of the Victor Electric Corp., to Gash only upon the surrender by him to the said Trust Co. of stock certificates representing 136.8 shares of stock of the Scheidel-Western X-Ray Co., but that the Central Trust Co. violated its instructions and directions and delivered to Gash the stock of the Victor Electric Corp., upon the surrender of certificates representing only 115 shares of stock of the said Scheidel-Western X-Ray Co.; that the Central Trust Co. violated its directions and agreement under which it acted as agent and as escrowee for hire, by delivering to Gash  $9\frac{1}{2}$  shares of the first preferred,  $6\frac{1}{2}$  shares of the second preferred, and 26 shares of common stock of the Victor X-Ray Corp., without compelling him to return to it, for the Scheidel-Western X-Ray Co. and the Victor X-Ray Corp., the outstanding certificate owned by complainant of 21.8 shares of the stock of the Scheidel-Western X-Ray Co.; whereas said escrowee should have delivered the said  $9\frac{1}{2}$ ,  $6\frac{1}{2}$  and 26 shares to complainant.

It is further averred that the Victor X-Ray Corp. has, since Gash received said  $9\frac{1}{2}$ ,  $6\frac{1}{2}$  and 26 shares, paid him \$3050 in dividends thereon and has redeemed them by paying to Gash therefor \$6872.50, all of which are the property of complainant and were received by Gash as trustee for complainant; that Gash having been on August 1, 1916, and for several years prior thereto and several years thereafter, the secretary and at times the president of the Scheidel-Western X-Ray Co. and during all said time a trustee of the Scheidel-Western X-Ray Co., his knowledge that complainant owned these 21.8 shares was in law the knowledge of the Scheidel-Western X-Ray Co., and because of the consolidations above mentioned was also the knowledge of the Victor X-Ray Corp.



was also the knowledge of the Victor K-Roy Corp.  
Western K-Roy Co., and because of the connections above mentioned  
owned those 21.8 shares was in law the knowledge of the Scheibel-  
Scheibel-Western K-Roy Co. and during all said time a trustee of  
years thereafter, the secretary and at times the president of the  
on August 1, 1916, and for several years prior thereto and several  
received by each as trustee for complainant; that each having been  
Scheibel-Western K-Roy Co. all of which was the property of complainant and were  
dividend thereon and has redeemed them by paying to each shareholder  
since then received said 21.8 shares, and the 21.8 shares in  
it is further averred that the Victor K-Roy Corp. has  
to complainant.

said shares should have delivered the said 21.8 and 22 shares  
21.8 shares of the stock of the Scheibel-Western K-Roy Co.; whereas  
I-K-Roy Corp., the outstanding certificate owned by complainant of  
return to it, the Scheibel-Western K-Roy Co. and the Victor  
common stock of the Victor K-Roy Corp., without commencing him to  
preferred, 21 shares of the second preferred, and 22 shares of  
shares for him. It delivered to each 21 shares of the first  
its directions and agreement under which it acted as agent and as  
Scheibel-Western K-Roy Co.; that the Scheibel Trust Co. violated  
certificates representing only 11.8 shares of stock of the said  
each the stock of the Victor K-Roy Corp., and the violation of  
Trust Co. violated the instructions and directions and delivery to  
of stock of the Scheibel-Western K-Roy Co., and said the violation  
the said Trust Co. of stock certificates representing 11.8 shares  
Victor K-Roy Corp., to each only upon the surrender by him to  
of second preferred stock, and 11.8 shares of common stock of the  
Trust Co., to deliver 21 shares of first preferred stock, 21 shares  
Co.; that Scheibel-Western K-Roy Co. dissolved its agent, the Victor

This amendment also avers that the redemption moneys and dividends so received by Cash from the 21.8 shares, or from the stock into which the 21.8 shares were exchanged, were invested by him to improve or to pay off incumbrances upon lots 7 and 8, Block 19, Dingee's Addition to Wilmette Village in Cook county, Illinois, and in the purchase of \$3,000 par value of stock of the Twentieth Century Life Co.

The amended bill prays that defendants may be decreed to render an accounting to complainant of all dividends and stock and proceeds thereof which have accrued and come into their possession, and that the real estate and the stock in the Twentieth Century Life Co. be impressed with a lien in favor of complainant; that the Victor X-Ray Corp. may also be decreed to render an accounting to complainant for all dividends earned and declared by its predecessor in interest, the Victor Electric Corp., on 28½ shares of its first preferred stock, 21½ shares of its second preferred stock, and 86 shares of its common stock, from the period between June 16, 1916, until September 29, 1920; that the said defendant be decreed to account to complainant for all dividends earned and declared by it on 1405 shares of its Class "A" preferred stock and 91.2 shares of its Class "B" preferred stock from September 29, 1920, until the time of the filing of the original bill of complaint; that the court may decree that the certificate of stock for 21.8 shares now held by complainant be reformed and decreed to be 21.8 shares of the capital stock of the Scheidel-Western X-Ray Co., and that said defendant may be decreed and required to issue to complainant certificates for 41.5 shares of Class "A" and 28.125 shares of Class "B" stock in said defendant. The said amended bill also prays for other and further relief.

It is contended by defendants that the demurrers were properly sustained for the reason that the second amended bill







was multifarious because it joined distinct and separate causes of action against different defendants, and Bonney v. Lamb, 210 Ill. 95; Patterson v. Northern Trust Co., 238 Ill. 601; First Nat'l Bank v. Starkey, 268 Ill. 22; and Jack v. Blettnar, 148 Ill. App. 451, are cited to this point. Although complainant has filed a reply brief he does not discuss any one of these cases nor make reply to this contention. In Story's Equity Pleadings, 9th ed., sec. 271, p. 243, it is said:

"The bill should not be multifarious; for if it is so, it is demurrable, and may be dismissed by the court of its own accord, even if not objected to by the defendant. By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. In the latter case the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants with which he has no connection. In the former case, the defendant would be compellable to unite, in his answer and defence, different matters wholly unconnected with each other; and thus the proofs, applicable to each, would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. Indeed, courts of equity, in cases of this sort, are anxious to preserve some analogy to the comparative simplicity of proceedings at the common law, and thus to prevent confusion in their own pleadings, as well as in their own decrees."

The mere statement of the facts, as already recited, indicates that the bill is subject to this objection. The bill seeks an accounting from the defendant, the Victor X-Ray Corp., upon the theory that it is liable as the successor of the Scheidel-Western X-Ray Co. It seeks an accounting from Gash upon the theory that he has violated the provisions of a personal contract made between complainant and himself with reference to collateral for a loan. The bill seeks to hold Gash not only upon the theory of the violation of his personal agreement but also upon the theory that he is a trustee by reason of his holding an office in the Scheidel-Western X-Ray Co. He is to be held in the one case upon the theory that he





is the owner of the stock in question and in the other case on the theory that he is not the owner of the stock - theories which are entirely inconsistent. It is manifestly unfair and wholly unnecessary that Gash and the Victor X-Ray Corp. should be required to jointly defend a bill which charges a liability upon each on wholly distinct theories and facts. The demurrer was properly sustained because the second amended bill was multifarious.

So far as the Victor X-Ray Corp. is concerned, we think also that the bill shows upon its face that complainant is guilty of gross laches, which is a complete bar to the relief demanded. The transaction upon which this suit is based took place on June 16, 1916, and this bill of complaint was filed on May 19, 1929. The bills show that during all this time Hooper had full knowledge of the facts, or that if he did not have full knowledge he could have learned all the facts upon slight inquiry. He was obligated to make such inquiry. He knew all this time that the record of the corporations in question showed Gash to be the owner of 21.8 shares of stock which he now claims. He kept the certificate issued in the name of Gash in his possession for 13 years. He permitted Gash during that time to receive all the benefits incident to such record ownership. By his bill he now seeks to avoid the consequences of his own negligence and to impose upon the Victor X-Ray Corp. (which so far as the record shows never had any knowledge even of his existence) a liability for the money he permitted to be paid to defendant Gash. Upon the clearest principles, he is guilty of laches which bars his recovery. That equity does not permit a complainant in such a situation to recover has been decided in cases so numerous that it is unnecessary to cite them.

There are other questions raised in the briefs, but



is the power of the stock in question and in the same way as  
the theory that he is not the owner of the stock - theories which  
are entirely inconsistent. It is manifestly untrue and wholly  
unsubstantiated that the stock is not his. It is his and he is  
entitled to it. He is entitled to it and he is entitled to it  
and he is entitled to it. The defendant was  
entitled to it. He is entitled to it. He is entitled to it.  
properly established because the record shows that he is entitled to it.  
as far as the Victor X-ray Corp. is concerned, we  
think also that the bill shows upon its face that complainant is  
entitled to it. It is a simple case. It is a simple case. It is a simple case.  
The defendant was not entitled to it. He was not entitled to it.  
He was not entitled to it. He was not entitled to it. He was not entitled to it.  
The bill shows that during all this time Victor  
had full knowledge of the facts, or that if he did not have full  
knowledge he could have learned all the facts and still in equity  
he was entitled to have them. He was entitled to have them. He was entitled to have them.  
The record of the corporation in question shows Cash to be the  
owner of 51.8 shares of stock which he now claims. He says the  
certificate issued in the name of Cash in his possession for 15  
years. He permitted Cash during that time to receive all the dividends  
this incident to your record ownership. By his bill he now seeks  
to nullify the ownership of his own corporation and to leave upon  
the Victor X-ray Corp. (which as far as the record shows never had  
any knowledge even of his existence) a liability for the money  
he permitted to be paid to defendant Cash. Upon the clearest  
principles, he is guilty of fraud which bars his recovery. That  
equity does not permit a complainant in such a situation to re-  
cover has been decided in cases so numerous that it is unnecessary  
to cite them.

There are other questions raised in the bill, but

those which we have considered are decisive.

For the reasons indicated the decree of the Circuit court is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

These will be now considered in detail.

For the reasons indicated the action of the Council

is as follows.

Article.

Article 1. The Council, 22, 1900.



34624

BANA WHITAKER, Adm'x. of Estate of  
Man Bradford, Deceased,  
Appellee.

vs.

METROPOLITAN LIFE INSURANCE  
COMPANY, a Corporation,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 668<sup>2</sup>

MR. PRESIDING JUSTICE MATCHETT  
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Life Insurance Company from a judgment in favor of plaintiff in the sum of \$1,000 entered upon the finding of the court. Plaintiff sued as the administratrix of the estate of one Man Bradford, who was accidentally killed by an automobile on December 16, 1928, and who at the time of his death held what is usually described as an industrial insurance policy from defendant in the sum of \$1000.

The administratrix in her statement of claim averred that the policy was then in defendant's hands and demand was made that the same be produced upon the trial.

Defendant filed an affidavit of merits stating that the policy contained a "facility of payment clause," as follows:

"The Company may make any payment or grant any nonforfeiture privilege, provided herein to the insured, husband or wife, or any relative by blood or connection by marriage of the insured, or to any other person, appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial; and the production of a receipt signed by either of said persons, or other proof of such payment or grant of such privilege to either of them, shall be conclusive evidence that all claims under the policy have been satisfied."

The affidavit further averred that one Rachael Bradford appeared to the company to be equitably entitled to the proceeds of said policy and that said policy was paid to Rachael Bradford on January 9, 1929, by its check No. B-408999.

It is argued by defendant that the trial Judge erred

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in finding for plaintiff and in entering judgment against defendant contrary to the undisputed evidence.

There seems to be no controversy as to the facts. Upon the trial the policy was offered in evidence by plaintiff and was received. It was dated October 12, 1925, and purported to insure Man Bradford (whose age at his next birthday was stated to be 37 years) for the amount of \$560, at a weekly premium of fifty cents. A rider attached to the policy provided that in case of accidental death, defendant should be liable for double indemnity. After this policy was received in evidence plaintiff rested.

Rachael James was then called as a witness for defendant and testified that the deceased had been a friend of hers for four years; that he was her "common law husband;" that prior to his death he had suffered from rheumatism, and that at the time of his death he was living at her home; that she saw the deceased after he was killed; that the body was brought to an undertaking establishment, and that the deceased was buried from that establishment. She said:

"I asked them to bury him from there. I have the bill to show. I knew Man Bradford had an insurance policy with the Metropolitan Life Insurance Company because I have taken it out on him."

The check of the defendant company for the sum due was identified by her, and she stated that she got the money on it. On cross-examination this witness stated that she was not married; that she had been married once to a man named Drain; that her maiden name was Williams; that she had another husband, Will James; that she married him at Atlanta, Georgia, about eighteen years ago; that she married Drain when she was young, so long ago that she had forgotten when; that was before she married James. She remembered when Bradford was killed, which was at South Parkway and 33rd street. She was not there. After he was killed she found him at Jones



in finding the defendant and in securing testimony against defendant  
 contrary to the defendant's evidence.

There seems to be no controversy as to the facts. Upon  
 the trial the policy was offered in evidence by the plaintiff and was  
 received. It was dated November 11, 1917, and was payable to Emma  
 Han Bradford (whose age at her death was stated to be 27  
 years) for the amount of \$500, at a weekly premium of fifty cents.  
 A rider attached to the policy provided that in case of accidental  
 death, defendant should be liable for double indemnity. After this  
 policy was received in evidence the plaintiff rested.

Emma Han Bradford was then called as a witness for the  
 plaintiff and testified that she deceased had been a friend of hers for  
 about four years; that he was her "business law partner"; that prior to his  
 death he had advised her to purchase the policy, and that at the time of his  
 death he was living at her home; that she saw the deceased after  
 he was killed; that the body was brought to an undertaking establishment  
 and that she saw the body and that she saw the deceased after

death:

"I asked them to bury him there. I have the bill to  
 show. I saw Han Bradford and an insurance policy with me  
 Metropolitan Life Insurance Company because I have taken it  
 out on him."

The check of the defendant company for the sum of the was  
 identified by her, and she stated that she got the money on 11.  
 On cross-examination this witness stated that she was not married;  
 that she had been married once to a man named John; that her  
 maiden name was Williams; that she had another husband, Will Jones;  
 that she married him at Chicago, Illinois, about 1915; that she  
 that she married John when she was young, so that she had been  
 married three times; that the policy was written on her. She  
 when Bradford was killed, which was at about 1917, and that after  
 she was not there, after he was killed she took care of him.

Undertakers. He had not come home that night and she went to several police stations. She got uneasy about him because he always came home, so she decided he had gone to one of his nieces, whose husband worked in the same place as deceased. He was killed on Sunday evening and she found him on Tuesday.

She says that the undertaker did not ask her anything about insurance; that she broke down and was crying and wished to tell his people about it; that the undertaker came back in the morning and asked her if she had insurance; that she told him "I carried Metropolitan Life Insurance. He had insurance that was made to his sister. The other I had taken out." She turned over the insurance policy to Jones, the undertaker. Jones said that he had been beat so much and that when the time came and when he got ready he would give her anything that he had over. She was not married to the deceased, although she carried his name. Her real name was Rachael James. The agent brought the check to her home and said, "Mrs. Bradford, here is your check," to which she replied, "All right, we will go and take it to the undertakers." He did not say anything about the check being for too much. Bradford had been buried when the agent brought her the check. The funeral bill was \$228, which amount the undertaker took out, and she got the rest. She produced a receipt for the payment of that amount to the undertaker.

The agent who sold the insurance policy testified and identified the receipt book for this particular policy. He said he made collections on this policy which were recorded in that book; that he received the payments from Rachael Bradford. He also identified the check that was given in payment of the policy and said that he delivered the check to "Mrs. Rachael Bradford, this same lady," (indicating.)

Defendant also offered and there was received in

University. He had not come home that night and she went to see  
 the police station. The first officer about the house he always  
 came home, so she decided to ask him to see one of his officers, whom  
 he had met in the same place as himself. He was called in  
 Monday evening and the next day on Tuesday.

The next day the policeman told her that he was going to  
 about himself; that the first time he was called he was called in  
 tell his people about it; that the policeman came back in the  
 morning and asked him if he had information; that the first day  
 carried information with him. He had information that was  
 made to his sister. The first day he was called in the  
 the insurance policy to Jones, was understood. Jones said that he  
 had been told no more and that when the time came and when he was  
 ready he would give her what she had told him. She was not  
 married to the husband, although she carried his name. Her name  
 name was Rachel Jones. The agent brought the check to her home  
 and said, "The check is your check," to which she re-  
 plied, "All right, as this is not told to the insurance."  
 He did not say anything about the check being his own. He  
 told her that he had told her the check was his own. The  
 money bill was \$200, which amount the husband took out, and  
 she got the rest. She provided a receipt for the payment of the  
 amount in the receipt.

The agent who told the insurance policy carried and  
 identified the receipt that he had provided. He said  
 he was called in the policy which was received in that  
 book; that he received the payment from Rachel Jones. He  
 also identified the check that was given in payment of the policy  
 and said that he delivered the check to her. Rachel Jones,  
 this was the first day. (Continued.)  
 The agent also stated that the money was received in



evidence a release endorsement signed by Rachael Bradford under seal and by Mrs. G. F. Jones. The proof of death was signed by "Mrs. Rachael Bradford--occupation House Wife," and it stated, "Premiums were paid by Mrs. Rachael Bradford and in answer to question No. 15, 'By what right and relationship do you claim the proceeds of the insurance?' She answers 'Wife.'" The proof contained an affidavit by her which stated that the answers to the questions therein were true.

Defendant also put in evidence a receipt dated January 15, 1939, from the undertaker Jones to Mrs. Rachael Bradford for \$228. It stated that payment was received in full for the funeral of Man Bradford. Defendant also produced an itemized bill of the undertaker for funeral expenses and the premium receipt book, on the cover of which appeared the name "Man Bradford" in ink.

The agent stated that his name appeared upon the book from June 11, 1928, until the last payment was made, December 10, 1928; that the book showed that the payment had been made on the policy of Man Bradford but that he never collected from Man Bradford; that the book did not show who paid the money; that after he delivered the check to Rachael Bradford he went to the bank with her and told her that the company had made a mistake in the amount; that she took out some money and went over to the undertaker who said everything was all right.

The so-called facility clause, which is set up in the affidavit of merits, is a usual clause in this form of policy. It has been construed by this court in Bishop v. Prudential Ins. Co., 217 Ill. App. 112, where the cases from different jurisdictions of the United States were considered, and it was held that this clause of the policy was not against public policy and that it should be

...and a release endorsement signed by ...  
...and by Mrs. O. P. Jones. The check of \$1000 was signed by  
"Mrs. Richard Brodsky--consolation house wife," and it stated,  
"Problems were said by Mr. Richard Brodsky and in answer to  
question No. 18, 'Why was night and relationship do you claim the  
proceeds of the insurance?' The answers 'Wife.' The great con-  
firmed an affidavit by her which stated that the answers to the  
questions therein were true.

Belmont also put in evidence a receipt dated Jan-  
uary 18, 1932, from the undersigned Jones to Mrs. Richard Brodsky  
for \$2500. It stated that payment was received in full for the  
balance of the insurance. Belmont also produced an affidavit dated  
at the undersigned for funeral expenses and the premium received  
back, on the cover of which appeared the name "Mrs. Brodsky" in  
ink.

The agent stated that the name appeared upon the back  
from June 11, 1930, until the last payment was made, December 1,  
1932; that the fact showed that the payment had been made on the  
policy of Mrs. Brodsky but that he never collected from Mrs. Brodsky;  
that the book did not show who paid the money; that after he deliv-  
ered the check to Richard Brodsky he went to the bank with her and  
told her that the company had made a mistake in the amount; that she  
took out some money and went over to the undersigned who said every-  
thing was all right.

The so-called facility clause, which is set up in the  
affidavits of agents, is a novel device in this form of policy. It  
has been construed by this court in Hickman v. Industrial Ins. Co.,  
217 Ill. App. 125, where the facts from different indications of  
the United States were considered, and it was held that this clause  
of the policy was not against public policy and that it should be



liberally construed to the end that the insurer might be protected in making a prompt payment without the expense of administration proceedings. A similar clause was also construed in McDaniels v. Western & Southern Life Ins. Co., 332 Ill. 603, where the Supreme court said:

"Such clause in an industrial policy, usually issued for a small amount, is authorized in order to protect the insurance company, with the consent of the insured, against trifling but expensive litigation which might constantly occur over disputes as to parties entitled to the amount of the insurance, and where the company has exercised that option such exercise will be a complete defense under the terms of the policy. Bradley v. Prudential Ins. Co., 137 Mass. 226; Thomas v. Prudential Ins. Co., 148 Pa. St. 594."

Plaintiff cites and relies on Zornow v. Prudential Ins. Co., 206 N. Y. S. 92, where the court held, construing a policy of this kind, that in permitting the insurer to elect to whom it should pay the policy, the court would require not only good faith but also the exercise of sound judgment in making payment to the proper claimant; that no freedom of arbitrary or capricious choice was given, nor license to act carelessly and without proper inquiry. In that case one Zimmer died at a hospital in Rochester, New York, and prior to his last illness he had boarded with a Mrs. Rothfus. At the time of his death it was not known that he had any family or relatives. Zornow was an undertaker who was notified by a physician, and also by Mrs. Rothfus, of Zimmer's death and was asked to take charge of the funeral. He inquired with reference to the property of the deceased and was informed by Mrs. Rothfus and the superintendent of the defendant insurance company that the policies provided a fund for the burial of the deceased. Zornow then proceeded to arrange for the funeral, adjusting the expenditures with reference to the amount of the policies. Mrs. Rothfus made formal proof of death and of claim and delivered the policies to the insurance company's superintendent, who took a written statement from Mrs. Rothfus to the effect that she would pay the



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[illegible][illegible][illegible]

funeral expenses, but of these facts Zornow had no knowledge. Subsequently the Insurance company issued checks payable to Mrs. Rothfus. Two agents of the company went with Mrs. Rothfus to the office of Zornow, who was then absent. Mrs. Rothfus represented to Mrs. Zornow that it was necessary to have a receipted bill in order that the insurance might be made available for paying the funeral expenses. They did not disclose the fact that checks made payable to Mrs. Rothfus were then in the hands of the agent. Mrs. Zornow made out a bill and receipted it in the name of her husband and delivered it to the agent. Thereafter the agent delivered the checks to Mrs. Rothfus, but the funeral bill was not paid.

The administrator of Zornow's estate sued on the policies, there being apparently no other assets of the estate. It was under such facts that the court in its opinion, which was in favor of the administrator, used the language upon which the plaintiff here relies. The court, however, further said:

"Mrs. Rothfus was not, in any sense, a relative of the insured, and she had neither paid the funeral expenses nor made contract or arrangement with the undertaker whereby she became obliged to pay them. We hold it to be insufficient grounds upon which to base an equitable claim to a fund that a person of no financial responsibility makes a promise to the insurer that she will pay the funeral expenses of the insured, where that fact is not communicated to the person conducting the funeral, and where he has been given no choice to elect that he will accept such promise and rely upon the personal liability of a stranger, rather than upon the fund provided for the particular purpose of meeting the funeral expenses."

We think it quite unnecessary to point out in detail the facts which distinguish that case from the one which appears upon this record. The so-called facility clause of this policy provides that payment may be made (1) to the insured; (2) to the husband or wife; (3) to any relative by blood or connected by marriage, or (4) "to any other person, appearing to said company to be equitably entitled to the same by reason of having incurred expense on behalf of the insured, or for his or her burial." It further provides that the production of a receipt signed by



General expenses, but of course I am not to be understood as...  
ordinarily the insurance company issued checks payable to Mrs. Nathan.  
The. Two agents of the company went with Mrs. Nathan to the...  
line of business, who was then absent. Mrs. Nathan requested to  
Mrs. Nathan that it was necessary to have a receipted bill in order  
that the insurance might be made payable to the company.  
expenses. They did not disclose the fact that Mrs. Nathan was  
to Mrs. Nathan were then in the hands of the agent, Mrs. Nathan  
made out a bill and presented it to the name of her husband and  
delivered it to the agent. Thereafter the agent delivered the  
check to Mrs. Nathan, but the insurance bill was not paid.  
The administrator of Nathan's estate said on the  
polices, there being apparently no other assets of the estate.  
It was noted such facts that the court in its opinion, which was  
in favor of the administrator, used the language upon which the  
plaintiff here relies. The court, however, further said:  
"Mrs. Nathan was not, in any sense, a relative of the de-  
ceased, and she had neither paid nor incurred any expenses nor was  
contracted at arm's length with the undertaker whereby she became  
obliged to pay them. It is to be observed that the estate  
was not to have an executor of its own, but that a person  
of no financial responsibility was a trustee for the estate, who  
was to pay the funeral expenses of the insured, which  
fact that he was communicated to the estate and that  
thereafter, and that he has been given no choice to elect that  
he will accept such services and pay them as provided in the  
of a stranger, rather than that the fact provided for the de-  
ceased by the will of securing the funeral expenses."  
We think it quite unnecessary to go any further  
the facts which distinguish this case from the one which supports  
upon this record. The so-called Twelfth clause of said policy  
provides that payment may be made (1) to the insured; (2) to the  
husband or wife; (3) to any relative by blood or connection by  
marriage; or (4) "to any other person, appearing to said company  
to be entitled to receive the same by reason of having been  
expense on behalf of the insured, or for his or her benefit." It  
further provides that the production of a receipt signed by



either of these persons, or other proof of such payment or grant of such privilege to either of them, "shall be conclusive evidence that all claims under the policy have been satisfied." There is not a scintilla of evidence in this record which indicates that defendant company acted in bad faith or, indeed, that any of the persons involved in this transaction acted in bad faith. It is apparent that Rachel James, who represented herself to be the wife of the deceased, was the only person who indicated any interest in his welfare at the time of the accident resulting in his death. Legally, of course, she was not his wife, but she manifested the same interest in him as if she had been. She arranged for his funeral and became personally liable therefor. It was she who caused the insurance policy to be taken out, and it was through her that the premiums upon it were paid. There was no circumstance up to the time the payment of the policy was made to her which could have indicated to defendant Insurance company that she was not in fact his wife. Unlike the case upon which plaintiff relies, there is no proof of fraud or fraudulent intent, and we think on the uncontradicted evidence plaintiff is not entitled to recover.

For the reasons indicated the judgment will be reversed with a finding of facts and judgment here for defendant.

REVERSED WITH FINDING OF FACTS AND  
JUDGMENT HERE FOR DEFENDANT.

McSurely and O'Connor, JJ., concur.

...of these persons, or other kind of non-payment or ...  
...to which it is ...  
...that all claims ...  
...not a ...  
...company ...  
...in ...  
...that ...  
...in ...  
...the ...  
...of ...  
...and ...  
...the ...  
...at ...  
...to ...  
...are ...  
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...no ...  
...notified ...  
...for ...  
...the ...

...and ...

## FINDING OF FACTS.

We find as facts that the defendant Insurance Company in this case, prior to the beginning of this suit and prior to any notice, or fact putting it upon notice, that any other person claimed any interest in the policy in question, paid the amount due thereunder to one Rachael James, who represented to said company that she was the wife of the deceased and who, although not the wife of the deceased, had become liable for the expenses of his burial; that such payment was in full discharge of all liability of defendant under the policy sued on, and that judgment against plaintiff and in favor of defendant for costs should be entered in this court.



[illegible]

34654

ALBERT BURCHARD,

Appellee.

vs.

JOHN W. ESCH,

Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

259 I.A. 668<sup>3</sup>

MR. PRESIDING JUSTICE HATCHETT  
DELIVERED THE OPINION OF THE COURT.

John W. Esch, one of several defendants, prosecutes this appeal to secure the reversal of a decree whereby he and other defendants, including several municipal corporations and the Schiller Park Coal & Supply Co., their agents, etc., were permanently "enjoined and restrained from hauling to and depositing upon the land of Esch, known as the north 60 acres of the west half of the northwest quarter of Section 21, Township 40, Range 12 in Cook County, any garbage, offal, carcasses of dead animals, or other obnoxious, putrid or nauseating matters, and that defendant, Esch, his servants, agents and employees, or any one through or on his behalf, be, and they are hereby perpetually enjoined and restrained from maintaining and permitting to remain on his said land, garbage, offal, carcasses of dead animals, or other obnoxious, putrid or nauseating matter, and the said Esch, his servants, agents and employees, or any one through or on his behalf, be, and they are further perpetually enjoined and restrained from obstructing and blocking the natural flow of surface waters over and across the said land through the said ditch shown and described on the blue print in evidence as Defendants' Exhibit 1 of February 14, 1930, as ditch A, and the said Esch, his servants, agents and employees, or any one through or on his behalf, are further perpetually enjoined and restrained from maintaining any obstructions or blockades of the natural flow of surface waters over and across his land through ditch A or from obstructing or blockading the natural flow of surface

ALBERT J. BROWN  
JAMES A. BROWN  
JAMES A. BROWN

553 LA. 668

AL. PROBATION SERVICE BUREAU  
REPLYING THE OFFICE OF THE COURT

James A. Brown, one of several defendants, respondents  
this court to return the record of a hearing conducted in this  
delinquent, including several municipal corporations and the  
delinquent was sent to the State Prison, where he was  
delinquent and returned from the State Prison in the month of  
the month of June, 1930, when he was sent to the State Prison  
the defendant James A. Brown, Jr., formerly of, and now of  
County, was arrested, and, together with several other  
delinquents, sent to the State Prison, and that defendant, Brown,  
his servants, agents and employees, or any one of them, or in his  
delinquent, he, and they are hereby perpetually enjoined and restrained  
from maintaining and permitting to remain on his said land, estate,  
official, servants or agents, or other persons, agents or  
managing matter, and the said John, his servants, agents and em-  
ployees, or any one of them, or in his behalf, he, and they are hereby  
perpetually enjoined and restrained from obstructing and inter-  
fering the natural flow of surface waters over and across the said land  
through the said ditch shown and described on the blue print in  
evidence as defendant's Exhibit A of February 14, 1930, as filed,  
and the said John, his servants, agents and employees, or any one  
of them, or in his behalf, are further perpetually enjoined and re-  
strained from maintaining any obstructions or blockades of the  
natural flow of surface waters over and across his land through  
ditch A or from obstructing or blocking the natural flow of surface



waters over and across the said land, and the said Esch and his servants, agents and employees, be and they are hereby further perpetually restrained from discharging from his said land onto the lands of others, any waters containing garbage, offal or carcasses of dead animals, and the clerk of this court is ordered and directed to issue the Peoples' writ of injunction against the defendants aforesaid, restraining and enjoining them, as aforesaid."

The cause was heard upon the amended bill of complaint, the answers of defendant thereto, and the report of a master in chancery to whom the cause had theretofore been referred upon the issues to take the evidence and report his conclusions of law and of fact, and upon the exceptions of defendant to the report of said master. The report was approved, the exceptions thereto overruled, and a decree entered as heretofore stated. The decree stated the facts as found by the master and as alleged in the amended bill of complaint, but denied in the answers, to be as follows:

The complainants are owners of certain lands, which some of them occupy with their families and one of them by a tenant. The land of complainant Burchard lies on the west side of a north and south highway known as Mannheim road and the lands of the other complainants lie east of Mannheim road. Practically all of the land lying east of Mannheim road, north of the St. Paul railroad and south of Irving Park boulevard is subdivided.

Defendant Esch is the owner of 60 acres of land lying east of Mannheim road and practically surrounded by the land and property of complainants. This Esch land lies just north of the village of Franklin Park and has been used for farming purposes, and it is lower than and servient to the lands of the complainant Burchard, which lie west and north of it and to the land of complainants Bert and Edith Petersen lying to the south of it. The Esch land is vacant and unimproved except as hereinafter stated.

waters over and around the said land, and the said land and his  
vents, agents and employees, he and they are hereby further per-  
petually restrained from discharging from his said land onto the  
lands of others, any waters containing garbage, oil or other  
of dead animals, and the grant of this court is ordered and directed  
to issue the Peoples' writ of injunction against the defendant  
et cetera, restraining and enjoining them, as aforesaid."

The cause was heard upon the amended bill of complaint.  
The master of defendant brought, and the report of a master in  
chancery to whom the cause had heretofore been referred upon the  
issue to take the evidence and report his conclusions of law and  
of fact, and upon the exceptions of defendant to the report of  
said master. The report was approved, the exceptions thereof over-  
ruled, and a decree entered as heretofore stated. The decree stated  
the facts as found by the master and as alleged in the amended bill  
of complaint, but failed in the answers, to be as follows:

The complainants are owners of certain lands, which some  
of them occupy with their families and one of them by a tenant. The  
land of complainant Edmund lies on the west side of a north and  
south highway known as Main Street and the land of the other  
complainants lies east of Main Street. West of all of the  
land lying east of Main Street, north of the highway, there is a  
road and a creek of water that is called.

Defendant lies in the center of the area of land lying  
east of Main Street and practically surrounded by the land and  
property of complainants. His own land lies north of the  
Alameda of Franklin Park and has been used for farming purposes,  
and it is lower than and adjacent to the lands of the complainants  
thereof, which lie west and north of it and to the land of com-  
plainants Bert and Edith Peterson lying to the south of it. The  
said land is vacant and unimproved except as heretofore stated.



For many years past there has been a ditch (which is shown on a blueprint in evidence and described as "Ditch A") starting in a certain tract of land in Leyden Township, which lies north and west of the land of Esch and runs southeasterly across the north half of section 21 and through a culvert under Mannheim road and across a portion of a ten-acre farm lying immediately south of and adjacent to the land of Esch, and then turns north and runs across the land of Esch in a northeasterly direction across the land of certain complainants and thence in a northeasterly direction to Irving Park boulevard. Work has from time to time been done by Esch in the way of clearing out this ditch and straightening it; the County of Cook has placed a large culvert in it through Mannheim road, and the owners north of the Esch line have placed a tile drain below ditch A and along its course. The court finds that this ditch A has been regarded by the owners through whose land it passes as a mutual ditch, and that it is in fact a mutual ditch under the law for the benefit of the owners along its course.

For many years last past the surface waters from the lands to the south and west of defendant's land have uninterruptedly drained through ditch A; thence north to Irving Park boulevard, across the said land. Prior to the doing of the acts complained of the lands west of Esch have been free of standing and back water and the lands to the south of Esch in times of freshets have had standing water thereon, which water has drained off to the north and across Esch's land after said freshets were over, the drainage beyond Irving Park boulevard being easterly into the Desplaines river.

For some time past <sup>the</sup> defendants named in the amended bill have collected the garbage, refuse and offal, including small dead animals and usually ashes and miscellaneous waste from the various municipalities, and with the consent of Esch have dumped the same in large piles <sup>on the Esch lands</sup> *The aggregate population*



[illegible]

of these several municipalities or villages is 56,500, and from 20 to 30 loads a day in open trucks and trailers of garbage, offal, refuse, ashes and miscellaneous waste, depending upon the season of the year, have been hauled daily from the said villages to Esch's land. This matter has been heaped upon the land of Esch in piles to heights of some six to eight feet, completely blocking ditch A, without the consent of the land owners, and by said blocking the lands to the south and west of said dump have been at times flooded. In the winter part of the municipalities deposited little if any garbage and offal, and the garbage and offal from the other municipalities were mixed with ashes. There is evidence that defendant Esch was paid for this dumping privilege.

The said dump has been on fire from time to time for long periods of time, and smoke arose therefrom which was carried by the wind across the land of complainants. Said smoke at times was heavy and black and at all times had an extremely bad odor and was nauseating. The garbage, offal, refuse and dead animals deposited on the land of Esch and on said dump gave forth a stench detrimental to health. Immediately north of the Esch land there are a number of small homes occupied by families whose comfort and health and occupancy and use of their homes are detrimentally affected by odors arising from said garbage, offal, refuse and dead animals, which decay and rot, and by the smoke carried by the wind. The same condition is true as to the houses to the south and west of the Esch land.

The seepage from rains and melting snow from said dump is polluted by the garbage, offal and refuse in and on said dump and runs over Esch's land, across the land of certain complainants, and across the lands of other people to the north, in ditch A, and said ditch from the north end of the Esch land to Irving Park boulevard for approximately a half mile, runs very close to their homes



of these several municipalities or villages is 50,000, and from 25 to 30 loads a day in open trucks and in lists of trucks. All refuse, ash and miscellaneous waste, including upon the season of the year, have been dumped into the said village to which is given. This matter has been passed upon the land of which is given to a large of some 10 to 15 ft. deep, completely blocking the street the center of the land owners, and by said blocking the lands to the north and west of said dump have been at times flooded. In the winter part of the municipalities mentioned there is no drainage and other, and the garbage and other from the other municipalities are mixed with refuse. There is evidence that defendant knew that this was the case.

The said dump has been on the line in the long periods of time, and waste from the dump was carried by the wind across the land of complainant. The waste at times was heavy and black and at all times was extremely bad and was noxious. The garbage, ash, refuse and dead animals deposited on the land of which was given there a great deal of damage. Immediately north of the dump land there are a number of small houses occupied by families whose health and comfort and use of their houses are detrimentally affected by odors arising from said garbage, ash, refuse and dead animals, which have been, and by the waste carried by the wind. The same condition is true as to the houses in the south and west of the dump land.

The garbage from refuse and melting snow from said dump is pointed by the garbage, ash and refuse in and on said dump and runs over which land, across the land of certain complainants, and across the lands of other people to the north, in which A, and said dump has been on the line of the land to which said dump was the responsibility of said dump, and was very close to which houses



and frequently the water flowing therein from said dump contains deposits of garbage, offal and carcasses of dead animals, and gives forth a vile, obnoxious and nauseating odor. During the summer months it is impossible to leave any windows open in these houses without suffering serious inconvenience and discomfort owing to the smell and odor. Complainants have suffered great and irreparable damage by reason of the maintenance of the dump. The value of the land in the neighborhood of said dump has decreased on account of the dump and the garbage, offal and refuse 20 per cent along Irving Park boulevard and 50 per cent along the Esch land.

The blocking of the waters usually flowing through ditch A on the Esch land has flooded and held back water on the lands to the south and west of Esch's land, which water, if it were not for said obstruction, would have flowed through ditch A on the Esch land and beyond, and by reason thereof the owners of the lands to the south and west have suffered great damage due to the water being held back and standing on their land.

By reason of the maintenance of the dump and the garbage and refuse thereon, large numbers of rats and flies have collected and bred therein and have invaded the homes in the vicinity. The complainants and all persons living in the vicinity of the dump will suffer great and irreparable damage to their health and property if the said conditions are permitted to remain, and the complainants have no adequate remedy at law.

The court specifically finds that the maintenance and permission of the things above described by Esch upon his land are and constitute a nuisance.

It will be noticed that Esch alone prosecutes this appeal, the other defendants having acquiesced in the decree. While defendant presents what purport to be fourteen points in

and frequently the water flowing over the land has caused  
destruction of crops, cattle and sometimes of human animals, and given  
birth to a life, sometimes and sometimes not. During the summer  
months it is impossible to leave any minute area in these houses  
without suffering serious inconvenience and discomfort owing to  
the well and water. The water has not only been used and it has  
caused damage by reason of the maintenance of the pump. The value  
of the land in the neighborhood of said pump has decreased on  
account of the pump and the pump, cattle and water to get out  
along the river bank and to get out along the river bank.  
The situation of the water is such that it is impossible  
to get A on the land and the land has been flooded and the pump water on the  
lands to the south and west of the land, which water, it is  
not for the said observation, would have been thrown through the A  
on the land and water, and to the south and west of the land of  
the land to the south and west have suffered great damage due to  
the water which has been and is being on the land.

By reason of the situation of the pump and the land  
pump and water thereon, large numbers of cattle and sheep have been  
killed and the land has been flooded and the water is such that it is  
impossible to get A on the land and the land has been flooded and the pump water on the  
lands to the south and west of the land, which water, it is  
not for the said observation, would have been thrown through the A  
on the land and water, and to the south and west of the land of  
the land to the south and west have suffered great damage due to  
the water which has been and is being on the land.

The water is such that it is impossible to get A on the land and the land has been flooded and the pump water on the  
lands to the south and west of the land, which water, it is  
not for the said observation, would have been thrown through the A  
on the land and water, and to the south and west of the land of  
the land to the south and west have suffered great damage due to  
the water which has been and is being on the land.



his brief, only three of these are argued, and the others, under our rule, may be deemed to be waived.

It is insisted, in the first place, that the terms of the injunction are uncertain, and in support of this contention defendant quotes a single phrase of the decree, disconnected from its context, to the effect that defendant is enjoined and restrained from depositing garbage, etc., "and other obnoxious, putrid and nauseating matters." The words objected to, with context, are, "any garbage, offal, carcasses of dead animals, or other obnoxious, putrid or nauseating matters." We are not able to discern anything that is at all uncertain in this language; and if there were any doubt in the matter it would seem to be easily removed by the application of the rule of ejusdem generis. Misch v. Russell, 136 Ill. 22; Strickland v. Strickland, 271 Ill. 614. In other words, "other obnoxious, putrid and nauseating matters" are similar in kind to those described in the preceding part of the sentence which includes "garbage," "offal," and "carcasses of dead animals." This would seem to be entirely sufficient to express the intention of the decree to the ordinary mind.

The second point argued by defendant is that improper testimony was admitted upon the hearing before the master. This point is worthy of little, if any, consideration. The evidence objected to was admitted subject to objection, and the master in making his report and the chancellor in entering the decree are presumed to have disregarded any improper evidence in reaching their conclusions. Mix v. The People, 116 Ill. 265.

Defendant next contends that the decree erroneously finds that the natural flow of the water over defendant's land was towards the north, when as a matter of fact the direction of the flow was towards the south and the east, and he challenges the finding of the chancellor and of the master that his land is lower





and servient to the lands of the complainants or that he has by the things complained of blocked the natural flow of the surface waters across his land. The finding of the master and of the chancellor is against defendant on these points, and while the finding does not (as complainants contend) have the same weight as the verdict of a jury, that of the master is prima facie correct and the decree confirming the report of the master will not be reversed unless it is manifestly against the evidence. Czechik v. Kotelsky, 311 Ill. 438. Even a slight examination of this evidence discloses that this court would not be justified in reversing for that reason. In fact, the ditch to which the decree refers is marked as "Ditch A" upon an exhibit which was offered in evidence by defendant. A map of the U. S. geological survey, showing the general topography of the land in the vicinity of the Esch land was offered in evidence by complainants, and an inspection thereof tends to confirm the findings of the decree. The testimony of numerous witnesses, many of them called by defendant, establishes by an overwhelming preponderance of the evidence that the water in the ditches across defendant's land ran to the north and the east and towards Irving Park boulevard, as the decree finds.

There is no error in the record, and the decree is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

and returned to the hands of the respondents at that time by  
the latter conveyed or placed in the hands of the latter  
witness across his land. The finding of the court was that the  
respondent is entitled to recover on these points, and will not  
long ago not be considered correct. The court will not  
verify of a jury, but of the court is given leave to correct and  
the court confirming the report of the court will not be reversed  
unless it is manifestly against the evidence. Whipple v. Whipple,  
101 Cal. 438. When a slight examination of this evidence discloses  
that this court would not be justified in reversing for that reason.  
In fact, we wish to which the deposed witness is marked as "Witness  
A" upon an exhibit which was offered in evidence by defendant. A  
map of the U. S. Geological survey, showing the general topography  
of the land in the vicinity of the main road was offered in evi-  
dence by defendant, and as indicated several facts to confirm  
the findings of the deposed. The testimony of numerous witnesses,  
many of them called by defendant, established by an overwhelming  
preponderance of the evidence that the water in the ditch  
across defendant's land ran from the north and the east and  
towards living from defendant, as the deposed finds.  
There is no error in the record, and the deposed is

affirmed.

Reversed.

Reversed and remanded, 11, 1907.



34527

THE PEOPLE OF THE STATE  
OF ILLINOIS,

Defendant in Error,

vs.

MONROE H. LOEB,

Plaintiff in Error.

ERROR TO CRIMINAL COURT  
OF COOK COUNTY.

259 I.A. 668<sup>4</sup>

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

Defendant, found guilty upon trial by the court in a proceeding or proceedings instituted on behalf of Elsie Hasselberg, seeks a reversal.

The record is in confusion. It seems that on April 2, 1929, Elsie Hasselberg filed a complaint before a justice of the peace in which she charged Benjamin Loeb with having on December 20, 1928, forcibly ravished her. On the same day another complaint signed by her was filed with the justice charging Benjamin Loeb with being the father of her unborn child. Hearing of these charges was set by the justice for April 9, when, the complaining witness evidently having changed her mind, an order of nolle prosequi was entered and she swore to two other complaints before the same justice charging the defendant, Monroe H. Loeb, with having forcibly ravished her on December 6, 1928, and with being the father of her unborn child. There was a hearing of these charges before the justice and subsequently another hearing before one of the judges of the Criminal court of Cook county. It is not clear which of these two charges was tried in the Criminal court, although apparently it was the bastardy charge. The judgment of the court reads: "The court being fully advised in the premises doth find the said defendant Monroe H. Loeb guilty in the sum of eleven hundred (\$1100.00) dollars." We assume that this was intended to represent the finding of the court as to the bastardy charge, for the penalty for rape is imprisonment in the penitentiary and not a

STATE OF CALIFORNIA

IN SENATE

259 I.A. 668

THE PEOPLE OF THE STATE  
OF CALIFORNIA,  
Plaintiff in Error,

vs.

MONTEZ A. LEE,  
Defendant in Error.

ON PETITION FOR WRIT OF HABEAS CORPUS.

That the said defendant, MONTEZ A. LEE, was tried by the court in a  
proceeding to establish a violation of Article I, Section 15, of the  
Constitution of the State of California.

The record in this case is as follows:

On April 1, 1938, the defendant, MONTEZ A. LEE, was tried by the court in a  
proceeding to establish a violation of Article I, Section 15, of the  
Constitution of the State of California.

The record in this case is as follows:

On April 1, 1938, the defendant, MONTEZ A. LEE, was tried by the court in a  
proceeding to establish a violation of Article I, Section 15, of the  
Constitution of the State of California.

The record in this case is as follows:

On April 1, 1938, the defendant, MONTEZ A. LEE, was tried by the court in a  
proceeding to establish a violation of Article I, Section 15, of the  
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proceeding to establish a violation of Article I, Section 15, of the  
Constitution of the State of California.

The record in this case is as follows:

On April 1, 1938, the defendant, MONTEZ A. LEE, was tried by the court in a  
proceeding to establish a violation of Article I, Section 15, of the  
Constitution of the State of California.

The record in this case is as follows:

money judgment. Chapter 38, paragraph 505, Cahill's Illinois Stats.

Section 4 of the Bastardy act provides that, when the issue as to whether the person charged is the real father of the child or not, such issue "shall be tried by a jury." The right to a trial by jury in such a case may be waived. The People v. Humbracht, 215 Ill. App. 29; Kanorewaki v. The People, 113 Ill. App. 468. The instant record fails to show any waiver of this right. In The People v. Ryan, No. 34545, this court (opinion filed this day) we held that in a criminal case the waiver of a jury trial must affirmatively appear and that the waiver was expressly and understandingly made. While a prosecution under the Bastardy act is a civil and not a criminal proceeding, yet, in view of the express provision in section 4 that the issue "shall be tried by a jury," we are of the opinion that to give this provision effect the waiver of a jury trial must appear in the record in the same manner as in a criminal action.

Counsel for defendant discuss at some length and in detail the testimony touching the guilt of defendant. There are many discrepancies in the testimony of the complaining witness and some alleged facts which are hardly believable. No brief is filed in behalf of the People.

The record fails to show any judgment whatever. There is a finding that the defendant is "guilty in the sum of eleven hundred (\$1100.00) dollars." This, of course, is meaningless.

For the reasons indicated the so-called judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.



many instances. Under the provisions of the Illinois Code.

Section 4 of the Illinois Code provides that, when the

issue as to whether the person charged is the same as the

one in the case, shall be tried by a jury. The right to

a trial by jury is not a mere privilege, but a right.

People v. Jones, 112 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

488. The instant record fails to show any waiver of this right.

In The People v. Jones, 112 Ill. App. 2d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

day) we said that in a criminal case the waiver of a jury trial

must affirmatively appear and that the waiver was expressly and

unambiguously made. While a presumption exists that the waiver was

in a civil case not a criminal proceeding, yet, in view of the

express provision in section 4 that the issue "shall be tried by a

jury," we are of the opinion that the issue was properly waived

the waiver of a jury trial must appear in the record in the same

manner as in a criminal action.

Accordingly the judgment is reversed and the case remanded.

Reversed and remanded. The court is divided 4 to 3.

Many dissensions in the majority of the majority of the court.

Some dissenters have been heard by the majority of the court.

Reversed and remanded. The court is divided 4 to 3.

In dissent of the majority.

The record fails to show any judgment of the court.

In a dissent from the majority it is said in the case of the court.

And (dissenting) dissent. The court is divided 4 to 3.

The court is divided 4 to 3. The court is divided 4 to 3.

Reversed and the case remanded.

Reversed and remanded. The court is divided 4 to 3.

Reversed and remanded. The court is divided 4 to 3.

34557

JULIA KOSTERMAN,  
Complainant,

vs.

JOHN KOSTERMAN,  
Defendant.

JOHN KOSTERMAN,  
Cross-Complainant,  
Appellee,

vs.

JULIA KOSTERMAN,  
Cross-Defendant,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 668<sup>5</sup>

MR. JUSTICE McSHURELY DELIVERED THE OPINION OF THE COURT.

Julia Kosterman, the cross-defendant, appeals from a decree awarding John Kosterman a divorce upon his cross-bill charging her with adultery.

Apparently Mrs. Kosterman filed a bill for separate maintenance, but this bill is not in the record. Answer was filed by Mr. Kosterman and a cross-bill charging Mrs. Kosterman with adultery and asking for a divorce. She answered, denying the charges and subsequently filed an amended bill for divorce charging desertion. The cross-bill charged that Julia Kosterman committed adultery on July 17, 1926, and at various other times and places with Noel Whitehead and at other times and places with a man named Garner and with divers other persons unknown to the cross-complainant. After hearing evidence the court entered a decree finding Mrs. Kosterman guilty of adultery with Noel Whitehead on June 17, 1926, and granted the cross-complainant a divorce.

The parties were married August 26, 1915. They separated for short periods but would resume marital relations. October 28, 1927, they had a serious quarrel, he charging her

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with adultery and ordering her to leave their home, which she did. Upon the hearing on the cross-bill and answer an attempt was made to prove Mrs. Kosterman guilty of three acts of adultery with three separate persons. There was no direct evidence as to any of these acts and as the court found only that Mrs. Kosterman was guilty of adultery with Noel Whitehead, we construe this as a finding that none of the other acts alleged were proven.

The record fails to show sufficient proof that Mrs. Kosterman was guilty of adultery with Noel Whitehead as found by the chancellor. There is no pretense that they were seen in any compromising situation. The only testimony tending to support the charge is given by a Mrs. Garity, who said that she was living in the apartment next to that occupied by the Kostermaens; that Whitehead roomed with the Kostermaens; that Mrs. Kosterman told the witness that she was deeply in love with Whitehead and had had intercourse with him on June 17th. The witness never saw any immoral conduct between them. This witness displayed some feeling against Mrs. Kosterman who, the witness said, had gossiped about her (the witness) in the neighborhood, saying that she was "dirty" and a "where." This would indicate that the witness had some animus against Mrs. Kosterman which probably inspired her testimony.

Mrs. Kosterman testified, denying categorically that she had had any intercourse with Whitehead at any time and denying the alleged confession of wrong-doing. Whitehead himself testified that he and another man roomed with the Kostermaens; that he left the house early in the morning and returned in the evening after Mr. Kosterman had returned. He denied that there was ever any misconduct between him and Mrs. Kosterman. He testified that at one time when talking with Mrs. Garity she offered to allow him the use of one of the rooms in her apartment "if you want a room to bring a girl up to." Mrs. Garity did not deny this

also seeking and receiving him in 1935, when he was 114.  
 about the location of the house - 1111 and about an attempt was made  
 to prove that the location of the house was in 1111.  
 three possible places. There was no direct evidence as to any  
 of these places and as the court found only that Mrs. Kesterson was  
 guilty of adultery with Jack Whitcomb, we conclude that as a  
 matter of fact the house was located where it was.  
 The house built in 1935 was a new building built for Mrs.  
 Kesterson and built in 1935 with her name on it and by  
 the owner. There is no evidence that they were seen in any  
 compromising situation. The only testimony tending to support the  
 charge is given by a Mrs. Gentry, who said that she was living in  
 the apartment next to that occupied by the Kestersons; that Mrs.  
 Kesterson told her that she was deeply in love with Whitcomb and had had inter-  
 course with him on June 17th. The witness never saw any further  
 contact between them. This witness displayed some feeling against  
 Mrs. Kesterson who, the witness said, had whispered about her (the  
 witness) in the neighborhood, saying that she was "dirty" and a  
 "whore". This witness testified that the witness had some contact  
 with Mrs. Kesterson who was deeply in love with Whitcomb.  
 Mrs. Kesterson testified, having been asked  
 that she had had any intercourse with Whitcomb at any time and  
 having the signed declaration of Whitcomb, Whitcomb himself  
 testified that he had never had any intercourse with the witness; that  
 he left the house only in the morning and returned in the evening  
 after 11. Kesterson had returned. He testified that he never had any  
 any intercourse between him and Mrs. Kesterson. He testified that  
 at one time when talking with Mrs. Kesterson she offered to show  
 him the use of one of the rooms in her apartment "if you want a  
 room to bring a girl up to." Mrs. Gentry did not deny this



conversation.

Mrs. Kosterman left a letter for her husband when they separated in October, 1927. It contains a vulgar expression, but nothing which could be interpreted as a confession of wrong-doing. It rather indicates that it was written by a very angry woman. Mrs. Kosterman admitted the authorship of the letter and testified that she was ashamed of it but excused herself on the ground that she was distraught because of the wrong accusations made against her by her husband. A number of character witnesses testified to the effect that Mrs. Kosterman was an industrious, hard working, respectable woman; that her conduct was generally proper, giving rise to no suspicion of immorality on her part.

To narrate all of the testimony would make a long opinion and would show nothing of substantial importance. There seems to have been a good deal of idle and malicious gossip among the neighbors and it is probable that Mrs. Kosterman did not always conduct herself in a highly circumspect manner. The record discloses an unhappy situation which, in our opinion, was caused for the most part by the verbal abuse Mr. Kosterman visited upon his wife.

The charge of adultery may be established by showing circumstances which raise the presumption of cohabitation and unlawful intimacy. Zimmerman v. Zimmerman, 242 Ill. 552. And the charge need be proven only by a preponderance of the evidence. Stiles v. Stiles, 167 Ill. 576. The charge must be proven, and the unsupported statement of an alleged confession, when met with the denial of the party accused of adultery, supported by the circumstances, does not warrant a decree upon so serious a charge. Ramez v. Ramez, 133 Ill. App. 668; Hale v. Hale, 197 Ill. App. 361. The accused party is presumed to be innocent of the charge of adultery and this presumption of innocence continues until





convincing proof sufficient to overcome it is presented. Oyenu v. Oyenu, 201 Ill. App. 607; Carter v. Carter, 62 Ill. 439. In Whitlock v. Whitlock, 268 Ill. 218, referring to a charge of adultery, the court said:

"When such a charge is made it involves the character of both parties to the offense, and the character of the woman, to whom it is of priceless value. She should not be found guilty on evidence which may as well import innocence as guilt."

The instant decree does not rest upon any proven facts but merely upon an alleged confession, which is denied by Mrs. Kosteran. This denial, with other circumstances, together with her reputation among her associates as a moral woman, presents a sufficient defense to the charges made by the cross-bill.

For the reasons indicated the decree is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.





34648

ETHEL GRAVAS,  
Appellee,

vs.

ALEXANDER BISNOW et al.,

ISADORE SARNOFF,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 669'

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Complainant filed her bill setting forth an exchange of properties by her and defendant Sarnoff under a written contract, by which she was obligated to make certain payments at certain specified times; that defendant waived the prompt payment of these instalments, but unconscionably declared a forfeiture and had commenced forcible detainer proceedings against her for possession of the premises taken and occupied by her pursuant to the exchange. Subsequently she filed a supplemental bill alleging that, by virtue of a judgment in the forcible detainer suit, she had been ousted from the premises. She asked that the parties be restored to their original position as before the exchange was made and that she be allowed certain expenditures. Answers were filed and both bills were referred to a master in chancery, who after hearing the evidence reported with recommendations that a decree be entered substantially in accord with the prayer of the bills of complaint. Such decree was entered, and the defendant Sarnoff appeals.

The master found that on June 1, 1926, complainant owned property at number 4043 South Wabash avenue, Chicago, and that defendants Bisnow and Sarnoff owned number 4113 Indiana avenue, Chicago. Both pieces were improved and occupied by tenants. Complainant and the defendants entered into a written

54845

THOMAS G. BROWN

1911

ALABAMA POWER CO.

MOBILE, ALABAMA

1911

2531A.689

AL. POWER CO. v. BROWN, et al. (1911)

... as filed for bill ...  
of property by her and defendant Brown under a written con-  
tract, by which she was obligated to make certain payments at  
certain specified times; that defendant waived the prompt payment  
of these installments, but unreasonably declared a forfeiture  
and had commenced forcible detainer proceedings against her for  
possession of the premises taken and occupied by her pursuant to  
the exchange. Subsequently she filed a supplemental bill alleging  
that, by virtue of a judgment in the forcible detainer suit, she  
had been ousted from the premises. She asked that the parties be  
restored to their original position as before the exchange was  
made and that she be allowed certain expenditures. Answers were  
filed and both bills were referred to a master in chancery, who  
after reading the evidence reported with recommendations that a  
decree be entered substantially in accord with the prayer of the  
bills of complaint. Such decree was entered, and the defendant  
surrendered.

The master found that on June 1, 1908, complainant  
owned property at number 4043 South Wabash avenue, Chicago, and  
that defendant Brown and Brown owned number 4112 Indiana  
avenue, Chicago. Two houses were improved and occupied by  
complainant. Defendant and his wife entered into a written

contract on or about June 1 for the exchange of their properties, complainant taking the Indiana avenue property at a valuation of \$21,500, and she was allowed \$3215 on the value of her equity in the Wabash avenue property. She agreed to pay the balance of \$18,285 in monthly instalments of \$175 each. The complainant took possession of the Indiana avenue property and defendants of the Wabash avenue property. Subsequently, on July 7, 1926, Bisnow assigned all his right and interest in the contract to defendant Sarnoff.

The master found that the payments were made from time to time but not promptly upon the 1st of the month, as provided by the contract; that they were always a month or two late; that a payment on account was made May 20, 1928, and on May 23rd following defendant through his attorneys served a written notice on complainant that, unless all payments in arrears were made by the 26th the contract would be declared forfeited. Subsequently, on May 29th, notice of forfeiture was served on complainant and thereafter defendant commenced a forcible detainer suit in the Municipal court against complainant and on June 9th obtained a judgment for possession, and on June 13, 1928, a writ of restitution was issued and duly served on complainant, who was thereby ousted from possession of the Indiana avenue property. The master found, in view of the receipt by defendant of the payment on May 20th together with the statement by defendant that he was willing to receive further payments from the complainant as soon as she was able to make them, the notice on the 23rd that unless payment was made by the 26th defendant would forfeit the contract, was not sufficient notice; that by reason of defendant's conduct in permitting complainant to make payments as much as two months late, he had waived that portion of the contract which provided





that "time should be of the essence of the contract." The master also found that, in addition to \$3215, the value of the equity of complainant in the Wabash avenue property, she had paid on the contract to defendant \$3579; that she was \$445 in arrears in her monthly payments and the taxes for 1927, or \$400, had not been paid. The master found that under such circumstances the forfeiture was unreasonable and ineffectual and recommended that a decree be entered setting aside the forfeiture.

Subsequently upon the filing of the supplemental bill of the complainant, setting forth the ouster of complainant from the Indiana avenue property, the master made a further finding that because of the action of the defendant in ousting her from the premises, the complainant could and did elect to rescind the contract of June 1, 1926, and so notified the defendant in writing, and that she was entitled to be placed in statu quo as of that date. The master made a statement as to the receipts and disbursements of the respective parties and recommended that a decree be entered ordering defendant to restore the title of the premises known as 4043 South Wabash avenue to the complainant within a reasonable time, to be fixed by the court, and to pay complainant the amount found to be due, and that complainant at the same time reconvey to the defendant all interest she might have acquired in number 4113 Indiana avenue. Objections and exceptions to the master's report were overruled and a decree was entered in accordance with its recommendations, ordering the respective parties to make the necessary transfers of the properties so as to place them as they were on June 1, 1926; and it was further ordered that complainant have a judgment against Barnoff for \$715.34, which includes the costs of this suit.

Counsel for both parties in writing their respective briefs have so ignored the provisions of our Rule 19 as to make





it very difficult for this court to arrive at an accurate understanding of all the facts. In this opinion we shall confine ourselves to the principal points made by counsel for the defendant.

Defendant argues that the forcible detainer suit in the Municipal court was res adjudicata of all the rights of the parties, citing Gounaris v. Pavlakos, 203 Ill. App. 268; Kossakowski v. Shuman, 172 Ill. App. 436; Bakaitis v. Fink, 340 Ill. 440. These cases lay down the general proposition that, if the defendant in a forcible detainer proceeding presents as a defense facts which might be cognizable in equity, the outcome of the forcible detainer suit must be taken as res adjudicata of all the issues between the parties. These cases do not hold that, where a defense is purely equitable in nature and cannot be presented in the statutory proceeding of forcible detainer, the judgment in the action is res adjudicata as to all issues. It is obvious at once that in the instant case complainant could not have presented in the forcible detainer proceedings her equitable right to have the contract rescinded. Her rights were peculiarly enforceable in equity alone and upon equitable principles. The general rule is stated in O'Brien v. O'Brien, 195 Ill. App. 346:

"The grounds of relief alleged in the bill were equitable and cognizable only in a court of chancery. An action in forcible detainer is an action at law and an equitable defense cannot be set up in such action."

To the same effect are Knox v. Hunter, 150 Ill. App. 392; St. Louis National Stock Yards v. Wiggins Ferry Co., 102 Ill. 514.

It is next argued that the forfeiture declared by Sarnoff was reasonable and that the rescission by complainant was not justified. It is a well settled principle that equity abhors a forfeiture and will not only decline to lend its aid to the parties seeking the forfeiture but will interfere to do equity. 21 C.J. 111, 112; Tarr v. Stearman, 264 Ill. 110; T. St. L. & N. O. R.R. Co. v.

is very difficult for this court to arrive at an accurate estimate  
of all the facts. In this opinion we shall confine  
ourselves to the principal points raised by counsel for the defendant.  
Defendant argues that the tortious character of the  
defendant's conduct was not established at all the points of law  
presented, citing Gonzalez v. ..., 100 Ill. App. 3d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



St. L. & O. R. R. Co., 208 Ill. 623. The master and the chancellor were of the opinion that, when defendant permitted complainant to be in arrears in her payments for a month or more over a considerable length of time, he must be held to have waived the strict performance of the contract as to time. It was wholly unconscionable for the defendant, having received a payment and at the same time giving complainant to understand that she would have further time to make up any arrears, within three days thereafter to serve notice that a forfeiture would be declared. It appears that at this time complainant had paid approximately \$6700, which is an additional reason to support the finding of the chancellor declaring that the forfeiture was unreasonable and unjust. When defendant declared a forfeiture and commenced his action in forcible detainer and ousted complainant from the premises, she then had a right to treat the contract as rescinded. It is a well settled principle that, where one party repudiates a contract and refuses to be longer bound by it, the injured party may treat the contract as rescinded and recover the amount of his expenditures. Lakeshore & M. S. R. R. Co. v. Richards, 152 Ill. 59.

Defendant questions the master's accounting as to various items. Complaint is made of allowing complainant \$290.34 for the amount paid by her for the taxes of 1926 on the Indiana avenue property, and a statement is made in the brief that this represents the bill for the whole year and that complainant had already been given credit for the amount of taxes prorated up to June 1, 1926, when she took possession. The record, however, does not support the statement that the taxes for the whole year were \$290.34. The copy of the account in the master's report shows the taxes for 1926 were \$405. The allowance to complainant of \$290.34 was apparently based upon the taxes for the entire year.





The item of \$700 complained of was a proper allowance. It was to pay a mechanic's lien for work done on 4113 Indiana avenue, of which defendant received the benefit. We see no reason to sustain other criticisms made of the accounting.

The decree seems to fix the rights of the parties upon an equitable and fair basis, doing substantial justice to both parties. No sufficient reason is made to appear for altering it. It is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.





34699

In Re: Petition of ALFONSO COZZI  
to be discharged under the  
Insolvent Debtors Act.

APPEAL FROM COUNTY COURT,  
COOK COUNTY.

259 I.A. 669<sup>2</sup>

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by respondents, Margaret Berg and C. J. Berg, doing business as E. A. Berg & Son, from an order and judgment of the County court of Cook county discharging the petitioner, Alfonso Cozzi, upon his petition for discharge under the Insolvent Debtors Act. Chapter 72 Illinois Statutes, Cahill. The petitioner does not appear in this court to defend the judgment.

On March 22, 1928, and prior thereto the petitioner owned three pieces of real estate improved with buildings, in Chicago. For a long period of time prior to that date petitioner had numerous deals with the respondents, said respondents furnishing material and labor to petitioner for a period commencing about November 15, 1920, and ending June 1, 1926. On this latter date there was a balance due to respondents in the sum of \$1056.15. Several times in March, 1928, demands were made upon petitioner to pay this balance, threatening to place the claim with an attorney with instructions to commence suit unless the same was paid. March 22, 1928, petitioner quit-claimed and transferred to his son two of the parcels of real estate for an alleged consideration of \$10 and other good and valuable considerations. The third piece of real estate petitioner claims he sold to a man whose name he did not know, and for which he admits he obtained no consideration. Respondents continued to make demands upon petitioner for payment of the balance due them. About the middle of May, 1928, petitioner told respondents to go ahead and sue; that the property was not in his name; that it "was in his son's name and that he got rid of it."

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owned three pieces of real estate improved with buildings, in Chicago. For a long period of time prior to that date petitioner had received calls from various persons, and had been informed that material and labor for a period commencing about November 1, 1932, and ending June 1, 1933. On this latter date there was a balance due to respondent in the sum of \$1086.12. Several times in 1933, however, when demands were made upon petitioner to pay this balance, respondent at times did not accept the same with instructions to commence suit unless the same was paid. March 22, 1933, petitioner paid-off and transferred to his son two of the parcels of real estate for an alleged satisfaction of it, and other good and valuable considerations. The third piece of real estate petitioner claims he sold to a man whose name he did not know, and for which he admits he obtained no consideration. Respondent continued to make demands upon petitioner for payment of the balance due them. About the middle of May, 1933, petitioner told respondent to go ahead and sue; that the property was not in his name; that it

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July 25, 1928, respondents filed their suit in assumpsit in the Superior court of Cook county against petitioner for goods, wares and merchandise sold and delivered and for work and services rendered and on April 7, 1929, had a judgment against him for \$1056.15. An execution was issued out of the clerk's office of the Superior court and was served on the petitioner and was returned nulla bona and no part satisfied. An alias writ was issued and served on petitioner advising him to surrender sufficient of his goods for the satisfaction of the writ and that upon failure to comply with such demand he would be liable to arrest upon an execution against his body, and that he further file a schedule of his property within ten days. This writ was also returned nulla bona and no part satisfied.

Thereafter an affidavit for a capias ad satisfaciendum was presented to Honorable Marcus Kavanaugh, one of the judges of the Superior court, alleging that the petitioner had made certain conveyances of certain assets without adequate consideration, that such conveyances were fraudulent and made for the sole purpose of defeating the judgment creditor in enforcing the collection of the judgment. Thereupon an order was entered, certifying that probable cause was shown by said affidavit to authorize the issuance of a writ, and a writ of capias ad satisfaciendum was ordered to issue, which was accordingly done. April 11, 1930, petitioner was taken into the custody of the sheriff, and the respondents paid the jail fee and one week's board. On the same day petitioner filed his petition in the County court to be released under the Insolvent Debtors act, and gave a bond for his appearance and he was released. Subsequently he filed his schedule and thereafter, on May 29th, upon hearing before the Honorable I. L. Weaver, sitting in the County court of this county, without a jury, petitioner was discharged. Respondents appeal from this order.





A body execution will issue against the debtor where the proof shows that he has estate, goods, chattels, lands or tenements not exempt from execution which he unjustly refuses to surrender or that since the debt was contracted or the cause of action accrued the debtor has fraudulently conveyed, concealed, or otherwise disposed of some part of his estate with a design to secure the same to his own use or defraud his creditors. Section 63, chapter 77, Illinois Statutes, Cahill. In the Matter of the Petition of Clark Lips v. McCleavy, 41 Ill. App. 59.

It is not controverted that petitioner owed respondents for materials and labor and that an action therefor accrued on June 1, 1926. On this date and thereafter petitioner owned, at least, three parcels of real estate in Cook county and on March 22, 1928, or approximately 20 months after the debt was incurred and the cause of action accrued, he conveyed two of these parcels to his son without any consideration. The testimony of petitioner was: "Everything I gave to my son rather than have the debts get the property. I gave it to my son."

The trial court apparently found that the conveyances were fraudulent, and held in effect that petitioner had a right to convey the property to his son in order to escape payment of the judgment, but released the petitioner on the ground that the conveyance was made before the suit in the Superior court was started and judgment rendered. Section 63, chap. 77, under which the court acted in issuing the capias ad satisfaciendum, makes no distinction between a fraudulent conveyance made after the commencement of the suit and a fraudulent conveyance made prior thereto. The statute provides that, if the judgment creditor shall make an affidavit that the debtor has estates, goods, etc., not exempt from execution which he unjustly refuses to surrender, "or that since the debt was contracted or the cause of action accrued the debtor

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has conveyed, concealed or otherwise disposed of some part of his estate with a design to secure the same to his own use or defraud his creditors," that an execution against the body of the judgment debtor shall issue.

Respondents also make the point that under section 8 of the statute on Insolvent Debtors, chapter 72, Illinois Statutes, Cahill, it is specifically provided that when any debtor is arrested for debt upon charge of fraud or upon execution on the charge of refusal to surrender his estate for the payment of any judgment, he shall be entitled to have the question whether he is guilty of such fraud or refusal to surrender such estate tried by a jury, and if the jury find him not guilty the debtor shall be discharged; but if the debtor be found guilty he shall be remanded to the custody of the proper officer. The record shows in the instant case that the petitioner waived trial by jury, so that the finding by the court had the same effect as a finding by the jury. The record shows that the court found the conveyances in question to be fraudulent and made by petitioner in order to escape payment of the judgment. Under such a finding, therefore, the proper order should have been to remand the petitioner to the custody of the officer. The order of the court was inconsistent with the finding and in that respect disregarded the provisions of the statute.

The court suggested that the respondents had their remedy by filing a creditors' bill. Filing a creditors' bill does not bar the right to resort to the remedy provided by statute for enforcing the judgment by capias, where the judgment is unsatisfied. Nelson v. Swanson, 186 Ill. App. 632.

We hold that since the debt of the petitioner was contracted and since the cause of action accrued the petitioner fraudulently conveyed, concealed, or otherwise disposed of some



part of his estate with a design to secure the same to his own use or defraud his creditors. The judgment is therefore reversed and the cause remanded for further proceedings consistent with what we have said in this opinion.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.



...and we have said in other columns.

and the same happened for various preceding generations.

was or behind his assistant. The document is somewhat confused

...with the article with a leading in which the word is the same

• **PROF. DR. G. A. K. K. K.**

.....

34585

MARTHA LEHRMANN,  
Appellee,

vs.

CITY OF CHICAGO, a Municipal  
Corporation,  
Appellant.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 669<sup>1</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant, City of Chicago, seeks to reverse a judgment for \$1350 entered against it in favor of plaintiff. Plaintiff brought her action to recover damages alleged to have been sustained by her for personal injuries received on account of the negligent driving of one of the City's motor trucks.

The record discloses that about two o'clock on the afternoon of July 2, 1928, plaintiff was riding in the rear seat of a Dodge automobile which was being driven by Edwin Johannes southeasterly on Elston avenue, a public street in Chicago. There were five adults and two children in the Dodge car, the driver and his wife in the front seat, three adults including plaintiff, and two children in the rear seat. The Dodge car was straddling the westerly rail of the westerly street car track, traveling about fifteen miles an hour. Coming in the opposite direction at about eleven miles an hour, in the easterly street car track, was the City truck. The driver and his helper were in charge. The helper was on the running board on the easterly side of the truck and the driver was in his proper place in the seat. He had been employed by the defendant City of Chicago as a chauffeur for nine years, and prior to that time he was a chauffeur for five years. He testified that he never had an accident in the nine years he worked for the City until the one in question. All of the evidence is to

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Department of Justice  
 Federal Bureau of Investigation  
 Washington, D. C. 20535

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FORM NO. 10 (REVISED JANUARY 1975) GSA GEN. REG. NO. 27

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on account of the difficulty of the work of the water  
tanks to have been furnished by the Government of the  
District. The water supply was not sufficient to  
be reversed a distance of 100 miles and it is likely  
to be.

• 001.4.73

The report indicates that about two-thirds of the

Page 100 of 100

at a Dodge automobile which was being driven by Edwin Jannasch southeast on Dixon Avenue, a public street in Chicago. There were five people in the car, and the driver was his wife in her front seat, three other passengers, and two children in the rear seat. The Dodge car was traveling the westerly tail of the westerly street, located about fifteen miles north of Chicago. There is no specific direction of travel given on the map, in the vicinity of the car, and the city of Chicago. The driver and the Dodge were in Chicago, and the car was on the ground on the westerly side of the track and the driver was in the driver's seat in the car. It had been reported by the defendant City of Chicago as a manufacturer for nine years.

For the GSA would use one in operation. All of the evidence is to establish that he never had an interest in the nine years of service and prior to that time he was a consultant for five years. He



the effect that when the truck and the Dodge car were from five to ten feet apart the truck suddenly swerved to the left, striking the Dodge car and pushing or throwing it over the westerly curb of the street, injuring the plaintiff and some of the other persons in the automobile. The driver and helper of the truck, together with other persons, gave aid to the defendant and the other injured persons, and shortly thereafter plaintiff and some of the other persons who were injured were taken to a nearby hospital by a citizen who came by at that time in his automobile.

The only defense interposed was, as testified to by the driver and his helper, that as the truck and Dodge car were approaching each other two young men driving a Ford car northerly and behind the City truck, going at about forty miles an hour, turned to the right to pass the City truck on the easterly side of it and as the Ford was near the front part of the truck it suddenly pulled in front of it to get back on the street car track, and as this was done the left hind wheel came in contact with the right front wheel of the City truck and turned it suddenly to the west, causing it to collide with the Dodge car. There is some evidence that the two young men in the Ford almost immediately after the accident disappeared.

A number of witnesses testified on behalf of plaintiff, and on cross-examination were asked as to whether they had seen the Ford car. Almost constant objections were made to these questions by counsel for the plaintiff and a great many of the objections were erroneously sustained. Many of the questions were entirely proper.

The driver's helper gave testimony to the effect that the Ford car was the cause of the accident. The City then called the driver, who testified concerning the Ford car striking the truck. He testified that he "didn't see the Ford until he got

The witness then when the truck and the Dodge car were from five to ten feet apart the truck suddenly swerved to the left, striking the Dodge car and causing it to turn the corner of the street, injuring the plaintiff and some of the other persons in the automobile. The driver and helper of the truck, together with other persons, were taken to a nearby hospital by a citizen who came by at that time in his own car.

The only witness who was, as testified to by the driver and the helper, that as the truck and Dodge car were approaching from the east two young men driving a light-colored car, and seeing the truck, being at about forty miles an hour, turned to the right to pass the truck on the westerly side of it and as the truck was just about to turn to the left it suddenly pulled in front of it to get back on the street car track, and as this was done the left hand wheel came in contact with the front wheel of the Dodge car and caused it to swerve to the west, causing it to collide with the Dodge car. There is some evidence that the two young men in the light-colored car immediately after the accident disappeared.

A number of witnesses testified as to what they saw, and on cross-examination were asked as to whether they had seen the light-colored car. Almost constant questions were asked as to whether they had questions by counsel for the plaintiff and a great many of the questions were erroneously sustained. Many of the questions were entirely proper.

The witness's father gave testimony as to what he saw the light-colored car was the cause of the accident. The day when called the witness, was testified concerning the light-colored car truck. He testified that he "didn't see the light-colored car

right in front of me," and further, "The Ford came alongside of me, about forty miles an hour, and he (my helper) had to step up alongside of me in order not to be hit." Thereupon counsel for plaintiff said: "Now, I respectfully object and I ask with reference to all the testimony involving this Ford car, that it be stricken out, as having no bearing on the defense of this defendant, whether there were joint tort feasons, one or more. It is collateral to this defense and is not a defense." The Court: "Objection sustained. The plea is not guilty here." After some other discussion court and counsel retired to chambers but the ruling was not changed. So that the only defense the City had was ruled out by the court. Obviously this ruling was erroneous. If the City was not at fault, of course it is not liable in this case, and the City was not at fault if the accident happened as the City's two witnesses testified.

A number of instructions were given at the request of plaintiff, some of which ignored entirely the defense of the City in relation to the Ford automobile, and some erroneously assumed the defense of the City was still before the jury. The evidence having been stricken out, of course the instructions should not have been given. Other errors are complained of, principally the ruling on the admission and exclusion of evidence, but we think on the retrial they will not again occur.

The judgment of the Superior court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.



right to know of me," and I asked, "What time were you at the  
about forty miles an hour, and at (my house) but he did not say  
side of me he did not go to the right." The witness answered that he did not  
call: "Now, I respectfully object and I ask with reference to this  
the testimony involving this fact that, there is no statement made, and  
having no bearing on the defense of this defendant, whether there  
were told that someone, one or more. It is objected to this de-  
fense and is not a statement." The court: "Sustained." The  
plea is not guilty here." After some other discussion court and  
counsel retired to chambers but the ruling was not changed. So that  
the only defense the City had was tried by the court. Obviously  
this ruling was erroneous. If the City was not at fault, of course  
it is not liable in this case, and the City was not at fault in the  
accident happened on the City's two witnesses testified.  
A number of instructions were given at the request of  
plaintiff, some of which ignored entirely the defense of the City  
in relation to the City's negligence, and some erroneously assumed the  
defense of the City was still before the jury. The evidence having  
been taken and it being the instructions should not have been  
given. Other errors are complained of, principally the ruling on  
the admission and exclusion of evidence, but we think on the re-  
trial they will not again occur.  
The judgment of the Superior Court of that county is  
reversed and the cause remanded.

34594

PEOPLE OF THE STATE OF ILLINOIS,  
for the use of WILLIAM WARDELL,  
Executor of the Estate of Mary  
W. Wallace, Deceased,  
Appellee,

vs.

BENJAMIN F. J. ODELL,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 669<sup>4</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment rendered against him in an action of debt brought upon a bond signed by him as surety. The case was tried before the court without a jury, the court found the issues in favor of the plaintiff and against the defendant, finding being for the plaintiff in debt for \$1,000 and damages were assessed at \$1,000. Judgment was entered on the finding and this appeal follows.

The record discloses that plaintiff brought an action against defendant as surety on the bond executed by defendant, as surety for a receiver appointed in a foreclosure proceeding pending in the Superior court of Cook county. The bond was in the sum of \$1,000 and stated that the receiver as principal and the defendant as surety were firmly bound unto "the People of the State of Illinois, in the sum of One Thousand (\$1,000.00) Dollars." The bond was the ordinary bond given by receivers in foreclosure suits. The condition of the bond was that if the receiver should duly account for what came to his hands or control as receiver and pay and apply the same as directed by the court then the obligation to be void, otherwise to remain in full force and effect.

The evidence is to the effect that there was a foreclosure suit brought in the Superior court of Cook county, in which suit defendant was solicitor for the complainant; that a receiver was appointed and gave bond in the sum of \$1,000, which

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By this appeal the defendant seeks to reverse a judgment rendered against him in an action of debt brought upon a bond signed by him as surety. The bond was filed with the court without a copy, and the court rendered its decision in favor of the plaintiff. The defendant, having failed to file a copy of the bond, was not permitted to introduce evidence in support of his defense. The court rendered its decision in favor of the plaintiff, and the defendant seeks to reverse the same.

THE UNITED STATES DEPARTMENT OF THE INTERIOR

Illinois, in the sum of one Thousand (\$1,000.00) Dollars." The bond was an surety were firmly bound unto "the People of the State of Illinois, in the sum of one Thousand (\$1,000.00) Dollars, to the said surety for a recovery associated in a foreclosure proceeding conducted in the Superior Court of Cook County. The bond was in the sum of \$1,000 and stated that the receiver be principal and the defendant against defendant as surety in the bond executed by defendant, as

was the ordinary bond given by receiver in foreclosure sales. The condition of the bond was that if the receiver should pay account for what came to his hands or control as receiver and pay and apply the same as directed by the court then the obligation as a void, attempted to remain in full force and effect.

The evidence is to the effect that there was a false closure and payment in the Superior court at San Francisco, in which said defendant was solicitor for the complainant; that a receiver was appointed and gave bond in the sum of \$1,000, which



was signed by defendant here as surety. The receiver entered upon the discharge of his duties and filed an account. Afterwards the receiver died and his representative filed a final account. Objections were taken to both of the accounts and the matter was referred to a master in chancery. The master took the evidence, made up his report and found that the receiver had not properly accounted for the moneys which came into his hands as receiver. The report of the master was approved by the chancellor over defendant's objection and a decree was entered directing the representative of the receiver to pay over in due course the amount of such deficiency, together with costs incurred in the proceeding before the master. An appeal was prayed and allowed from this decree, but it was never prosecuted and the decree therefore stands in full force and effect.

It further appears from the evidence that the defendant was removed as counsel for complainant and that he thereafter represented certain parties in the foreclosure suit. He was given notice from time to time of the proceedings in that case. It further appears that he testified concerning the objections raised to the report of the receiver and that he was at all times advised as to what was being done in the foreclosure proceeding which resulted in the decree above mentioned.

On the trial of the instant case the defendant offered evidence tending to show that the property involved in the foreclosure suit had been transferred to the complainant in that case; that a deficiency decree entered in that case had been satisfied; all of which took place prior to the decree entered by the Superior court finding that the receiver was short in his account. Obviously none of this evidence was competent. All of those matters were settled conclusively by the decree of the Superior court. The Superior court had jurisdiction of the matter, and having heard all the evidence, and the defendant having been notified of all the

[illegible]

proceedings in that case, he will not, in this suit, be heard to say that the decree was erroneous.

The decree entered in the foreclosure proceeding was offered in evidence in this case showing the amount unaccounted for by the receiver. This was at least prima facie evidence against the defendant in this case. He might show, if he could, that the amount had been paid but he could not show this by matters that took place in the foreclosure suit prior to the entry of the decree.

The defendant further contends that the judgment in this case is wrong because William Wardell, as executor of the estate of Mary W. Wallace, the usee in the instant case, was not the sole usee but that there were other parties who were beneficially interested who should have been named as usees. The point is without merit. The bond ran to the People of the State of Illinois, and the name of the usee is immaterial. It is no concern of the defendant for whose use the action was brought. Tedrick v. Wells, 59 Ill. App. 687; Schott v. Youree, 142 Ill. 233.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.



proceedings in this case, he will not, in any way, be bound to say that the same are correct.

The latter object is not necessarily proceeding as

offered in evidence in this case showing the same as presented by the witness. This was of course under the same evidence and the testimony in this case, as shown above, it is said, that the amount has been paid and he will not say by what means he took place in the testimony only that to the effect of the case.

Case.

The defendant's testimony is that the defendant

this case is about the same as the case of the

case of Mary W. Wilson, the case in the same case, and the

the case was not there any other parties who were

directly interested in the case had been in the case. The case

is without merit. The case was to the people of the State of

Illinois, and the case of the case is answered. It is no concern

of the defendant for the case and the case was answered. The case

Wilson, 22 Ill. 401, 402; Wilson, 22 Ill. 401.

The defendant is the defendant of the case in

Wilson.

Wilson.

Wilson, 22 Ill. 401, 402; Wilson, 22 Ill. 401.

34603

HENRY H. BOREY,  
Appellant,

vs.

HARVEY MORRELL,  
Appellee.

APPEAL FROM CIRCUIT COURT  
OF COOK COUNTY.

259 I.A. 670

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 6, 1929, plaintiff caused judgment to be entered in the Circuit court of Cook county, in his favor and against the defendant for \$851.14, the judgment purporting to be on a promissory note dated at Decatur, Illinois, March 24, 1928, for \$685, due one year after date, to the order of the Standard Light Company of Decatur, Illinois. The note was endorsed by the payee, and was claimed to have been purchased by the plaintiff. After the judgment was entered it was opened up on motion of the defendant and he was given leave to defend. He filed his pleas and there was a trial before the court without a jury, and a finding and judgment in defendant's favor, and plaintiff appeals.

It appears from the evidence that Percy B. Sullivan of Decatur was in the business of installing lighting plants in farmers' residences and at the time in question was doing business as the Standard Light Company of Decatur, Illinois. The defendant, Morrell, was a farmer living with his wife and family on his farm near Owaneco, Christian County, Illinois. In March, 1928, Sullivan called at Morrell's home with a view to installing a lighting plant for Morrell. On the first call there appears to have been but a short talk between the parties concerning the plant, but about two days later, March 24, 1928, Sullivan again called in the evening at Morrell's home where he remained for about three hours telling Morrell and his wife about the lighting plant and endeavoring to induce Morrell to have one installed in his home. As a result of

HENRY E. HENRY

1911-1912

1911

HARVEY HENRY

1911-1912

TO THE COURT  
IN THE MATTER OF

253 L.A. 670

IN REPLY TO THE ORDER OF THE COURT

August 8, 1911, plaintiff caused judgment to be entered in the Illinois court of Cook County, in his favor and against the defendant for \$300.14, the judgment purporting to be on a promissory note dated at Decatur, Illinois, March 24, 1909, for \$250, but not paid at that date, on the order of the defendant's Company of Decatur, Illinois. The note was retained by the plaintiff and was claimed to have been purchased by the plaintiff. When the judgment was entered it was entered up on motion of the defendant and he was given leave to defend. He filed his plea and there was a trial before the court without a jury, and a judgment was entered in defendant's favor, and plaintiff appeals.

It appears from the evidence that Henry E. Sullivan of Decatur was in the business of installing lighting plants in farmers' residences and at the time in question was doing business as the Standard Light Company of Decatur, Illinois. The defendant, Henry, was a farmer living with his wife and family on his farm near Decatur, Christian County, Illinois. In March, 1911, Sullivan called at Henry's home with a view to installing a lighting plant for Henry. On the first call there appears to have been but a short talk between the parties concerning the same, and about two days later, March 24, 1909, Sullivan again called in the evening at Henry's home where he remained for about three hours talking to Henry and his wife about the lighting plant and endeavoring to induce Henry to have the lighting installed in his home. As a result of



this solicitation Morrell, on that day, signed the promissory note on which judgment was confessed, and a document which both parties treat as a contract whereby Sullivan, who says he was doing business as the Standard Light company, agreed to install a lighting plant in Morrell's home for which Morrell was to pay \$635. About two days after this Sullivan endeavored to discount the note at a bank in Morrisenville, Christian County, not far from where the defendant lived. The banker, who did not know the defendant, called him on the telephone advising defendant that a note had been left by Sullivan at the bank for the purpose of having the bank discount it, and to ascertain whether the bank would be safe in doing so. There is a dispute as to what was said at that time between the banker and the defendant; the defendant testified that he did not tell the banker at that time that he had signed the note but that he told the banker "there was a rabbit in the woodpile;" and that he would be over the next day with his lawyer to see the banker. The testimony of the banker is somewhat at variance in that he testified the defendant said he had signed the note, but this is the only material discrepancy in the testimony of the two. The banker testified that on the next day he returned the note by mail to Sullivan at Decatur, but there was no letter enclosed explaining why the bank did not discount the note. Sullivan testified that a few days later, April 2, 1928, he sold the note to plaintiff, Morey, who was a practicing lawyer in Decatur. And the testimony of plaintiff and Sullivan is to the effect that plaintiff paid Sullivan on April 2, \$200 by check and returned to Sullivan a note for \$300 which Sullivan owed plaintiff, and that the note and the interest due amounted to \$521; that later on plaintiff advanced and paid out moneys to Sullivan aggregating \$1018.86.





The contention of plaintiff was that he was a bona fide holder in due course; that he purchased the note from Sullivan in good faith, paying full value therefor. The theory of the defendant was that the agreement between him and Sullivan was that Sullivan was to install the lighting plant in defendant's home for the purpose of demonstrating it to prospective purchasers in the neighborhood; that for every person who bought one of the plants after seeing it demonstrated in defendant's home, defendant was to be allowed \$75, and at the end of three years defendant was to have the privilege of buying the plant for half price, namely, \$342.50, and of applying the commissions of \$75 per plant, upon this purchase price; that a blank note was presented to him for signature which defendant refused to sign, but that after Sullivan explained it was not a note but merely a form of memoranda to be used in the filing system of the Standard light company, upon which commissions which might become due to defendant might be endorsed, defendant signed the document; that the blank spaces were not filled out at that time.

On the other hand, Sullivan testified that he sold the plant to Morrell for \$685; that the note was filled out at Morrell's home before it was signed; that it and the contract were read over twice by him and by the defendant. Sullivan further testified that a few days after he received the order from the defendant for the plant he ordered a man by the name of Tuttle to deliver the plant to Morrell's home. Morrell testified that no such delivery was made. Tuttle was not called.

The evidence further shows that in November following Sullivan caused the lighting plant to be sent via the Illinois Central Railroad from Decatur, Illinois, to the defendant at Owaneco. The defendant was notified by the Railroad company that the fixtures were at Owaneco, but he refused to accept them.



The defendant at trial testified that he was a long time  
Halter in the business; that he was married and had two children in  
Good faith, saying that he was married. The theory of the defense  
and was that the agreement between him and Sullivan was that Sul-  
livan was to install the lighting plant in defendant's home for the  
purpose of demonstrating it to prospective customers in the neigh-  
borhood; that for every house and building one of the plants after  
seeing it demonstrated in defendant's home, defendant was to be  
allowed \$75. and at the end of three years defendant was to have  
the privilege of buying the plant for half price, namely, \$37.50.  
and of receiving the commission of 4% per annum, upon this per-  
centage price; that a time when the defendant was to be paid for the  
whole defendant returned to him, but that after Sullivan installed  
it was not a note but merely a form of memorandum to be used in the  
lighting system of the defendant's light company, upon which commission  
which might become due to defendant might be endorsed, defendant  
signed the document; that the blank spaces were not filled out at  
that time.  
On the other hand, Sullivan testified that he was  
going to install the plant; that the note was filled out at defendant's  
home before it was signed; that it and the contract were read over  
twice by him and by the defendant. Sullivan further testified that  
a few days after he installed the plant from the defendant for the  
plant he ordered a man by the name of Tuttle to deliver the plant  
to Tuttle's home. Tuttle testified that no such delivery was  
made. Tuttle was not called.  
The witness further says that in his opinion  
Sullivan caused the lighting plant to be sent via the Illinois  
Central Railroad from Chicago, Illinois, to the defendant at  
Oswego. The defendant was notified by the railroad company that  
the package was at Oswego, but he refused to accept it.

There is further evidence to the effect that <sup>when</sup> Sullivan left the note for discount at the Morrisonville bank it was agreed that the bank might have the note at a discount of twenty per cent; that plaintiff had known Sullivan for a number of years and had been his attorney in a number of matters; that Sullivan had been engaged in selling lighting plants for a number of years and had sold some of the notes he received in these matters to plaintiff; that Sullivan had also turned over to plaintiff, his attorney, certain of these notes for collection and that there had been considerable trouble in making collections on a number of these notes.

The document above mentioned which both parties seem to designate a contract and which was signed at defendant's home March 24, 1928, is peculiar in a number of particulars. We think it is not a contract at all. It is a printed document with blank spaces and is headed:

"Order Blank for a

STANDARD LIGHT PLANT \* \*

To be installed for Harry Morrell \* \*

Party Signing Below as Dealer

Please install a STANDARD LIGHT PLANT on premises:  
Situate 4 mi so."

There are then blank spaces, some of which are filled in, apparently showing parts which go to constitute the plant. Then there is printed matter containing the following: "This order not subject to cancellation by the purchaser except with the consent of the seller, in which case one-half the purchase price will be paid as liquidated damages. When said Light Plant is installed in good working order and each and every light tested, it is understood that settlement will be made as follows: (In case any time is agreed on with company, dealer or salesman to test merits of plant or make sales in vicinity, negotiable note for one year or less at six per cent interest will be given to pay for plant, purchaser to rely on his efforts to secure prospects for sales.







"Amount due (negotiable note) \$635.00 \* \* \* \* \*

"It is the purpose of the Dealer to install a plant that will be a credit to them and a source of permanent pleasure to the users." This is signed by defendant Harry Morrell (Purchaser) and Stand L. Salesman. Opposite this is the following: "Accepted \_\_\_\_\_ 191 \_\_\_\_\_ For Dealer By \_\_\_\_\_." There is no acceptance by anyone for the dealer or anyone else. On the back of this document appears the following printed matter:

"AGREEMENT WITH DEALER OR SALESMAN.

"Customer whose name appears on reverse side to be entitled to a commission of \$75.00 on all orders for light plants procured through his cooperation, the same to be credited on negotiable note or paid him in cash on the cost of his plant until fully paid, after which he is to receive \$37.50 in cash on all sales made with his help.

"In case enough sales are not made within three years provided purchaser secures enough good prospects ready to close and the company should fail to make delivery on such sales, it may be optional with the Seller to either remove plant or give purchaser right of outright purchase at one half price or to continue selling beyond three year period." This is signed, "Stan It Co." Then appears the following, which the evidence shows was written by Sullivan: "\$342.50 will be half price agreed on on this plant or plant removed as above."

It will be noticed that the alleged contract is very indefinite and uncertain. It was not accepted by the person purporting to sell the plant and it is expressly stated in the document that when the light plant is installed and in good working order, settlement will be made. But the evidence shows, according to Sullivan's theory, that the settlement was made by



the defendant giving his promissory note although the plant had not been installed and obviously could not be installed for some time. The matter printed on the back of the document is ambiguous and uncertain in meaning and in view of all the evidence in the record we are clearly of the opinion that it was prepared to entrap the unwary and the defendant in this case, or anyone else who might be induced to sign it.

The court found in effect that the note was obtained from the defendant by Sullivan through deception and fraud and that plaintiff was not a bona fide holder in due course. We think both these findings accord with substantially all the evidence in this case. Although the alleged contract provided that the plant was not to be settled for until it was installed, yet we find Sullivan obtaining the note, and the next day or so endeavoring to sell it for 20 per cent discount at a bank, and although the bank after communicating with the defendant did not buy the note at a 20 per cent discount, yet we find Sullivan a few days thereafter pretending to sell it to his attorney, who was familiar with such matters and who had had considerable expense and trouble in connection with similar transactions, for the full face of the note. Moreover, we find suit brought in the Circuit court of Cook county, a great distance from the home of the defendant who lived on his farm in Christian county, thereby causing the defendant great inconvenience and expense in coming with his witnesses and counsel to Chicago to defend the case. The bringing of the suit in Chicago we think is evidence that tends to show the scheme was fraudulent from the beginning. The defendant offered to show that in similar transactions suit was often brought a long way from the defendants in these cases. This was ruled out by the learned trial Judge, but we think it should have been admitted, as it would tend to throw



The defendant having his own lawyer, the court and  
 not been interested in the case, the court is satisfied  
 time. The matter being on the part of the defendant is satisfied  
 and uncertain in nature, and in view of all the evidence in the  
 report we are clearly of the opinion that it was proper to re-  
 late the matter and the defendant in this case, or anyone else who  
 might be interested in it.

The court found in effect that the case was decided  
 from the evidence of the defendant's testimony and from the  
 fact that it was not a fact that the defendant was not  
 before the court. The court found that the defendant was not  
 this case. Although the defendant's testimony was not  
 was not to be admitted the court is not satisfied, but we find the  
 given concerning the facts, and the court is not satisfied in  
 will be for the defendant at a trial, and although the court  
 after communicating with the defendant and the court is not  
 to the court, but we find that the defendant is not satisfied  
 protesting as well as in the defendant, who was satisfied with each  
 matter and who had not communicated with the court in any  
 matter with the defendant, but the court is not satisfied.  
 Moreover, we find that the defendant is not satisfied with the court.  
 a great distance from the court at the defendant's trial in his  
 time in the court, the court is not satisfied with the defendant's  
 testimony and the court is not satisfied with the defendant's  
 to the court in the court. The court is not satisfied with the  
 we find in evidence that there is no evidence in the court  
 from the defendant. The defendant offered to show that in evidence  
 representations that was shown through a fact that the defendant  
 in these cases. This was not done by the defendant's trial, but  
 we find it should have been admitted, as it would not be shown

light on the case in question, - tend to show that the scheme in question was fraudulent. If the transaction was honest there was no reason why suit should not be brought where the defendant lived and where he could attend and defend if he saw fit to do so, without great expense and inconvenience.

The finding and judgment is the only finding and judgment that is warranted by the evidence. Any other finding would have to be set aside as contrary to the overwhelming weight of the evidence.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

light on the case in question, - I am to show that the answer is  
question was fundamental. If the transmission was honest there was  
no reason why it should not be treated as such. The defendant, I say  
and where he could stand and defend it he saw fit to do so, with  
out great expense and inconvenience.

The finding and judgment in the case looking and inte-  
ment that is returned by the evidence. Any other finding would  
have to be set aside as contrary to the overwhelming weight of the  
evidence.

The judgment of the Circuit Court of Cook County is

affirmed.

RECORDED.

Witness my hand and seal, this 1st day of January, 1900.



34621

MARY J. PALMER,  
Appellant,

vs.

CHARLES M. FIELD and ROSE G.  
FIELD, his wife,  
Appellees.

APPEAL FROM SUPERIOR COURT  
OF COOK COUNTY.

259 I.A. 670<sup>2</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of assumpsit against the defendants to recover damages. At the close of plaintiff's case, on the court's motion, there was a directed verdict for the defendants and plaintiff appeals.

The record discloses that on October 24, 1928, plaintiff and her husband entered into a written contract with defendant Charles M. Field, whereby Mrs. Palmer agreed to assign and convey her interest in a cooperative building, and in consideration thereof the defendant Charles M. Field agreed to convey a certain apartment building consisting of thirteen apartments, known as 3001 North Carlov avenue, Chicago.

The contract provided for the conveyance of the building by Field, "together with screens and screen doors, ice boxes, gas ranges, fire places and electrical fixtures therein." A further provision was in relation to the pre-rating of insurance, etc. And another with reference to the allowance of \$375 which Mrs. Palmer had theretofore allowed to her tenant who was occupying the apartment in the cooperative building, and there was a further provision in the contract whereby the parties agreed "that in the event this contract is not consummated by November 1, 1928, then in that event, the second party (Field) shall have the option to place a mortgage of Eighty-five Hundred Dollars (\$8500.00) in lieu of the purchase money mortgage mentioned in the within contract,

25 26 27 28

1911

27

1. NAME DATE PERIOD  
 2. TOPIC DATE PERIOD  
 3. NAME DATE PERIOD

• *Journal of the American Medical Association* 1994; 271: 1000-1001

32014.05

RECEIVED THE FOLLOWING INFORMATION FROM THE BUREAU OF THE INSURANCE COMPANY OF THE STATE OF NEW YORK:

Research and clinical experience on the social, family and individual variables for the development of antisocial behavior. At the close of Glisenti's course, participants to research progress in relation to antisocial behavior and

[illegible]

ing by Field, "consistent with systems and common sense, the bones, the ranges, the glass and electrical fixtures, etc." A provision was in relation to the pre-testing of insurance, etc. And another with reference to the allowance of \$275 which Mrs. Palmer had previously allowed to her tenant who was occupying the apartment in the cooperative building, and there was a further provision in the contract whereby the parties agreed "that in the event this contract is not consummated by November 1, 1938, then in that event, the second party (Field) shall have the option to place a mortgage of thirty-five hundred dollars (\$35,000) in lieu of the purchase price and shall be entitled to the title to the property."



payable at the rate of One Hundred Fifty Dollars (\$150.00) per month for 23 months and the balance within 24 months after date of execution; and the said party of the first part (Palmer) does in that event, at the consummation of said deal, assume and agree to pay the said mortgage or trust deed." And there is a later provision in the contract which provides that the first party (Palmer) agrees to pay to the second party (Fields) at the date of the delivery of the deeds \$8500.00, "evidenced by 23 notes of One Hundred Fifty Dollars (\$150.00) each, due one note each month commencing one month after date of delivery of deed, and final payment 24 months after date of delivery of deed," etc.

To plaintiff's declaration, which consisted of the common and special counts, the defendants filed a plea of not guilty and later filed an affidavit of defense in which they set up that at the time of the making of the contract for the exchange of the property, and at the time of the consummation of that transaction, the defendants owed the plaintiff \$11.25 which they had theretofore tendered; that none of the items mentioned in plaintiff's copy of the account sued on (which consists of a number of items) "with the exception of the gas ranges, has been contracted for between the plaintiff and the defendants.\*\*\*

\*\*\* that the amount of Three Hundred Seventy-five Dollars (\$375.00) as set forth in the copy of the account sued, was the amount agreed on to be paid by the plaintiff to the defendants, which amount the plaintiff allowed in the pro-rating at the consummation of the deal between the said parties.\*\*\*

\*\*\* that prior to the consummation of said deal the plaintiff and the defendant inspected the premises in question and they found everything pertaining to said transaction in good order; that the said plaintiff was fully satisfied with the condition of the premises and as a result thereof the deal was <sup>fully</sup> consum-



... of the sale of the ... (1900-01) ...  
... 15 months and the balance within 30 months after date of  
... and the said party of the first part (Plaintiff) ... in  
... of the communication of said ... and ...  
... the said ... and ...  
... vision in the contract ...  
... (Plaintiff) agree to pay to the second party (Defendant) ...  
... of the delivery of the ...  
... the said ...  
... one month after date of delivery of said ...  
... 30 months after date of delivery of said ...  
... to Plaintiff's satisfaction, which ...  
... and special ... the defendant ...  
... and later filed an affidavit of ...  
... at the time of the making of the contract for the ...  
... of the property, and at the time of the communication of said  
... the defendant with the plaintiff \$11.25 ...  
... therefore tendered; that none of the items mentioned in  
... of the account such as (which consists of a  
... of same) with the execution of the ...  
... between the plaintiff and the defendant ...  
... of three hundred seventy-five  
... as set forth in the copy of the account ...  
... to be paid by the plaintiff to the ...  
... which amount the plaintiff allowed in the ...  
... of the communication of the deal between the said parties ...  
... that prior to the communication of said deal the  
... and the defendant ...  
... they found everything pertaining to said transaction in good order;  
... that the said plaintiff was fully satisfied with the condition of  
...  
... the ...

mated." Both parties agree that the deal was consummated by the passing of the necessary papers, the defendants having executed and delivered their warranty deed to the premises mentioned in the contract about December 12, 1928.

On the trial plaintiff offered evidence tending to show that at the time of the execution of the contract for the exchange of the properties the thirteen apartment building which the defendant Charles M. Field agreed to convey was in process of construction and had not been completed at that time, and that it was agreed upon that Field would complete the building and install certain fixtures which he failed to do to the damage of plaintiff.

The court excluded this evidence on the theory that it was variant from the written contract. His attention was not called to the defense interposed as shown by the affidavit of defense, parts of which we have above quoted. The evidence was admissible under the pleadings. We think the evidence was also admissible under the written contract entered into between the parties for the exchange of the properties because the contract is ambiguous. It provides that Field will convey the property together with the screens, screendoors, ice boxes, gas ranges, fire places and electrical fixtures. In view of the offered evidence, we think this indicates that the building was in the course of construction. Moreover, the contract expressly provided that if the deal was not consummated by November first, Field might place a mortgage of \$8500 on the thirteen apartment building, and the contract further provided that this mortgage if made was to be paid off by Mrs. Palmer in monthly installments. This indicates that the building was not complete at the time the contract was made and that \$8500 might be necessary for that purpose. Field was given the privilege of raising this money by a mortgage on the property. This would be done at once while Mrs. Palmer was to repay it in monthly installments



[illegible]

show that at the time of the execution of the contract for the purchase of the property the defendant was in possession of the same and had not been evicted at that time, and that it was

THE COURT GRANTED THIS PETITION AND THE ORDER WAS MADE THAT THE PETITIONER BE REINSTATED TO HIS POSITION AS A MEMBER OF THE BOARD OF DIRECTORS OF THE COMPANY.

It is very difficult to find any one who is not a member of the party. The party is very large and is very active. It is very difficult to find any one who is not a member of the party. The party is very large and is very active. It is very difficult to find any one who is not a member of the party. The party is very large and is very active.

It is provided that this will ensure the necessary security with the

For the knowledge of the responsible persons the following is notified:

Respective names and addresses of persons concerned are between the parties

This indicates that the subject was in the vicinity of the  
 electrical transformer. In view of the above evidence, we think  
 it probable that the subject was in the vicinity of the  
 electrical transformer, and that the subject was in the vicinity of the

Moreover, the committee is of the opinion that it is in the best interests of the community to have a public library building, and the committee recommends that the city of Chicago be authorized to issue bonds for the purpose of financing the construction of a public library building.

of a large scale study of a number of the processes. This would be  
likely to concern the total amount. This was given the number  
was not enough of the time the subject was told that 1950  
before he made his decision. He indicated that the subject

... ..



We think that both under the written contract and under the defense interposed the offered evidence was admissible. The defense set up in defendants' affidavit is that the parties examined the apartment building after the contract was made and just before the deal was consummated in December, and that the building was then satisfactory to Mrs. Palmer.

The court erred in excluding the offered evidence and in instructing the jury to find for the defendants. The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

We think that both under the witness company and under the law  
 those interested in the witness company are interested. The witness  
 told us in testimony that the witness company is not the witness company  
 concerned with the witness company and the witness company is not the  
 witness company concerned in the witness company, and that the witness company is  
 interested in the witness company.

The witness stated in testimony that the witness company is  
 interested in the witness company and the witness company is not the  
 witness company concerned in the witness company. The witness  
 of the witness company at that time is interested in the witness company  
 concerned in the witness company.

INTERVIEWING THE WITNESS.

Witness, E. L. and testimony, E. L. witness.

34651

209  
ANTHONY MANGANO and ANTHONY PELEGRINO,  
Administrators of the Estate of Frank  
Mangano, Deceased,

Appellants,

vs.

DANIEL W. VOLTZ, EDWARD C. VOLTZ and  
VOLTZ BROS., INC., a Corporation,  
Appellees.

7  
APPEAL FROM SUPERIOR  
COURT OF COOK COUNTY.

259 I.A. 670<sup>3</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Anthony Mangano and Anthony Pelegrino, as administrators of the estate of Frank Mangano, deceased, brought an action under the statute to recover for the wrongful death of Frank Mangano, a child about six years of age, for the claimed reason that defendants had maintained on their premises an attractive nuisance as a result of which the boy was killed. At the close of plaintiffs' case there was a directed verdict for defendants.

The facts, as disclosed by counsels' briefs (an intelligent understanding cannot be had by a reading of the record) are that about seven o'clock on the evening of July 24, 1928, Frank Mangano was killed while playing on a freight elevator located in a garage at 816 Forquer street, and which was owned and controlled by defendants. The elevator was located in <sup>the</sup> front of the garage, which faced south on Forquer street, an east and west street in Chicago. The dimensions of the elevator were about twelve feet by twenty-four feet, and was immediately inside of a door which was just at the inside of the sidewalk on Forquer street. This door was opened and closed by pushing it up and by pulling it down. It was closed at the time of the accident. The garage was two stories in height and the elevator was used to take automobiles from the first to the second floor.

The deceased lived with his parents, brothers and



DAVID W. WHITE, Attorney at Law,  
Chicago, Illinois.

Attorney at Law

Vol.

DAVID W. WHITE, Attorney at Law,  
Chicago, Illinois.

253 I.A. 670

MR. JUSTICE O'CONNOR DELIVERED THE OPINION AS FOLLOWS:

Trank Mangano and Anthony Peligrino, as administrators of the estate of Frank Mangano, deceased, brought an action under the statute to recover for the wrongful death of Frank Mangano, a child about six years of age, for the claimed reason that defendants had maintained an unsafe condition on the premises as a result of which the boy was killed. At the close of plaintiffs' case there was a directed verdict for defendants. The facts, as disclosed by complaints, bills (as amended) and the evidence, cannot be set by a reading of the record, are that about seven o'clock on the evening of July 26, 1928, Frank Mangano was killed while playing on a freight elevator located in a garage at 225 North Street, and which was owned and controlled by defendants. The elevator was located in front of the garage, which faced north on North Street, on east and west streets in Chicago. The dimensions of the elevator were about twelve feet by twenty-four feet, and was immediately inside of a door which was fast at the inside of the sidewalk on North Street. This door was opened and closed by pulling it up and by pushing it down. It was closed at the time of the accident. The garage was two stories in height and the elevator was used to take automobiles from the first to the second floor. The deceased lived with his parents, Stephen and

sisters at 814 Forquer street, immediately adjoining the garage on the east. About a half hour before the accident Dominick Mangano, a brother of the deceased, who was then about ten years old, went in the alley in the rear of the garage. He testified that he went there to get a ride on the elevator; that he had seen other children riding on it some months before; that in the rear of the garage there was a small door in a larger one; that he "bumped on the door and the door went back open;" that he then went in the garage from the rear, went up the stairs to the second floor where the elevator was, and pulled a rope, then the elevator went down and he operated it, riding up and down on it; that he then went back to his home, called his sister and playmates to come and take a ride on the elevator and that they, including the deceased, went with him; that all the children then went through the back door of the garage to the front of the garage and got on the elevator and he operated it up and down; that Frank came in contact with the elevator and the floor and was killed.

It further appears that the defendants owned and operated a factory at 842 South Halsted street, which is a north and south street, the factory apparently being a short distance north of Forquer street; that they owned the garage, and for about three months prior to the accident had been using it to leave their automobiles in during the day, and for storage purposes; that prior to the three months it had been rented to tenants who operated a garage, and during the time it was occupied by defendants' tenants a number of children in the neighborhood at different times rode up and down on the elevator and that those children were seen by Dominick Mangano and other children in the neighborhood. It also appears that none of the children who were on the elevator on the evening in question had ever played on the elevator before that evening and, so far as the record discloses, the children who

[illegible]



had theretofore played on the elevator came in through the front door when it was open. There is no evidence that any child ever went through the back door of the garage and rode on the elevator except on the evening in question.

We think it obvious that the ruling of the court in directing a verdict for the defendants at the close of the plaintiffs' case was in accordance with the law. The owner of land who allows young children to play on his property must use ordinary care to keep the premises in a safe condition because the children, being without judgment, are likely to be drawn by childish curiosity into places of danger. Ramsay v. Tuthill Material Co., 295 Ill.395. The rule applies where the owner expressly or by implication invites children onto the premises. In the instant case the evidence is to the effect that the defendants knew nothing about children having theretofore played on the elevator while the premises were controlled by defendants' tenants; and the evidence also is that no children played on the elevator for about three months prior to the accident, which was the time defendants resumed control of the garage. There was therefore no express invitation, nor was there any implied invitation on the part of defendants. The rule of law recognized in this state as to an implied invitation is that where the owner of premises maintains a dangerous condition or thing of such a character that he may reasonably anticipate children, who by reason of tender years are incapable of exercising care for their own safety, are likely to be attracted to the dangerous thing, he is required to use reasonable care to protect them from injury, provided it is shown that such dangerous condition or thing is so located as to attract children from the street, playground or places where they have a right to be. Where such an agency is so located it constitutes an implied invitation to such children to come upon the premises, and they are not in law considered trespassers. The rule does not apply

had been taken up by the court in 1910, the court  
 door when it was open. There is no evidence that any child ever  
 went through the back door at the house and into the alleyway  
 except on the evening in question.

It is also in evidence that the father of the child in

directing a verdict for the defendant at the trial of the child  
 fifth case was in accordance with the law. The court of last resort

also found evidence to show that the defendant's wife was not

care to keep the premises in a safe condition because the children  
 being without judgment, and likely to be known by children visiting  
 into places of danger. Baran v. Baran, 1911, 102, 103.

The wife's negligence was not shown by evidence that the child  
 children into the premises. In the instant case the evidence is to

the effect that the defendant's wife was negligent in not keeping

the child's sight on the children while the children were standing

by defendant's house, and the evidence also is that an employee

played on the street for about three months after in the summer,  
 which was the time defendant's house was built on the corner. There

was therefore no evidence of negligence, and was thus not liable for

violation on the part of defendant. The wife of the defendant in

this case is to be held liable in that she was the mother of

premises and that a negligent condition of child of seven a neighbor

that he may reasonably expect to be negligent, and by reason of negligence

years and months of negligence and the child was killed, and

likely to be negligent in the negligence being, as it is held to be

reasonable care is to be held from the father, provided it is shown

that such negligent condition of child is to be held as an attempt

children from the street, negligent or negligent child may have a

right to be held liable as negligent in the negligence being

liable in negligence in that child in case was not negligent, and

that was not in the negligent condition. The law does not say

where the owner maintains something for his own use which, though dangerous, would be found by the children when going upon the premises as trespassers. McDermott v. Burke, 256 Ill. 401; St. Louis, Vandalia and Terre Haute R. R. Co. v. Bell, 81 Ill. 76.

In the instant case the elevator was not so located as to be seen by the children who were playing on it on the evening in question. The front door to the garage was closed; the rear door was also closed except that a small door was slightly ajar. The elevator could not be seen by the children from the rear door because it was located in the front of the building. In these circumstances, it is obvious that under the law there is no liability on the defendants for the unfortunate accident.

The judgment of the Superior court of Cook county is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.



where the same evidence was given for the two cases, the  
evidence, could be found by the evidence given in the  
evidence in evidence. Reynolds v. United States, 137 U.S. 149.  
United States v. Smith, 137 U.S. 149.

In the instant case the elevator was not so located as  
to be seen by the witness who was standing on the second  
in question. The fact that the witness was standing on the  
floor was also closed except that a small part was slightly  
the elevator could not be seen by the witness from the floor  
because it was located in the front of the building. In these  
circumstances, it is evident that what the witness is so  
fully on the facts for the evidence stated.

The fact that the witness was not so located as  
stated.

ATTORNEY.

Witness, J. J., and Attorney, J. J., present.

34675

RAYMOND A. JOHNSON,  
Defendant in Error,

vs.

FRANK A. OLSON,  
Plaintiff in Error.

ERROR TO MUNICIPAL COURT  
OF CHICAGO

259 I.A. 670<sup>4</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$2,000 with interest thereon from October 31, 1929, basing his claim on the fact that a check for \$2,000 endorsed by the defendant and delivered to the plaintiff was refused payment by the bank on which it was drawn, on account of the bank being closed by the State Auditor at the time of the presentation of the check. The defendant entered his appearance and filed an affidavit of merits. Later the case came on for hearing before the court without a jury and on motion of the plaintiff the defendant's affidavit of merits was stricken. The defendant <sup>was</sup> then defaulted and judgment was entered on the plaintiff's affidavit of claim, no evidence being heard. At the same time the defendant moved the court that the default and judgment be vacated and set aside, which motion the court entered and set for hearing on April 18th, and it was further ordered that the defendant might file a petition in support of his motion on or before April 16, 1930. On April 18th the defendant filed his petition praying that the order striking his affidavit of merits from the files and the judgment against him be vacated. On the same day the motion was heard and overruled and defendant appeals.

Counsel for the defendant, who was not defendant's counsel in the trial court, makes a number of contentions as to why the judgment should be reversed; but in the view we take of the case it will be necessary to pass on only one of the conten-

WILLIAM A. BAKER  
Defendant in Error

vs.

FRANK A. BAKER  
Plaintiff in Error

IN SENATE

NOVEMBER 11, 1911

255 I.A. 670

MR. JUSTICE SUTHERLAND delivered the opinion of the court.

Plaintiff brought an action against the defendant  
 on November 11, 1910, with intent to recover from April 11, 1910,  
 having his claim on the fact that a check for \$1,000 deposited by  
 the defendant was delivered to the plaintiff and retained payment  
 by the bank in which it was cashed, he claimed it was paid  
 closed by the State Auditor at the time of the presentation of  
 the check. The defendant claimed his endorsement was filed on  
 affidavit of service. After the case came on for hearing before  
 the court without a jury and on motion of the plaintiff the  
 defendant's affidavit of service was stricken. The defendant  
 testified and judgment was entered on the plaintiff's affidavit  
 of claim, an answer being overruled. At that time the defendant  
 and moved the court that the verdict and judgment be vacated and  
 not set aside, which motion the court granted and the hearing on  
 April 11, 1911, and it was further ordered that the defendant bring  
 into a position in answer to his motion on or before April 11,  
 1911. In April 1911 the defendant filed his petition praying  
 that the order vacating the affidavit of service from the time  
 and the judgment against him be vacated. On the same day the  
 motion was heard and overruled and defendant answered.  
 Grounding the defendant, who was not before the  
 court in the trial court, made a number of suggestions as to  
 why the judgment should be reversed; but in the view of facts of  
 the case it will be necessary to pass on only one of the sug-



tions, and that is that plaintiff's statement of claim fails to state a cause of action. Since there was no evidence heard by the trial court but defendant was defaulted, the statement of claim was in no way aided by the proofs, there being none. Plaintiff, in his statement of claim alleged that defendant, on October 31, 1929, gave plaintiff a cashier's check "of The Security State Bank of Chicago, dated October 9, 1929;" that the check was endorsed by the payee and by the defendant and delivered to plaintiff. "\*\*\*\*a copy of said check\*\*\*\* is hereto attached and made a part hereof. Plaintiff further alleges that on November 1, 1929, he deposited said check to his account in the Twelfth Street State Bank and said check was returned to him unpaid for the reason that said Security State Bank of Chicago was closed by the State Auditor and said check has not been paid." The check attached to the statement of claim and made a part thereof, as may be done under the system of pleading in the Municipal court (Plaw v. Board, 274 Ill. 232) is a cashier's check on the "City State Bank of Chicago." The check being a check of the City State Bank of Chicago, it is obvious that the fact that the Security State Bank of Chicago was closed by the Auditor, was of no consequence. Further, the statement of claim alleges that plaintiff received the check on October 31 and deposited it the next day in the "Twelfth Street State Bank;" there is no allegation where this bank is located, and it is further alleged in the statement of claim that the check was returned to plaintiff unpaid because the Security State Bank was closed by the State Auditor. There is no allegation that the check was presented nor as to when the Security State Bank was closed by the State Auditor.

It is the law that where a check is payable on demand it must be presented for payment within a reasonable time, and what is reasonable time is often determined by the location of

clear, and that the fact of Plaintiff's receipt of such bills to  
 create a cause of action. There were no bills shown by  
 the trial court but defendant was admitted. The statement of  
 Plaintiff was in no way aided by the facts, which being known.  
 Plaintiff, in his statement of claim alleged that defendant, on  
 October 21, 1937, gave Plaintiff a check for the sum of  
 fifty cents cash at Chicago, which he paid to the bank.  
 check was retained by the bank and by the defendant and delivered  
 to Plaintiff. "The fact that the check was retained and  
 made a cash payment. Plaintiff further alleges that on December 2,  
 1937, he deposited said check in the bank and the bank  
 stated that said check was returned to the bank for the reason  
 that said check was not cashed at Chicago but at New York.  
 Plaintiff and said check was not cashed. The bank alleged in  
 the statement of claim was made a cash payment, as was the bank.  
 under the terms of the check is the bank's duty to cash it.  
 The fact that the check was not cashed at Chicago but at New York  
 is the fact that the check was not cashed at Chicago but at New York.  
 Chicago was closed by the bank, and it is alleged that the bank  
 the statement of claim alleged that Plaintiff received the check on  
 October 21 and deposited it in the bank for the reason that  
 "said bank" gave to an attention which was not to be paid,  
 and it is further alleged in the statement of claim that the check  
 was retained by Plaintiff and should have been cashed by the bank.  
 was closed by the bank. There is no allegation that the  
 check was presented and as to when the check was cashed was  
 closed by the bank.  
 It is the fact that the check was not cashed at Chicago but at New York  
 it was not presented for payment until a reasonable time, and  
 what is reasonable time is often determined by the location of

the banks involved. From what we have said it is obvious that the statement of claim is wholly insufficient to sustain the judgment.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.





34711

RAYMOND A. FREY, Doing Business  
as R. A. Frey Teaming Company,  
Appellee,

vs.

SIMMS D. McGUIRE and LAKE ZURICH  
MILK CO., a Corporation,  
Appellants.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 670<sup>5</sup>

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendants to recover damages claimed to have been sustained on account of the negligent operation by the defendants of an automobile which collided with and damaged a truck belonging to plaintiff. There was a trial before the court without a jury. The court found both defendants guilty as charged in the statement of claim, and assessed plaintiff's damages at \$123.70, and defendants appeal.

The record discloses that just before noon on October 20, 1926, plaintiff's chauffeur was driving a three-quarter ton International truck south in Franklin street, Chicago, and at the same time the defendant McGuire's chauffeur was driving a Lincoln automobile east in Wendell street. The two streets intersect at right angles. There was a collision between the truck and the automobile. Plaintiff had the truck repaired and brought suit to recover for the cost of the repairs, and for damages claimed to have been sustained by him on account of his inability to use the truck during the time it was being repaired. On October 9th both defendants entered their appearance, and on the following day an order was entered defaulting the Milk company for want of an appearance, and the record recites that on motion of the defendant McGuire it was ordered "that the time to file Affidavit of Merits \*\*\* be \*\*\* extended Ten (10) days." Each defendant filed a

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8

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED  
DATE 08-11-2001 BY 60322 UCBAW

520 I.A. 60

22. LATERAL CONTROL OF THE MOTOR SYSTEM

...the ... of the ...

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separate affidavit of merits and on April 23, 1930, the cause came on for trial before the court without a jury, evidence was heard, the court found both defendants guilty and entered judgment as above stated. It is obvious that the order defaulting the Milk company was inadvertently entered and does not affect the decision of the case because the order was entirely ignored when the case came on for trial and was tried in the regular way.

We do not pass on the question of negligence of the plaintiff or of the defendants because there must be a retrial of the case and the law on the question of negligence or the lack of it in such an accident may be found in the cases of Heidler Co. v. Wilson & Bennett Co., 243 Ill. App. 89; Salmon v. Wilson, 227 Ill. App. 286, and other authorities from this and other courts cited in that opinion. In addition to the cases there cited, see Erwin v. Traud, 100 Atl. (N.J.L.) 184; Spaww v. Goldberg, 110 Atl. (N.J.L.) 565. Nor do we pass on the question whether the damages were properly proved, for the same reason. For the law on the question of repairs see Cloyes v. Plaintiff, 231 Ill. App. 183; Eyalos v. Matheson, 243 Ill. App. 60; same case affirmed, 328 Ill. 269; and on the question of the claimed damages for the inability to use the truck, see McCabe v. Chicago & Northwestern Ry. Co., 215 Ill. App. 99.

But the judgment must be reversed because there is no evidence in the record showing that the Lake Zurich Milk Company was in any way involved, and the judgment against both defendants therefore cannot stand. If it is erroneous as to one of the defendants, it must be reversed as to both. Christensen v. Johnston, 207 Ill. App. 209; The West Chicago Street R.R. Co. v. Morrison, Adams & Allen Co., 160 Ill. 288. The Milk Company filed an affidavit of merits denying that it owned or was in possession of the Lincoln automobile. The affidavit of merits filed by the defendant

... of motive and on April 12, 1917, the same  
 case as the trial judge found a jury, evidence was  
 heard, the court found both defendants guilty and entered judg-  
 ment as above stated. It is stated that the other defendant  
 the first company was inadvertently entered and does not affect  
 the decision of the case because the order was not entered  
 when the case on for trial and was tried in the regular way.  
 We do not pass on the question of negligence of the  
 plaintiff or of the defendant because there must be a trial  
 of the case and the law on the question of negligence as the fact  
 of it is such an accident may be found in the case of Heideler Co.  
111. App. 286, and other authorities from this and other courts  
 cited in that opinion. In addition to the cases there cited,  
 see Heideler v. Heideler, 111. App. 286; Heideler v. Heideler, 111.  
App. 286. Now do we pass on the question whether the  
 defendant was negligent, for the same reason. Now the law  
 on the question of negligence see Heideler v. Heideler, 111. App. 286;  
Heideler v. Heideler, 111. App. 286; some case cited, the 111.  
App. 286; and on the question of the claimed damages for the liability  
 to the first, see Heideler v. Heideler, 111. App. 286.  
 111. App. 286.  
 The law is stated as to the question of negligence in the  
 evidence in the record showing that the Lake Huron Milk Company  
 was in my way, and the judgment against both defendants  
 is correct. It is in error as to the law.  
 Therefore, it must be reversed as to both. Heideler v. Heideler,  
111. App. 286; Heideler v. Heideler, 111. App. 286.  
 The law is stated as to the question of negligence in the  
 evidence of motive showing that it should be in possession of the  
 license and the evidence of motive (first of the defendant)

McGuire admitted the ownership and operation of the Lincoln car but denied any negligence on his chauffeur's part and alleged that the accident occurred on account of the negligence of the driver of the truck.

The testimony of the driver of the truck, as well as the testimony of the chauffeur who was driving the Lincoln car is all to the effect that the Lincoln car was owned and controlled by the defendant McGuire. No mention is made of the other defendant and under the law the judgment of the Municipal court of Chicago must be and it is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.



positive evidence of the conspiracy and possession of the libelous and  
but failed to establish to the satisfaction of the jury that the  
the defendant conspired to defame the plaintiff of the injury  
of the press.

The testimony of the father of the press, as well  
on the testimony of the defendant who was directed to the libelous  
is all to the effect that the libelous was owned and controlled  
by the defendant himself. The court is of the opinion that  
and under the law the judgment of the jury is correct.  
Chicago may be said to be reversed and the case is reversed.

REVEREND AND HONORABLE.

WATSON, J. J., and BOWEN, J. J., concur.

34182

FRIEDA NONN,  
Defendant in Error.

v.

ANDREW SAHN and EVA SAHN et al.,  
Plaintiffs in Error.

ERROR TO CIRCUIT  
COURT, COOK COUNTY.

259 I.A. 671

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Frieda Nonn, filed her bill to foreclose a second trust deed upon certain real estate in Chicago. The trust deed was given to secure the payment of a promissory note in the sum of \$2,500, dated June 14, 1926, and executed by Andrew Sahn and Eva Sahn, and made payable to the order of themselves and by them indorsed. The Sahns et al. were made defendants. All of the defendants save the Sahns were defaulted. The case was referred to Master in Chancery Kerner, who heard the evidence and made a report recommending that a decree of foreclosure be entered. The chancellor sustained the master's report and a decree of foreclosure was entered. The Sahns sued out this writ of error.

The bill is in the usual form and no point is made as to it. Defendants, in their answer, deny that on June 14, 1926, they were indebted in the sum of \$2,500, or in any amount whatsoever; neither admit nor deny that on that date they made or indorsed the note described in said bill or that they executed a trust deed; deny that they paid any part or portion of the note; deny that they ever recognized the alleged note and trust deed as a valid and subsisting claim and lien; deny that there is due complainant the sum of \$2,420, with interest; neither admit nor deny that defendant Louis Kovic indorsed the principal note, and deny that the premises

WILLIAM HARRIS,  
Defendant in Error.

v.

AMERICK BARN and EVA BARN et al.,  
Plaintiffs in Error.

COUNTY OF KANE, ARIZONA.

1929 14 251

MR. JUSTICE THOMAS delivered the opinion of the court.

Trade Bank, filed her bill to recover a second trust deed upon certain real estate in Chicago. The trust deed was given to secure the payment of a promissory note in the sum of \$2,800, dated June 14, 1928, and executed by Andrew Barn and Eva Barn, and made payable to the order of themselves and by them indorsed. The names of al. were made defendants. All of the defendants have the same were defaulted. The case was referred to Master in Chancery Horner, who heard the evidence and made a report recommending that a decree of foreclosure be entered. The chancellor sustained the master's report and a decree of foreclosure was entered. The same was on this writ of error.

The bill is in the usual form and no point is made as to it. Defendants, in their answer, deny that on June 14, 1928, they were indebted in the sum of \$2,800, or in any amount whatsoever; neither admit nor deny that on that date they made or indorsed the note described in said bill or that they executed a trust deed; deny that they paid any part or portion of the note; deny that they ever recognized the alleged note and trust deed as a valid and existing claim and deny that there is any complaint the sum of \$2,430, with interest; neither admit nor deny that defendant Lewis Kovic indorsed the promissory note, and deny that the premises



are subject to a first mortgage incumbrance of \$5,000 or in any amount. They allege that they received no consideration for the note and trust deed; that they are unable to read the English language intelligently; "and were induced to sign documents which the defendant, Louis Kovie, a real estate broker, represented to these defendants as being documents necessary to be signed to sell said premises to John Fritz; \* \* \* that these defendants had made arrangements to sell said premises to said John Fritz, and believed they were signing and executing some documents necessary to be signed and executed in order to convey said premises to the said purchaser, \* \* \* and were not advised at that time, nor for a long period of time thereafter, that they had signed and executed a note and trust deed; that no consideration whatever was given to these defendants for the execution of said note and trust deed by the said Louis Kovie, or by anyone, \* \* \* and these defendants were fraudulently induced to sign and execute said alleged note and trust deed." Defendants further allege that complainant was not a bona fide purchaser of the note and trust deed for value before maturity and that the said instruments were signed and executed by reason of fraud practiced upon them by Kovie.

The master found (inter alia) that in July, 1924, the Sahns entered into a contract to convey the real estate in question to John Fritz and wife for \$5,700 and that the Fritzes paid to the Sahns \$1,000 as earnest money; that the deal was not consummated and the Sahns "never personally returned said sum of \$1,000;" that because the said deal was not consummated it became necessary for the Sahns to return the \$1,000, and to evidence the debt they executed a trust deed for the sum of \$3,700, "but that this trust deed is not in controversy in the instant proceedings;" that on May 24, 1924, the Sahns executed the following power of attorney:

and subject to a first mortgage insurance of \$5,000 on in any amount. They allege that they received no consideration for the

note and trust deed; that they are unable to read the English language intelligently; and were induced to sign documents which

the defendant, Louis Kovic, a real estate broker, represented to them defendants as being documents necessary to be signed to sell

said premises to John Witz; \* \* \* that these defendants had made arrangements to sell said premises to said John Witz, and believed

they were signing and executing some documents necessary to be

signed and executed in order to convey said premises to the said

defendant, \* \* \* and were not advised at that time, nor for a long period of time thereafter, that they had signed and executed a note

and trust deed; that no consideration whatever was given to these

defendants in the execution of said note and trust deed by the said

Louis Kovic, or by anyone, \* \* \* and these defendants were threatened, induced to sign and execute said alleged note and trust deed. "Defendants

also further allege that complainant was not a bona fide purchaser

of the note and trust deed for value before maturity and that the

said instruments were signed and executed by reason of fraud

practiced upon them by Kovic.

The master found (inter alia) that in July, 1934, the

defendants entered into a contract to convey the real estate in question

to John Witz and wife for \$5,700 and that the trustees paid to the

defendants \$1,000 as earnest money; that the deal was not consummated

and the defendants "never personally returned said sum of \$1,000;" that

because the said deal was not consummated it became necessary for

the defendants to return the \$1,000, and to evidence the debt they

executed a trust deed for the sum of \$5,700, "but that this trust

deed is not in conformity with the usual procedure;" that on

May 24, 1934, the defendants executed the following power of attorney:



"KNOW ALL MEN BY THESE PRESENTS, That Andrew Sahn and Eva Sahn, his wife, of the City of Chicago, County of Cook in the State of Illinois, have made, constituted and appointed, and By These Presents do make, constitute and appoint Louis Kovic of the City of Chicago, County of Cook and State of Illinois, true and lawful Attorney for them and in Their names, place and stead to have the full power and control of our property located at 5034 Princeton Ave. City of Chicago, Cook County, State of Illinois described as: Lot Fifteen (15) in Block Four (4) in Gilbert and Canfield's and W. W. Crocker's Subdivision of the West-Half (W $\frac{1}{2}$ ) of the South-West-Quarter (SW $\frac{1}{4}$ ) of the North-West-Quarter (NW $\frac{1}{4}$ ) of the North-East-Quarter (NE $\frac{1}{4}$ ) of Section Nine (9) Township Thirty-Eight (38) North Range Fourteen (14) East of the Third Principal Meridian with all improvements thereon. This power can be not revoked.

The Title of the property is in the names of Andrew Sahn and Eva Sahn, which title is herewith granted in full extend and giving and granting unto Louis Kovic, their said Attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as they might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that their said Attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

IN TESTIMONY WHEREOF, we have hereunto set our hand and seal this 24 day of May 1924.

(STAMP) L. K. 5/24/24

ANDREW SAHN (SEAL)  
EVA SAHN (SEAL)

STATE OF ILLINOIS }  
COUNTY OF COOK } ss.

I, I. Albert Schmidt, a notary public in and for, and residing in the said County, in the State aforesaid, Do Hereby Certify that Andrew Sahn and Eva Sahn his wife, personally known to me to be the same persons whose name are subscribed to the foregoing Instrument appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said Instrument as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 24 day of May, A.D. 1924.

I. ALBERT SCHMIDT (SEAL)"

The master stated that while the Sahn's denied that they understood they were executing a power of attorney or that they understood the purport of the said document, nevertheless, he was "convinced from a preponderance of the evidence that they understood that they were appointing one Louis Kovic as their attorney in fact, as set forth in said power of attorney." The master further found that for some time prior to the date of the execution of the power of attorney and up to the time of the execution of the note and trust deed in question, Kovic had full and complete charge of the



"Now all day by their testimony, that answer also was  
Mrs. Kahn, his wife, of the City of Chicago, County of Cook in the  
State of Illinois, have said, examined and approved, and by  
these two persons be made, examined and approved, and by the  
City of Chicago, County of Cook and State of Illinois, this and  
lasted attorney for and in their names, this and last  
have the full power and authority of the property located at 1214  
Winchester Ave., City of Chicago, Cook County, State of Illinois  
described as: Lot 11-12-13 (12) in Block 100 (4) in District 10 and  
Gentlefield's and W. T. Gentlefield's subdivision of the West-End (12) of the  
the South-End-Quarter (12) of the North-End-Quarter (12) of the  
North-End-Quarter (12) of the South-End-Quarter (12) of the  
(12) North-End-Quarter (12) of the South-End-Quarter (12) of the  
with all improvements thereon. This power can be not limited.  
The title of the property is in the name of the said  
and have been, which title is located in the City of Chicago and  
giving and granting unto said lands, their heirs and assigns, full power  
and authority to do and perform all and every act and thing which  
ever, reasonable and necessary to be done in and about the premises,  
as fully, to all intents and purposes, as they might or could do if  
personally present at the same. Witness my hand and seal of office  
this 12th day of May 1914, at the City of Chicago, Illinois, and  
attested and recorded, my official seal and signature, all this  
their said attorney at his residence shall remain to be done in  
be done by virtue hereof.

IN WITNESS WHEREOF, at the City of Chicago, Illinois, on this 12th day of May 1914.

\_\_\_\_\_  
Notary Public  
(Seal)

(SEAL) I. C. 12/14/14  
STATE OF ILLINOIS  
COUNTY OF COOK  
I, I. Albert Schmitt, a Notary Public in and for, and acting  
in the said County, in the State of Illinois, do hereby certify that  
before me and in my presence, the said Mrs. Kahn and the said  
certain persons have appeared and acknowledged to me the foregoing instrument  
signed before me this 12th day of May 1914, and acknowledged that they  
signed, acknowledged and delivered the said instrument as theirs and  
voluntarily and for the uses and purposes therein set forth.  
Given under my hand and official seal, this 12th day of May, 1914.

I. ALBERT SCHMITT (SEAL)  
The master stated that while the said Kahn and the said  
they were executing a power of attorney in that they understood the  
purpose of the said instrument, nevertheless, he was "convinced from  
a preponderance of the evidence that they understood that they  
were appointing the said Kahn as their attorney in fact, and not  
forth in said power of attorney." The master further found that  
for some time prior to the date of the execution of the power of  
attorney and up to the time of the execution of the said and Kahn  
dead in question, Kahn had full and complete charge of the

collection of rents derived from the premises in question and the expenditure of these moneys in the payment of taxes, repairs, etc., "and whether he has accounted to his principals for all money collected, or has acted wisely and properly in the expenditures, I do not find, as those facts are not involved in these proceedings." The master further found that in June, 1926, Kovic had a talk with the Sahns regarding the repairing of the premises in question, as a result of which he was instructed by the Sahns to negotiate the sale of a note to be secured by a second mortgage upon the premises and that there was then "executed by the Sahns, a note for the sum of \$2500.00, dated June 14, 1926, payable to the order of the Sahns, and by them endorsed in blank;" that the note was payable as follows: \$40 on July 15, 1926; \$40 on the 15th of each and every month beginning August 15, 1926, for twenty-nine months succeeding, and a final payment of \$1,200 on January 14, 1929; that Kovic sold this note to George M. Felbinger for the sum of \$1,995, and that Felbinger sold the note to complainant, Frieda Nonn; that the funds realized from the sale of the note were used by Kovic "in paying for repairs of said premises and in paying a prior encumbrance." The master further found that the Sahns contend that they cannot read the English language and did not understand that they were signing a note for \$2,500 and a trust deed securing the same, and that "the documents" were not completely filled in when they signed them. The master further found that defendant Andrew Bahn is a janitor, that both of the Sahns are of German descent and came to America in 1909, and read very little English and do not speak that language very well; that at the time of the execution of the note and trust deed all of the conversation had between the Sahns and Kovic was in the German language; that the notes and trust deed were explained to the Sahns "and that they confided and trusted their said agent, Louis Kovic, and that said note is the legal obligation of said Andrew Bahn and







Eva Sahn, and that if said Louis Kovic has not accounted for same, they have their right of action against him for a proper accounting." The master further found that complainant was the legal owner and holder of the trust deed and note in question and that the trust deed was a valid and subsisting lien upon the premises for the sum of \$2,966.20, together with interest, and the costs of the proceedings.

The major contention of defendants is that it is the law of this state that mortgages and trust deeds, being choses in action, are not assignable at law and an assignee takes them subject to the same defenses as between the original parties, and that it was the duty of complainant to inquire of the mortgagors if any reason existed why the mortgage should not be paid; that complainant knew from the notes and trust deed who the mortgagors were and she was obligated to inquire of them, if she wished to be protected in the purchase. In support of this contention defendants cite Olds v. Cummings, 31 Ill. 188, and several other cases that follow the rule stated in that case. The ruling in Olds v. Cummings must be considered in the light of the decisions in Connor v. Wahl, 330 Ill. 136, and Guerten v. Zachas, 256 Ill. App. 386 (certiorari denied by the Supreme Court). In Connor v. Wahl the court said: "The only question before the court in the Olds case was whether the defense of usury, which was good as against the mortgagee, could be enforced against his assignee, with or without notice. There was no question in that case as to the effect of the release of a trust deed by the trustee, or the failure of the mortgagor to take up the first note and mortgage before he executed the second note and mortgage, or the right of the assignee to rely on what the public record showed with reference to the title. There was no evidence showing any equities between the mortgagor and the assignee except that the mortgagor claimed usury as against the mortgagee. The mortgagor had not by any negligence

The major contention of the defendant is that it is the law of  
 this State that mortgages and trust deeds, being interests in real  
 estate, are not assignable at law and an assignee takes them subject to the  
 same defenses as between the original parties, and that it was the  
 duty of complainant to inquire of the mortgagee if any reason existed  
 why the mortgage should not be paid; that complainant knew from  
 the notes and trust deeds that the mortgagee was and was obligated  
 to inquire of them, it was wished to be protected in the purchase.  
 In support of this contention defendant cites Wright v. Wright, 11 Ill.  
 182, and several other cases that follow the rule stated in that  
 case. The ruling in Wright v. Wright must be considered in the light  
 of the holdings in Wright v. Wright, 200 Ill. 135, and Wright v. Wright,  
 200 Ill. 135. (The latter is cited by the defendant.)  
 In Wright v. Wright the court said: "The only question before the  
 court in the Wright case was whether the estate of Wright, which was  
 good as against the mortgagee, could be enforced against his assignee,  
 with or without notice. There was no question in that case as to  
 the effect of the release of a trust deed by the trustee, or the  
 failure of the mortgagee to take up the first note and mortgage before  
 he executed the second note and mortgage, or the effect of the assignee  
 to rely on what the public record showed with reference to the  
 title. There was no evidence showing any equities between the  
 mortgagee and the assignee except that the mortgagee obtained money  
 as against the mortgagee. The mortgagee had not by any assignment



on his part defeated or curtailed his right to impose that defense against the assignee. On account of these additional questions which enter into the case at bar, the Olds case is not conclusive of the questions raised in this case," and the court then stated that the case before it was governed by the rule that where one of two innocent parties must suffer by reason of the fraud or wrongful conduct of another, the burden must fall upon him who put it in the power of the wrongdoer to commit the fraud or do the wrong. We followed that rule in Guerter v. Zachas, supra, and it must also control our decision in the instant case. There is no proof that complainant was not a bona fide purchaser of the note and trust deed. Kovic, in his possession of the note and trust deed, was acting as the agent of the Bahns, and it was this agent, if anyone, who committed the alleged fraud against them. It was the Bahns who put it in the power of Kovic to commit the alleged fraud. As between themselves and the innocent complainant, they must suffer. However, we do not wish to be understood as holding that the proof shows that Kovic was guilty of any fraud against the Bahns. The master found against this contention of defendants, and further found that the funds realized by Kovic from the sale of the note were used by him "in paying for repairs of said premises and in paying a prior encumbrance." The chancellor sustained the findings of the master, and if it were essential to a decision of this case, we do not think that we would be justified in holding contrary to their findings. When Kovic sold the notes and trust deed to Felbinger he made an affidavit in which he stated that he was the "bona fide owner for value" of the principal promissory note for \$2,500, and defendants argue that Felbinger and also complainant, who purchased the note of Felbinger, relied upon this statement of Kovic, and that therefore the finding in the decree that Kovic, acting as the agent of defendants, sold the note to Felbinger, was not warranted, and that the finding of the master to



on his part dated on November 21, 1941, to report that before  
against the evidence. In a number of cases, the evidence  
which after that time, the United States is not responsible for  
the questions raised in this case, and the court then stated that the  
case before it was governed by the rule that where one of the parties  
parties must either by reason of the facts or by reason of the  
another, the burden must fall upon the one who is in the power of the  
wrongdoer to establish the truth or the wrong. The United States  
rule in United States v. Kovic, and it was also stated that  
decision in the instant case. There is no question that the  
was not a prima facie case of the case and that the  
in his possession of the case and that the case was not in the  
agents of the Government, and it was this court, it appears, was  
the alleged facts against them. It was the same as if it was  
power of Kovic to establish the alleged facts. The United States  
and the instant complaint, they were not. However, we do not  
wish to be understood as holding that the power which Kovic was  
guilty of the facts against the Government. The matter should be  
conclusion of the court, and the court found that the United States  
by Kovic from the sale of the case was not in the power of  
regards of said premises and is not a prima facie case.  
Chancellor Justice and Justice of the court, and it is not  
essential to a decision of this case, we do not think that we should be  
involved in holding contrary to the United States. The United States  
notes and that the United States is not responsible for the case  
stated that he was the "same" as the United States and the United States  
premises note for the United States and the United States  
also complained, and Justice of the court of the United States, relied upon  
this statement of Kovic, and that Justice of the United States in the court  
that Kovic, acting as an agent of the United States, with the note to  
Feldinger, was not responsible, and that the United States of the United States

the same effect was a mere fiction designed to avoid the necessity of going into an accounting between the Bahns and Kovie. While it is a reasonable inference from the evidence that Pelbinger and complainant, in the purchase of the note, assumed that Kovie was the actual owner of the same, nevertheless, that fact would not enable defendants to avoid the effect of the rule laid down in Conner v. Wahl, supra, and followed in Guerten v. Zachas, supra. Moreover, it is plain from the proof that Kovie was acting as agent for defendants in the matter of the sale of the note and trust deed. It is rather difficult for us to understand what point defendants are trying to make when they argue that the master improperly denied them the right to an accounting between Kovie and themselves. Although complainant made Kovie a defendant, defendants failed to file a cross-bill. In fact, they did not even claim any relief against Kovie in their answer. It is entirely unnecessary for us to decide whether or not defendants would have had the right, in the present proceedings, to file a cross-bill seeking an accounting with Kovie. The master very properly held that if Kovie had not accounted fully and faithfully to the Bahns they had a right of action against him. Under the proof in this case, even if Kovie owed defendants any money, that fact would not affect the right of complainant to a foreclosure.

Defendants contend that a debt or mortgage obligation of some character is an essential element in a transaction to create the relation of mortgagor and mortgagee and that there was no money paid the Bahns at the time of the execution of the note and trust deed in question, and therefore "the burden is upon the complainant to show when and how much money was paid under the trust deed." In support of this contention defendants argue that as they dealt only with Kovie it was necessary to have a complete accounting between him and defendants in order to determine the question as



the same effect as a mere listing of names to avoid the necessity of going into an extended debate. The same can be said. This is in a reasonable inference from the evidence that Robinson and some plaintiff, in the purchase of the land, caused that Davis was the actual owner of the same, notwithstanding that Davis was not named in the deed. The effect of the law is to make it so that Davis, and followed in Shelton v. Shuman, 1912, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543



to whether or not defendants were paid for the mortgage, and that the master, over the objection of defendants, refused to allow an accounting and held that it was not involved in the proceedings, and that the court sustained the master in this regard, and therefore the decree should be reversed. It is a sufficient answer to this contention to state that Kovic, acting as the agent of the Sahn, received \$1,995 for the note and trust deed and that the chancellor allowed the Sahn a credit of \$505, the difference between the face of the note, \$2,500, and the amount received by Kovic for the same.

Defendants contend that the decree is not supported by the evidence and is contrary to it. We find no merit in this contention. The following evidences the disposition of the chancellor to aid defendants in every possible way: It appears that Felbinger purchased the note at a discount of twenty per cent. While the trust deed in question is a second one, and although no defense of usury was interposed by defendants, nevertheless, the chancellor held that the Sahn were entitled to a credit of \$505 against the \$2,500 note because of the discount Kovic allowed Felbinger when the latter purchased the same.

The decree of the Circuit Court of Cook county is affirmed.

AFFIRMED.

Gridley, J., concurs.

As Mr. Justice Kerner was the master in chancery in this case, he took no part, in this court, in the consideration or determination of it.



34195

MANDEL MENDELSON,  
Plaintiff in Error,  
v.

JOSEPHINE L. KELLOGG,  
Defendant in Error.

ERROR TO SUPERIOR COURT,  
COOK COUNTY.

259 I.A. 671<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in assumpsit. The declaration consisted of three counts. Defendant filed a general demurrer to each of the counts, which was sustained as to each count, and as plaintiff elected to stand by his declaration judgment was entered dismissing the suit.

Plaintiff sued as assignee of the vendees' interest in a written contract for the sale of lands. Each of the counts sets forth the contract verbatim and alleges performance by plaintiff and his assignors, the vendees under the contract, and a breach by the defendant. Each also sets forth the opinion of the Supreme Court of Illinois in Kellogg v. Kartte et al. (Mendelson, Appellant), 323 Ill. 443, which was a suit in equity that involved the same parties and the same contract, and the concluding part of each count alleges "that all of the matters and things hereinabove set forth have been conclusively proven, established and finally adjudicated as alleged, in the opinion and decree of the Supreme Court" in the said equitable proceeding, "wherein the parties hereto and the same subject matter as herein were involved." Defendant assigned (inter alia) the following causes of demurrer:

"Second: That it affirmatively appears from the opinion of the Supreme Court pleaded in said declaration that the defendant was under no obligation to convey said lands to the plaintiff herein;



MAHARAJA KUMAR, ...  
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259 I.A. 681

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The declaration ...  
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"Third: That it appears from said declaration that the plaintiff made his election to pursue whatever rights he might be supposed to have against this defendant touching the said contract and the alleged failure of this defendant to perform, by a proceeding in equity to compel this defendant to specifically perform the alleged contract with the plaintiff, which suit was by the plaintiff prosecuted to final judgment in the Supreme Court of Illinois, wherein it was determined that the plaintiff was not entitled to the performance of the alleged contract by this defendant, and that having prosecuted said suit to final judgment, that the plaintiff is now estopped in law to maintain this action to recover supposed damages.

"Sixth: That it appears from said declaration that there was no mutuality between the plaintiff and this defendant, and that where there was no obligation resting upon the plaintiff to perform this defendant cannot be held to answer in damages resulting from her failure or refusal to perform."

Defendant, in support of the action of the trial judge in sustaining the demurrer, contends that "the right to institute proceedings in Chancery against a vendor for the specific performance of a contract, and the right to institute an action at law against the vendor on the same contract to recover damages, are inconsistent remedies, and the institution by the vendee of either constitutes an irrevocable election, and such election bars any relief by way of such inconsistent remedy." In support of this contention defendant cites Sluka v. Bielicki, 335 Ill. 202, wherein it is held (p. 210):

"Where two remedies for the breach of a binding contract exist, one an action at law for violation of the contract and the other for specific performance, and one of these remedies is elected by the party suing, then, under the doctrine of election of remedies, he cannot resort to the other. (Bell v. Anderson, 292 Ill. 605.) Where the doctrine of election of remedies applies the bar arises as soon as the choice is made, and becomes full and absolute against the other remedy at the time of the filing of the petition, declaration or claim. (Bradner Smith & Co. v. Williams, 178 Ill. 420.) This has been the rule in this State since Herrington v. Hubbard, 1 Scam. 569.

"Counsel for appellee contend that appellee's damage suit was, at most, but a misapprehension of remedies, and that one will not be held to be barred of a proper remedy because he has through misapprehension pursued the wrong remedy. The cases cited to this point sustain that proposition, but this is not a case of that character. This is not a misapprehension of remedies but an election of one of two remedies, each of which is a proper remedy. Filing the suit in the municipal court was evidence of her determination to treat the contract as rescinded, and that is equivalent to an express disaffirmance of it. (Herrington v. Hubbard, *supra*.)"

In Kellogg v. Kartte, *supra*, the instant plaintiff made his election



[illegible][illegible]

Beforehand, in support of the action of the trial judge in maintaining the demurrer, evidence was "not taken as to whether the defendant is a person for the specific purpose of a contract, and the right to maintain an action of the contract was denied on the same ground as to every contract, and independent contract, and the institution by the parties of other contracts as to the same."

Stallard, 328 Ill. 303, wherein it is held (p. 314):  
"remedy." In support of this contention several cases are cited.

Section 101 of the Internal Revenue Code provides that the estate of a decedent who is a resident of the United States at the time of his death shall be taxable as to all property which he owned at the time of his death, whether or not such property is situated in the United States. The estate of a decedent who is a resident of the United States at the time of his death is taxable as to all property which he owned at the time of his death, whether or not such property is situated in the United States. The estate of a decedent who is a resident of the United States at the time of his death is taxable as to all property which he owned at the time of his death, whether or not such property is situated in the United States.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. The Commission is therefore unable to determine whether the CLPS is a genuine anti-apartheid organization or a front organization for the South African Government.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said Court, at the City of New York, this 14th day of June, 1964.



when he filed a cross bill praying for specific performance of the contract in question. In the instant case he is suing for breach of the contract. In our judgment Sluka v. Bielicki, supra, determines this appeal, and adversely to plaintiff. Plaintiff contends that the doctrine of election of remedies is applicable only where a party has elected between inconsistent remedies for the same injury or cause of action, and he insists that the two remedies successively pursued by him are consistent, as both are based upon affirmance of the contract. He also contends that the language above quoted from Sluka v. Bielicki must be regarded as pure dicta and that the use of the same was due to a misunderstanding by the Supreme Court of the real purport of Herrington v. Hubbard, supra. The language in question is not dicta and the criticism of it by plaintiff is without the slightest merit. Sluka v. Bielicki clearly holds that the action for breach of a contract and the one for specific performance of the same contract that were involved in that case, were inconsistent remedies for the reason that the bill for specific performance was in affirmance of the contract and that "filing the suit in the municipal court was evidence of her determination to treat the contract as rescinded, and that is equivalent to an express disaffirmance of it." The same situation is presented in the instant appeal.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

Gridley and Kerner, JJ., concur.

When he filed a writ of habeas corpus for specific performance of the contract in question. In the instant case he was held to be bound by the contract. In my judgment Wright v. Wright.

Wright, determines this appeal, and answers it in the affirmative.

Plaintiff contends that the doctrine of election of remedies is inapplicable only where a party has elected between inconsistent remedies in the same injury or series of injuries, and he insists

that the two remedies successively pursued by him are inconsistent, as both are based upon attainment of the contract. He also con-

tends that the language above quoted from Wright v. Wright means

he requested no more than and that the use of the same was the

misunderstanding by the Supreme Court of the real purport of

Wright v. Wright. The language in question is not

dicta and the criticism of it by plaintiff is without the slightest

merit. Wright v. Wright clearly holds that the action for breach

of a contract and the one for specific performance of the same con-

stitute that were involved in that case, two inconsistent remedies

for the reason that the bill for specific performance was in return

made at the contract and that "filling the bill in the municipal court

can evidence of new determination to treat the contract as rescinded,

and that is equivalent to an express statement of it." The

same situation is presented in the instant appeal.

The judgment of the Superior Court of Cook County is

affirmed.

WRIGHT.

WRIGHT and WRIGHT, JJ., concur.

2/K A

In re Estate of MARY FOLKS, Deceased.

In the Matter of the Petition of  
CARRIE STONEBRIDGE,  
(Petitioner) Appelles,  
v.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

IRVING R. FOLKS, ETHEL ANDERSON and  
ROY E. McEWEN,  
(Respondents) Appellants.

259 I.A. 671<sup>3</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

From a judgment of the Circuit Court finding that the legal residence and domicile of Mary Folks, deceased, were, at the time of her death, in the County of Bronx and State of New York, and denying the application of Roy E. McEwen for letters testamentary, Irving R. Folks, Ethel Anderson and Roy E. McEwen, respondents, have appealed.

On May 17, 1929, Roy E. McEwen presented to the Probate court of Cook county a petition which set up that Mary Folks, of Chicago, died in New York City on February 3, 1928, leaving a last will and testament, which was presented for probate; that the testatrix nominated the petitioner as executor of the will;

"That said deceased left property and effects as follows: \$12,000.00  
Personal estate not to exceed in value Twelve Thousand .... Dollars.  
Real Estate not registered under Torrens Act, not to  
exceed in value \$ None  
..... .None. .... Dollars.  
Real Estate registered under Torrens Act, not to exceed  
in value \$ None  
..... .None. .... Dollars.  
That said Testatrix left visible estate more than sufficient to pay  
her debts.  
That the value of the whole estate of said deceased does not exceed  
Twelve Thousand (\$12,000.00) Dollars. That said deceased left  
her surviving:

NAME	Relationship	RESIDENCE
MRS. CARRIE STONEBRIDGE	Sister	2455 Washington Avenue, New York City



In the case of Mary Jones, deceased.

In the case of the estate of  
Mary Jones, deceased.

ALBERT JONES  
DIRECTOR  
NEW YORK

ALBERT JONES, DIRECTOR  
NEW YORK

THE FOLLOWING IS A SUMMARY OF THE CASES OF THE COURT.

There is a balance of the estate of Mary Jones, deceased, at the

legal estate and estate of Mary Jones, deceased, at the

time of her death, in the hands of her estate, at New York.

and during the period of her life, between the legal estate, and

Levy J. Jones, legal estate and Mary J. Jones, deceased, have

appeared.

On May 17, 1900, Mary J. Jones presented to the Probate

court of New York a petition which was by her Mary Jones, of

Chicago, died in New York City on November 2, 1900, leaving a legal

will and testament, which was presented for probate and the Probate

court has granted the petition as requested of the will.

That said deceased left property and estate as follows: \$10,000.00  
Personal estate not so covered in above listing: \$10,000.00  
Total estate not registered under probate act, but in

assets in case  
Total estate registered under probate act, but in assets  
in case

Total estate registered under probate act, but in assets  
in case

That said deceased left property and estate as follows: \$10,000.00  
Personal estate not so covered in above listing: \$10,000.00  
Total estate not registered under probate act, but in

assets in case  
Total estate registered under probate act, but in assets  
in case

That said deceased left property and estate as follows: \$10,000.00  
Personal estate not so covered in above listing: \$10,000.00  
Total estate not registered under probate act, but in

IRVING R. FOLKS	Nephew	1512 Townsend Avenue, New York City
MRS. ETHEL ANDERSON	Niece	194-59 114th Road, St. Albans, N.Y.

her only heirs at law;"

that the said heirs at law are the sole legatees and devisees under the will of the deceased. The petitioner prayed that the will be admitted to probate and that letters testamentary be issued to him. The will is dated May 23, 1914, and provides, after a direction that all just debts and funeral expenses be paid:

"SECOND. I give, devise and bequeath to my sister Carrie Stonebridge, wife of George Stonebridge, of New York City, as a token of my regard for her, the sum of Five Hundred Dollars (\$500.00).

"THIRD. I give, devise and bequeath all the rest, residue and remainder of my property and estate of every nature and kind, both real and personal, to my nephew and niece Irving R. Folks and Ethel M. Folks of New York City, equally, share and share alike."

Later there was filed a verified amended petition of Carrie Stonebridge, which contains (inter alia) the following:

"Your petitioner further states that at the time of the making of said Will, Mary Folks was a resident of Chicago, County of Cook and State of Illinois, and that thereafter on or about the 17th day of November, A. D. 1927, said Mary Folks with intent to change her domicile moved to New York City, New York, taking with her all her personal property, goods and effects.

" \* \* \* That on or about the 17th day of November, A. D. 1927, Mary Folks did change her domicile to New York City, and that she resided at 2453 Washington Avenue, County of Bronx, New York City, New York, up to the time of her death on the 8th day of February, A. D. 1928, and that said Mary Folks did not have a mansion house, or known place of residence in the County of Cook, and State of Illinois; and that at the time of her death she was not seized or possessed of any lands in Cook County, or in any other county in the State of Illinois.

" \* \* \* That said instrument, purporting to be the Last Will and Testament of Mary Folks, deceased, bequeaths all her estate to your petitioner, and to her nephew and niece, Irving R. Folks and Ethel M. Anderson, all of whom are residents of New York City, New York, and that there are no other beneficiaries under said Will.

" \* \* \* That at the time of her death, the personal property of Mary Folks, all of which is situated in the City of New York, in the County of Bronx, and State of New York, of which the deceased died possessed, does not exceed in value the sum of Ten Thousand Dollars (\$10,000)."

The petitioner prayed that the will be not admitted to probate by the Probate court of Cook county and that it be transferred to the Surrogate's court, County of Bronx, New York. This petition came on for hearing in the Probate court, and the court, after the respective







parties had presented evidence, found that the residence of the deceased, at the time of her death, was in the County of Bronx and State of New York, and denied the petition of McEwen to admit the will to probate in Cook county. An order to that effect was entered, from which Irving R. Folks, Ethel Anderson and Roy E. McEwen prayed an appeal to the Circuit court, where the cause came on to be heard, de novo, before the court, without a jury, and the court, after evidence heard, made a like finding to the one that had been made by the Judge of the Probate court.

At the commencement of the hearing in the Circuit court the parties stipulated "that Mary Folks resided at 114 North Karlov Avenue, Chicago, Illinois, until on or about October 23, 1927, when she left for New York City in the state of New York; that she stayed in New York City for a period of about two weeks and six days, until November 13, 1927, and then left for Chicago, Illinois, arriving here on November 14, 1927; that she stayed at Chicago for a period of two days, and then left Chicago on November 16, 1927, for New York City, New York, where she arrived on November 17, 1927, and that she remained in New York City since the last said date until the date of her death on February 8th, 1928; that when she resided at 114 North Karlov Avenue, Chicago, she maintained a five room flat and had resided at that number in that flat for a period of over fifteen years, and had resided continuously in the city of Chicago from 1906 or '07 until she left on October 23, 1927."

Mary Folks and her husband, Richard Folks, originally lived in the State of New York and they moved to Chicago about twenty years prior to her death. She left as heirs at law, her sister, Carrie Stonebridge, Irving R. Folks, a nephew, and Mrs. Ethel Anderson, a niece. These heirs at law were the sole beneficiaries under her will and they all resided in the State

position and financial statement. From that the evidence of the  
deceased, at the time of her death, was in the County of Marion and  
County of New York, and raised the position of Marion as against the  
will of Marion in New York. On March 14, 1917, the Court  
ordered, from which there is a writ, that Marion was not a  
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Marion was not a Marion in the County of Marion, and the Court,



of New York. She left no relatives of the blood in the State of Illinois. She was about sixty years old at the time of her death. Her husband died in 1926 and was buried in Pontiac, Illinois, where his sister lived. For about fifteen years the deceased occupied a flat, consisting of five rooms, at 114 North Karlov avenue, Chicago. After her husband's death she rented three of the five rooms to roomers. In April, 1927, she became ill, and about October 12, 1927, she asked the Bakens, who were roomers, if they would take the written lease of the premises off her hands, as she was too weak to take care of the flat and she wished to get rid of the lease "so that she could go to New York to live." The lease expired by its terms on May 1, 1928, and the deceased told the Bakens that if they would take it off her hands she would be willing to leave her furniture in the place until the time of the expiration of the lease. She told the landlord that she was not feeling <sup>very</sup> well and wished to go away for a while, and he then cancelled her lease and gave a new one to the Bakens. The deceased told the Bakens that if they re-leased the premises the following spring and did not want the furniture they should call in a second-hand man and see if they could get anything for it. The deceased then had her trunk and traveling bags packed and she left for New York City on October 23, 1927, taking with her everything that she possessed of value save the furniture. She arrived in New York on October 24, 1927, and there lived with her sister, Mrs. Stonebridge, until October 27, 1927, when she went to the home of her niece, Ethel Anderson (nee Folke), on Long Island, New York, with whom she lived until November 13, 1927. The deceased complained that Mrs. Anderson abused her, and on the last mentioned date she left New York and arrived in Chicago the following day. She went to her old flat and said to Mrs. Bakens: "I have come back to live with you. There isn't any of my folks in New York that will





do for me what you have done." She asked Mrs. Baken to let her have a room and the use of the kitchen of the Bakens, but Mrs. Baken stated that all the rooms were occupied, but that she would give one of the roomers notice to move and would let the deceased have the room as soon as it was vacated. Mrs. Baken then gave one of her roomers notice to move and the deceased obtained a room at a nearby hotel. When Mr. Baken returned from work that evening he told the deceased that she might have the flat back and that he and his wife would take the same room they occupied before. The deceased said that she was not strong enough to take the flat back and all that she wanted was a room, with the use of their kitchen, for which she would pay them seven dollars per week. Mr. Baken said that his wife was not strong enough to care for the deceased and that the latter should take the flat back and get a colored girl to do the work. The deceased replied that she could not afford to hire a girl. As soon as Mr. Baken told the deceased that his wife was not able to take care of her she decided to go back to New York, and she left Chicago for that city two days later. Mrs. Baken accompanied her to the train in a taxicab, and on the way to the depot the deceased said: "Well, I will be glad to get back to New York. Chicago doesn't look the same as it did. New York is cleaner and the buildings are taller. I believe the light in New York is better." When they arrived at the depot Mrs. Baken said to the deceased: "Now, I want to pay you for that furniture. It was appraised at \$48 and Mr. Baken told me to go over to the bank and get \$50 and pay you for the furniture;" to which the deceased replied: "If that is all that furniture is worth is \$48, I shouldn't take anything from you because you have been so good to me and have done so much for me," to which Mrs. Baken replied: "No, Mr. Baken insists upon a settlement for the furniture. Now, here is the \$50, I just drew it out of the bank."





Now, take it." The deceased took the \$30 and handed back \$20, saying: "Now, Mrs. Baken, you've been so good to me I want you to get something out of this to remember me by." Thereupon the deceased gave Mrs. Baken a written receipt for the \$30 for the furniture. When they got on the train Mrs. Baken said to the deceased: "If you're going back to New York, don't run in and surprise people that way now. When you came into our place there was absolutely no room whatever. Why not send them a telegram and let them know you are coming?" to which the deceased replied: "Yes, I will send a telegram to Carrie (her sister) and I will tell her, 'Carrie, I am coming to live with you just as long as you will have me.'" When the deceased arrived in New York she went directly to her sister's home, and on the day of her arrival, Mrs. Heideck, a tenant of the Stonebridges, seeing the deceased, expressed surprise that she was back in New York so soon again, at which statement the deceased smiled. Mrs. Heideck then said to her: "Are you going to stay here in New York this time or are you going back again?" to which the deceased replied: "I don't see why I should go back again, I haven't anything there." She continued to reside with her sister until she died, on February 8, 1928. The facts that we have stated appear from the testimony of disinterested witnesses who had previously testified in the hearing in the Probate court. The respondents introduced in rebuttal the testimony of Mrs. Elizabeth Daniel and William Scheffler. Scheffler gave testimony to the effect that after November 11 he had often talked with the deceased in New York concerning Chicago and New York, and that she stated to him that she was in New York only for the purpose of regaining her strength and that she hoped to return to Chicago in the spring, when the lease to the Bakens would expire; that she was dissatisfied with New York because it was so lonely and that she had no friends there and she wanted to get back to Chicago to live in her own sunny apartment,

Now, take it." The document took the \$20 and handed back \$20.  
 saying: "Now, Mrs. Wilson, you've been as good as me I want you  
 to get something out of this as possible as you." Thereupon the  
 deceased gave Mrs. Wilson a written receipt for the \$20 for the  
 purchase. Then they had an interview with the  
 deceased. "It was a good deal in New York, wasn't it?"  
 replied people that way now. "Now you come into our place there  
 was absolutely no room whatever. Why not come down a bedroom  
 and let your wife and son sleep?" He asked the document again:  
 "Yes, I will come to New York (New York) and I will tell  
 you, 'Gentle, I am coming to live with you just as long as you will  
 have me.'" When the deceased arrived in New York she went directly  
 to her sister's home, and on the day of her arrival, Mrs. Wilson,  
 a friend of the deceased, seeing the document, expressed surprise  
 that she was back in New York at that time, in which statement  
 the document said, Mrs. Wilson then said to her: "Are you going  
 to stay here in New York this time or are you going back again?" So  
 which the deceased replied: "I don't see why I should go back  
 again, I haven't anything to do." The document is written with her  
 sister until she died, on February 2, 1922. The facts that we have  
 stated agree from the testimony of disinterested witnesses who had  
 previously testified in the hearing in the Federal court. The  
 program was introduced in respect to testimony of Mrs. Wilson  
 and William Hamilton. Hamilton gave testimony to the effect  
 that after November 11 he had often talked with the deceased in New  
 York concerning her and New York, and that she stated to him that  
 she was in New York only for the purpose of organizing her husband  
 and that she was in New York in the spring, when the 1920  
 of the election was held. Hamilton also was dissatisfied with New York  
 because it was so lonely and that she had no friends there and she  
 wanted to get back to Chicago to live in her own sunny apartment.



where she could meet people whom she knew; that she was disappointed in the way the Bakens had treated her when she returned to Chicago and that they had ordered her out of the house. Mrs. Daniel gave testimony to the same general effect. Neither of these two witnesses had given testimony in the Probate court proceeding; although it appears that the respondents introduced in that hearing depositions of witnesses taken in New York. Scheffler is a nephew of Elizabeth Daniel, and the latter is the aunt, and Scheffler the cousin, of Irving Folke and Ethel Anderson, beneficiaries under the will, but neither Scheffler nor Mrs. Daniel is related to the petitioner, Carrie Stonebridge. Scheffler admitted that he was very friendly with Folke and his wife and Ethel Anderson and that he drove in <sup>an</sup> automobile from New York to Chicago with Irving Folke and his wife and Mrs. Daniel to testify in the instant proceedings, but he insisted that until he arrived in Chicago no one had ever talked with him in reference to the subject matter of his testimony; that although he knew of the trial in the Probate court and that the depositions of witnesses for the respondents were being taken in New York to be used in that proceeding, he never told anyone as to the talks that he had had with the deceased, although he then knew "what the controversy in the case was about." Mrs. Daniel admitted that she, Richard Folke, Ethel Anderson and Scheffler had discussed the case in New York after the case had been decided in the Probate court and that she had then visited the New York attorney of the respondents and had told him all that she knew in respect to the cause. We have very carefully examined the testimony of Scheffler and Mrs. Daniel and we are satisfied that there is merit in the contention of the petitioner that the trial judge was justified under all the facts and circumstances in this case in giving little, if any, weight to their testimony.

The respondents contend that it was admitted that the





deceased had resided in Chicago for many years and that the burden was upon the petitioner to prove that a change of residence had taken place. This rule of law may be conceded. (See The People v. Estate of Moir, 207 Ill. 180, 186.) They further contend that it is the rule of law in this state that to effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence, coupled with the intention of making the last acquired residence a permanent home. This rule of law also may be conceded. (See Holt v. Hendee, 243 Ill. 233.) The respondents have stated and argued several other well known principles of law applicable to a case of this kind. The parties had not the right to a jury trial in this cause and therefore propositions of law were not submitted. The respondents do not raise any question on the pleadings and do not contend that the court erred in ruling on evidence, and the only contention that we need consider is the following: "We respectfully submit that petitioner failed to establish, first, that the deceased abandoned the State of Illinois with no intention of returning; second, that she acquired a permanent domicile within the State of New York with the intention of making that her permanent home." After a careful examination of all the facts and circumstances in this case, we are satisfied that the trial court was justified in refusing to sustain these contentions and we are in full accord with the findings made. The husband of the deceased had been dead many years. She was not well. New York was her old home, and there her sister and the other beneficiaries lived. It is a reasonable inference from the evidence that when she first went to New York she had not finally determined to live there. Unfortunately for her, she left her sister's home and went to live with her niece, Mrs. Andersen, on Long Island. There she was mistreated, as she thought, and she apparently decided to return to Chicago and live with the

document was received in Chicago on March 1901 and the same  
was upon the premises in Chicago that a change of residence had  
taken place. This fact of law was not contested. The defendant  
HARRINGTON, NEW YORK, 1897. They further stated that it  
is the rule of law in this case to refuse a change of residence  
there must be an actual change of the first residence, namely  
with an intention not to return to it, and there must be a new residence  
occupied by actual residence, together with the intention of making the  
last residence a permanent home. This rule of law also  
may be applied. (See State v. Hargis, 100 Ill. 400.) The respondents  
have stated and argued several times with respect to the  
applicability of this rule. The parties had not the right to  
in any case in this case and therefore respondents of law were not  
submitted. The respondents do not raise any question on the ques-  
tions and do not contend that the court should be ruling on evidence.  
and the only contention that is made is that in the following: The  
respondents submit that the following facts in Hargis, State  
the court should follow the rule of Illinois with no intention of  
returning to it. That the court is a permanent residence within the  
State of New York with the intention of making that her permanent  
home. This is a material contention in all the facts and circum-  
stances in this case, it was admitted that the trial court was  
limited in its power to exclude these questions and we are in full  
agreement with the findings made. The burden of the evidence had been  
made very plain. The law was well. The trial was not the same, and  
there was error and the other facts are listed. It is a response  
able inference from the evidence that when and first went to New York  
she had not the intention of living there. Respondents, the law,  
she left her father's home and went to live with her mother, Mrs.  
HARRINGTON, in New York. That she was admitted to the church,  
and she apparently resided in New York in Chicago and live with the



Bakens, who had been kind and helpful to her and had "done so much" for her. But when she found that she could not live with the Bakens, as Mrs. Baken was not strong enough to take care of her, she decided to return immediately to New York to live, and left Chicago two days after her arrival there. As she said to Mrs. Heideck, upon her arrival in New York the second time, "I don't see why I should go back again (to Chicago), I haven't anything there." When she left Chicago the second time she had given up her old home and had parted with the lease to the same. She had sold her furniture, and the evidence tends to prove that she left in Chicago nothing of value that belonged to her. It was but natural, in her sick condition and under all the circumstances, that she should desire to go to New York to live with her sister.

In their reply brief the respondents attempt to inject a new question into the case, viz., that even if Mrs. Folke were domiciled in the State of New York at the time of her death and had then no real estate within this state, yet if she had personal property within the State of Illinois the Probate court of Cook county would have jurisdiction, and that it was incumbent upon the petitioner to prove that she had no personal property within this state, and that she failed in this regard and that therefore the will should have been admitted to probate. In the respondents' original brief no such contention was raised, and the sole contention of the respondents was that the petitioner had failed to prove, first, that the deceased abandoned the State of Illinois with no intention of returning; and, second, that she acquired a permanent domicile within the State of New York with the intention of making that her permanent home. The instant contention of the respondents is plainly an afterthought, and they, under the record in the case, would not have been justified in making it, even in their original brief, for it appears from the bill of exceptions that the trial court was informed



at the very outset of the proceeding that "there is only one issue in this case, and that is the question of domicile of the testatrix at the time of her death," and that issue was the sole subject of controversy in the proof. However, on the cross-examination of Mrs. Baken by the respondents it incidentally developed that when the deceased left Chicago she took with her everything that she had of any value save the furniture, and it appears from the proof that she afterwards sold the furniture. The respondents did not rebut, in any way, this testimony.

Two trial courts have found in favor of the petitioner and against the respondents. The judgment of the Circuit court is a just one and it should be and it is affirmed.

**AFFIRMED.**

**Gridley and Kerner, JJ., concur.**



of the very subject of the investigation, there is only one issue  
 in this case, and that is the question of liability of the defendant  
 of the fact of his death, and that issue is the only one of  
 importance in the case. However, as the court has decided in  
 Mrs. Baker by the majority of the court, it is respectfully suggested that when  
 the deceased last appeared and took with her everything that she had  
 of any value, and the defendant, and it appears from the facts that  
 she afterwards left the defendant. The responsibility is not upon  
 in any way, this testimony.

The trial court has found in favor of the defendant  
 and against the plaintiff. The judgment of the Circuit court  
 is a just one and it should be and it is affirmed.

WITNESSES.

Sitting and Retiring, 11.1. 1900.

34301

MARGARET E. CURTIN, Administratrix  
of the Estate of George W. Curtin,  
Deceased,

Appellee,

v.

EDWARD F. BRENNAN,

Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 671<sup>4</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Margaret E. Curtin, Administratrix of the Estate of George W. Curtin, Deceased, sued Edward F. Brennan in the Municipal Court of Chicago in a first class action. There was a trial before the court, without a jury, and a finding in favor of plaintiff in the sum of \$2,155. Judgment was entered on the finding and defendant has appealed.

In plaintiff's statement of claim she alleges that on April 21, 1921, defendant delivered to plaintiff's intestate his three checks, payable to the order of cash, bearing date April 18, 1921, for the sums of \$300, \$200 and \$100, and that on the same day defendant delivered to plaintiff's intestate his five other checks, each dated April 20, 1921, in the sums of \$200, \$100 and \$200, the first payable to the order of cash, the second payable to the order of currency, and the third payable to the order of G. W. Curtin; that on April 21, 1921, defendant delivered to plaintiff's intestate his three other checks, two of which were in the sum of \$100 and payable to the order of cash, and one of which was in the sum of \$300, payable to the order of currency; that all of the checks were drawn on the Washington Park National Bank of Chicago and were delivered to plaintiff's intestate for a valuable consideration to the defendant paid; that the checks were presented to the said bank

2141

MADE AT THE COURT OF CHANCERY  
IN THE CITY OF NEW YORK

1911

7

IN SENATE  
JANUARY 11, 1911

25814.071

THE COURT OF CHANCERY, IN SENATE

On the 11th day of January, 1911, the Court of Chancery, in Senate, heard the case of George W. Davis, Plaintiff, against Edward F. Newman, Defendant. There was a trial before the Court, and a finding in favor of Plaintiff in the sum of \$2,138. Judgment was entered on the finding and defendant has appealed.

In Plaintiff's statement of claim the alleged facts are that on April 11, 1911, defendant delivered to Plaintiff's interest his three checks, payable to the order of cash, bearing date April 10, 1911, for the sum of \$100, \$100 and \$100, and that on the same day defendant delivered to Plaintiff's interest his five other checks, each dated April 11, 1911, in the sum of \$200, \$100 and \$200, the first payable to the order of cash, the second payable to the order of currency, and the third payable to the order of G. W. Davis; that on April 11, 1911, defendant delivered to Plaintiff's interest his three other checks, two of which were in the sum of \$100 and payable to the order of cash, and one of which was in the sum of \$200, payable to the order of currency; that all of the checks were drawn on the Washington Trust National Bank of Chicago and were delivered to Plaintiff's interest for a valuable consideration; the defendant says that the checks were procured by the said bank



and payment  
for payment ~~was~~ refused for the reason that there were not sufficient funds in the bank to meet any of them; that there is due to plaintiff the sum of \$2,200, with interest at five per cent from the date of the issuance of the checks. Defendant filed his amended affidavit of merits, in which he alleged that all of his checks were given without consideration, and that they were executed by him and given to George W. Curtin, deceased, as a result of losses he sustained in a gambling transaction with Curtin; that defendant holds checks of Curtin, dated April 19, 1921, in the sum of \$400, which he is entitled to recoup against any claim of plaintiff. Defendant also filed a statement of set-off based upon the last mentioned checks.

Plaintiff introduced the checks in evidence and rested. Defendant then called as a witness one Edward W. Kelly, who testified that he was present when all of the checks were executed and delivered. This witness gave testimony tending to prove that all of plaintiff's checks were given by defendant to Curtin as a result of losses defendant sustained in dice games participated in by Curtin and defendant. Kelly also testified that the checks mentioned in defendant's set-off were given by Curtin to defendant in payment of losses sustained by Curtin in the said games.

Defendant contends that the court erred (a) in unduly limiting the direct examination of the witness Kelly, (b) in sustaining objections to proper questions propounded to said witness by defendant's counsel, and (c) in striking from the record proper, pertinent and material answers of the witness. After a careful consideration of the record we are satisfied that these contentions are meritorious. It would serve no useful purpose to state the many instances in the record that have forced us to this conclusion. As this case may be tried again we deem it advisable to state that





it is a well established rule of law that the intention and understanding of the parties to a gambling transaction may be proven by circumstances as well as by positive proof. In fact, a reference to the reported cases will show that it is generally necessary to resort to circumstantial evidence to prove gambling transactions and a court or jury may bring to bear their common observation and general knowledge and in the light of these, and as men conversant with affairs, pass upon the evidence and draw reasonable inferences therefrom.

Defendant also contends that it clearly appears from the testimony of Kelly that Curtin and defendant met on certain days in April, 1921, at a soft drink parlor, or saloon, at 6312 Cottage Grove avenue, Chicago, and there gambled with dice, and that the checks of defendant were executed and delivered to Curtin for no other consideration than to pay losses sustained by him in the dice game, and that as plaintiff did not offer any evidence to rebut this testimony the trial court erred in failing to find for defendant, and that judgment should be entered here reversing, without remanding, the judgment of the trial court. While the competent testimony given by Kelly made out a prima facie case that the checks of defendant were given as a result of gambling transactions with Curtin, and while it appears that plaintiff offered no evidence in rebuttal of this testimony of Kelly, nevertheless, we have reached the conclusion that justice will be best served by reversing the judgment and remanding the cause. Such a procedure will enable defendant to fully and fairly present his defense and at the same time will afford plaintiff, administratrix of the estate of Curtin, an opportunity to rebut, if she can, the testimony of Kelly. While it is true that plaintiff might have offered such rebuttal evidence in the instant case, nevertheless, the rulings of the trial court in



It is a well established rule of law that the intention and motive of the parties to a transaction may be proved by circumstantial evidence as well as by positive proof. In fact, a reference to the general course of the parties' conduct is usually sufficient to establish the intention of the parties in a particular case. In the case of a transaction, the intention of the parties is usually inferred from the facts and circumstances surrounding the transaction. In the case of a transaction, the intention of the parties is usually inferred from the facts and circumstances surrounding the transaction.

in the instant case, nevertheless, the findings of the trial court in the instant case, notwithstanding the fact that plaintiff offered such substantial evidence as opportunity to rebut, it was the duty of the court to believe the testimony of Kelly. While time will afford plaintiff, notwithstanding the fact that the testimony of Kelly and Kelly's present his defense and as the same judgment and rendering the same. Such a procedure will enable the conclusion that justice will be best served by reversing the testimony of this testimony of Kelly. Nevertheless, we have reached a point, and while it appears that plaintiff offered no evidence in defendant were given as a result of examining transcripts with given by Kelly made out a prima facie case that the errors of the findings of the trial court. While the majority testimony, and justice should be served by reversing, without remanding, testimony the trial court erred in failing to take the testimony, and that as plaintiff did not offer any evidence to rebut this other consideration than to pay losses sustained by him in the case checks of defendant were introduced and delivered to Kelly for no more evidence, charges, and those furnished with also, and that the April, 1933, as a mere ruling matter, on motion, as this Court testimony of Kelly that Kelly and defendant was on certain days in

respect to the examination of Kelly was such that her counsel undoubtedly deemed it entirely unnecessary to do so.

Plaintiff insists that the trial court must have concluded that the testimony of Kelly was entitled to no weight, and therefore disregarded it in toto. It is true that a court or jury is not bound to believe a witness when, from all the other evidence or from inherent improbability or contradictions in the testimony, the court or jury is satisfied of its falsity. But a court or jury cannot wilfully or from mere caprice disregard the testimony of an unimpeached witness, and where the testimony of a witness is uncontradicted, either by positive testimony or by circumstances, either intrinsic or extrinsic, and the witness is not impeached, the testimony cannot be disregarded by a court or jury. (See Larson v. Slog, 235 Ill. 584, 587.) Kelly was not impeached nor contradicted by any testimony and we find nothing inherently improbable in his testimony. In fact, there are certain undisputed circumstances that tend to support his testimony. However, as this case may be tried again, we do not wish to be understood as expressing an opinion as to the credibility of Kelly or the weight that should be attached to his testimony.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley and Kerner, JJ., concur.





34423

EDWIN J. GILL,  
Appellant,

v.

LISETTE KELLERHALS and  
J. F. HECHT,  
Appellees.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 672<sup>1</sup>

MR. PRESIDING JUSTICE SCAGLAN DELIVERED THE OPINION OF THE COURT.

In the Municipal Court of Chicago, in a first class action, Edwin J. Gill, plaintiff, sued Lisette Kellerhals and J. F. Hecht, defendants, to recover \$2,500 placed in escrow with J. F. Hecht, escrowee, as earnest money on a written contract for the purchase of real estate in Chicago. There was a trial before the court, without a jury, and at the close of plaintiff's case there was a finding against him. Judgment was entered on the finding and plaintiff has appealed.

Plaintiff's statement of claim alleged that his claim was for \$2,500 which he had deposited with J. F. Hecht, one of the defendants, to be held in escrow by him under the terms of a written contract for the purchase of certain real estate, a copy of which was attached; that subsequent to the execution of the contract Kellerhals, one of the defendants and a party to the contract, made certain alterations in the same without the authority, consent or approval of plaintiff; that there was a covenant in the contract by which defendant Kellerhals covenanted and agreed to convey the real estate to plaintiff not later than June 15, 1929; that said defendant has never performed the covenant, "thru no fault of the plaintiff herein;" that plaintiff has often demanded of defendant Kellerhals that she direct defendant Hecht to pay the \$2,500 to plaintiff but that she



has failed and refused and still fails and refuses to so direct said Hecht. Defendants, in their affidavit of merits, deny that any changes or alterations were made in the contract by defendant Kellerhals or anyone by her authorized, without the authority, consent or approval of plaintiff; deny that defendant Kellerhals was unwilling to perform the covenants of the contract and aver that said defendant repeatedly offered to convey the premises but that the time of closing the transaction was postponed from day to day and week to week by Henry W. Hoffman, the agent of plaintiff and the true party in interest as purchaser of the premises; that plaintiff is a mere dummy of said Hoffman; further aver that said Hoffman was making attempts to subdivide and sell said premises and to secure sufficient moneys out of the down payments of lot purchasers where-with to meet the first payment of \$7,500 due under the contract, "and that when said enterprise failed, said Hoffman and said Gill abandoned said contract."

Plaintiff contends that he made out a prima facie case and that therefore the court erred in finding the issues against him, at the close of his case. The law governing a case of this kind is plain, and the sole question to be determined is, Does the evidence support the instant contention of plaintiff? After a careful reading of the entire record we have reached the conclusion that it does not. While the statement of claim alleges that certain alterations were made in the contract by defendant Kellerhals without the consent of plaintiff, there is no allegation as to what these alterations were nor how, if at all, they affected the rights of the parties, and it is plain that the only case stated in the statement of claim is that defendant Kellerhals failed to convey, through no fault of plaintiff. On the trial plaintiff admitted that all the alterations made in the contract were made in his presence, and at his request, and that he signed the contract after the changes were made. The contract had been





previously signed by defendant Kellerhals. Plaintiff testified that he had never been apprized that defendant Kellerhals accepted the changes. While the proof did not show that defendant Kellerhals formally notified plaintiff that she approved of the changes made in the contract, nevertheless it does show clearly that the parties in their dealings thereafter treated the contract as altered as having been approved by defendant Kellerhals. Moreover, the contract provides that it should be held in escrow by Hecht, and on the face of the document defendant Kellerhals approved the changes and modifications that had been made in the same. We have referred to the said alterations for the reason that defendants, in their brief, have deemed it necessary, apparently, to devote a considerable space to this subject. However, plaintiff, in his brief, makes no point as to the said alterations and his sole claim is "that the plaintiff was ready, willing and able to consummate the deal prior to the time specified in said contract," and that it was through the fault of defendant Kellerhals that the deal was not consummated. Plaintiff's evidence fails to show that he was ready, willing and able to perform on his part if the defendant was ready to perform on her part. In fact, in his own testimony plaintiff does not state that he was ready, able and willing at any time to perform. He never saw defendant Kellerhals nor Hecht after the signing of the contract and he never, in person nor through an agent, tendered any money to her nor to Hecht, nor demanded a deed from her nor from Hecht. The contract provided that the delivery of deed and payment of purchase price shall be made at the office of the escrow holder (Hecht) or at the office of the Registrar of Titles, if property to be conveyed is registered under the Torrens System. For aught that appears in the record defendant Kellerhals delivered a deed to Hecht or at the office of the Registrar of Titles. Koenig, who was employed by Hoffman,





plaintiff's broker, testified that some time after the signing of the contract Hecht called him on the telephone and asked him "how they were coming along with the deal," to which he replied: "I told him that the plat, survey plat, would be ready, as the surveyor said it would be, in a couple of days, and that I would let him know. So he said, 'Well, when you get that survey plat,' he says, 'I would like to have one,' and I said, 'I will absolutely bring one over to you as soon as it is ready.' \* \* \* About two days after that I got the survey plat and took it over to Mr. Hecht \* \* \* in his office," where the following conversation was had: "Well, I told Mr. Hecht that we had a little difficulty with the survey, and the Chicago Title & Trust Company wouldn't recognize a lot - I forget the number of the lot - but there was fifteen feet to that particular lot, and they wouldn't recognize that as a lot, by the Chicago Title & Trust Company. Q. What did he say? A. Well, he wanted to know what we were going to do about it. Q. What did you say? A. I told him the surveyor said it was necessary to make those changes and see how it would work out, by re-surveying the property, and he said that that would be O. K., but we should let them know as soon as we got it ready. And he asked me to call him up when it was ready, and I did;" that about two days thereafter he called up Hecht and told him "that Mr. Gill was out of town, would be gone a couple of days, and that he had made arrangements with his bank to close the deal. \* \* \* He asked me whether or not we weren't ready to close the deal. \* \* \* I said, 'Yes, with the exception we have got to get together on that fifteen foot lot,' and I told him that Mr. Gill was ready to close the deal, and he would let me know, he would get in touch with the Kellerhals." The contract did not provide that the Chicago Title & Trust Company should guarantee the title of defendant Kellerhals. It did provide that plaintiff should pay defendant Kellerhals "Seventy-five



Hundred (\$7500.00) Dollars within five days after the title is shown to be good and merchantable," and that when a deed was delivered permission should be given to plaintiff to subdivide and put in sidewalks and underground improvements. It further provided that objections to the title should be made in writing, but plaintiff does not claim that he made any objections as to defendant Kellerhals's title. As to the provision that plaintiff should pay \$7,500 within five days after the title "was shown to be good and merchantable," there is nothing in the record to show that plaintiff was able to perform this condition.

As plaintiff's case did not show that he was entitled to the return of the earnest money the trial court was justified in leaving the parties where it found them. The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

Gridley and Kerner, JJ., concur.



... (1700, 1710) ... the title is  
shown to be good and marketable," and that when a deed was  
delivered to the grantee should be given to the grantee to evidence  
and put in evidence and underwritten improvement. It further  
provided that objections to the title should be made in writing,  
but plaintiff's case did not claim that he made any objections as to  
defendant's title. As to the provision that plaintiff  
should pay \$7.50 within five days after the title was shown to  
be good and marketable," there is nothing in the record to show  
that plaintiff was able to perform this condition.  
As plaintiff's case did not show that he was entitled  
to the return of the earnest money the trial court was justified  
in leaving the parties where it found them. The judgment of the  
Municipal Court of Chicago is affirmed.

GRISWOLD and KERNER, JJ. concur.

34484

HARRY SILBERG,  
Plaintiff in Error,

v.

MARGARET SILBERG,  
Defendant in Error.

WRIT OF HABEAS CORPUS

OF COOK COUNTY.

259 I.A. 672<sup>2</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Harry Silberg filed his bill for divorce against Margaret Silberg in August, 1928. Service was had on the defendant and she filed her answer. Thereafter various orders for temporary alimony, solicitor's fees, etc., were entered on motion of defendant. The cause was reached upon the regular trial calendar on January 28, 1930, and was called for trial by the chancellor on January 29, 1930. At that time complainant and his solicitor appeared, but neither the defendant nor her solicitor appeared. The chancellor, Judge Lewis, on that date, heard the evidence offered by complainant in support of his bill, and on January 31, 1930, entered a decree of divorce. On March 11, 1930, the defendant filed a verified petition in which she prayed that the order of January 31 be vacated and set aside. This petition was presented to Judge Williams, who was then hearing the divorce calendar, and on March 31, 1930, this chancellor entered an order vacating the decree entered by Judge Lewis. Thereafter complainant filed a motion that the order of Judge Williams be set aside, on the ground that Judge Williams had no jurisdiction to enter the same. This motion was denied. The complainant has sued out this writ of error.

The petition of the defendant to vacate the decree of divorce recites that "by virtue of the filing of her appearance and answer therein, she was entitled to have notice of any and all





proceedings to be had or taken in said cause, and presentation of any motions, orders or decrees entered or to be entered in said cause or proceedings; \* \* \* that she is now advised and informed that on the 31st day of January, A. D. 1930, a decree of divorce was presented to the court in said proceedings, without notice to your petitioner nor to her attorneys, and that the Court thereupon caused said decree of divorce as presented by the solicitors for complainant without notice to your petitioner or her solicitors to be entered of record in said cause. Your petitioner further shows that by the rules of court, and the General Practice Act, your petitioner and her solicitors were entitled to have notice of the presentation of said final decree in said cause and proceedings, and that the entry thereof without notice to the solicitors for your petitioner, was contrary to the rules of court and the Practice Act of the State of Illinois, governing such proceedings."

Complainant contends that in the March term, 1930, Judge Williams was without jurisdiction to set aside the decree of divorce entered in the January term. While it is clear that this contention is a meritorious one, we will briefly consider certain reasons argued by the defendant in support of the action of Judge Williams.

The defendant contends that the order from which the writ of error was sued out is an interlocutory one and therefore not a final or appealable order, and she has filed a motion in this court praying that the writ of error be dismissed. There is no merit in this contention of the defendant. After the expiration of the term at which a judgment is entered the chancellor has no authority to set aside the judgment for any alleged error of law. The petition of defendant in the trial court was undoubtedly intended to allege errors of fact, and the action of the chancellor in vacating the decree of divorce was based upon the assumption that the petition set up such errors. The law allows an appeal from the order of Judge Williams. (See Cramer v.

proceedings to be had as taken in said decree, and proceedings of  
any nature, order or decree entered or to be entered in said  
court or proceedings, and that the same are in now advised and informed  
that on the 21st day of January, A. D. 1930, a decree of divorce  
was presented to the court in said proceedings, which decree is  
your petition will be not otherwise, and that the court thereupon  
entered said decree of divorce as presented by the petitioners for  
complaint without notice to your petitioner or her petitioners to be  
entered or record in said decree. Your petitioner further shows that  
by the rules of court, and the General Practice Act, your petitioner  
and her petitioners were entitled to have notice of the proceedings  
of said final decree in said court and proceedings, and that the entry  
thereof without notice to the petitioners for your petitioners, was  
contrary to the rules of court and the Practice Act of the State of  
Illinois, governing such proceedings.

Complaint contends that in the March term, 1930, Judge  
William was without jurisdiction to set aside the decree of divorce  
entered in the January term. While it is clear that said complaint  
is a petition and, as will clearly appear certain reasons assigned  
by the defendant in support of the action of Judge William.

The defendant contends that the error from which the wife  
of error was even one in an infrequently one and therefore not a final  
or appealable order, and she was filed a motion in said court setting  
that the wife of error be dismissed. There is no merit in this con-  
tention of the defendant. For the explanation of the form of which  
a judgment is entered the chancellor has no authority to set aside the  
judgment for any alleged error of law. The position of defendant in  
the trial court was undoubtedly intended to allow entry of law,  
and the action of the chancellor in vacating the decree of divorce was  
based upon the assumption that the petition was up such errors. The  
law allows an appeal from the order of Judge William. (See Chapter 7.



Commercial Men's Ass'n, 260 Ill. 516, 520.) A number of cases that have followed the ruling in the Cramer case might be cited, if it were necessary. The motion of the defendant to dismiss the writ of error is denied.

Defendant contends that "the decree of divorce was improperly entered ex parte upon inadmissible evidence improperly received to contradict the undenied allegations of defendant's answer, to which no replication has ever been filed." Defendant, in support of the instant contention, claims that the decree of divorce was "based upon evidence erroneously admitted" by the chancellor. It is hardly necessary to state that such a contention cannot be raised by a motion under section 89 of the Practice Act.

Defendant next contends that "no notice of the entry of the decree of divorce was ever given appellee, or her attorney, when appellee's appearance was on file and her answer (undenied) was in the files when the cause was heard, as required by the rules of court and the Practice Act of Illinois." Rule 10 provides: "Parties shall take notice of all calls of the calendar." Rule 20 provides: "No motion will be heard or order made in any cause without notice to the opposite party when an appearance of such party has been entered except when a party is in default or when a cause is reached on the call of the trial calendar." It is a sufficient answer to the present contention to say that the record shows that the cause was reached on the regular trial calendar on January 28, 1930, and the chancellor heard evidence on January 29, and the entry of the decree, on January 31, 1930, was not in violation of rule 20.

The judgment order of March 31, 1930, vacating the judgment order of January 31, 1930, was a void order and it is, therefore, reversed.

JUDGMENT ORDER OF MARCH 31, 1930, REVERSED.

Gridley and Kerner, JJ., concur.



2025 RELEASE UNDER E.O. 14176

THE UNIVERSITY OF CHICAGO

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THE TWO-PARTY SYSTEM OF AMERICAN GOVERNMENT

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34502

SOPHIE KNOPP,  
Defendant in Error,

v.

ROSE KNOPP,  
Plaintiff in Error.

ERROR TO CIRCUIT  
COURT, COOK COUNTY.

259 I.A. 672<sup>3</sup>

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Sophie Knopp, plaintiff, brought an action on the case against Rose Knopp, defendant, to recover damages for the alleged wrongful act of defendant in alienating the affections of plaintiff's husband. There was a trial before the court, with a jury, and a verdict returned finding defendant guilty and assessing plaintiff's damages in the sum of \$3,500. Judgment was entered on the verdict and defendant has sued out this writ of error.

Defendant is the mother of "Al" Knopp, the husband of plaintiff. Knopp was nineteen years of age at the time of the marriage, which took place in Valparaiso, Indiana, July 25, 1927, at 3 a. m. After the marriage plaintiff and Knopp returned to the homes of their respective parents in Chicago. They never lived together.

Defendant has alleged and argued a number of contentions in support of her claim that the judgment should be reversed. In the view that we have taken of this appeal it will be necessary for us to consider one only. Defendant contends that the verdict was not warranted by the evidence. Two juries have found for the plaintiff and we have given due weight to this fact, but after a painstaking examination of the entire evidence we are satisfied that the present contention is a meritorious one. As the case may be tried again, we refrain from analyzing and commenting upon all the facts and cir-

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Plaintiff, brought an action on the case against Ross Knapp, defendant, to recover damages for the alleged wrongful act of defendant in alienating the affections of Plaintiff's husband. There was a trial before the court, with a jury, and a verdict returned finding defendant guilty and awarding Plaintiff a damages in the sum of \$5,000. Judgment was entered on the verdict and defendant has since paid said sum to plaintiff.

Defendant is the mother of "Al" Knapp, one husband of Plaintiff. Knapp was nineteen years of age at the time of the marriage, which took place in California, July 25, 1917. At 2 A. M. after the marriage Plaintiff and Knapp returned to the home of their respective parents in Chicago. They never lived together.

Defendant has alleged and argued a number of defenses in support of her claim that the judgment should be reversed. In the view taken we have taken of this appeal it will be necessary for us to consider one only. Defendant contends that the evidence was not warranted by the evidence. Two facts may be taken from the evidence and we have given due weight to this fact, and after a consideration of the entire evidence we are satisfied that the present conclusion is a proper one. In the view taken of the evidence we believe that the judgment should be reversed.



cumstances in evidence that have led us to this conclusion. We feel impelled, however, to state that plaintiff admitted that shortly after the marriage she wanted proceedings started to annul the marriage. She also stated that "they (referring to certain members of defendant's family) promised me they would annul it. \* \* \* I called to have them go on with the case. They promised me they would have the marriage annulled and I waited. Q. And you were waiting to have the marriage annulled, weren't you? A. Yes. Q. That was in September, 1927, wasn't it? A. Yes."

The judgment of the Circuit Court of Cook County is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley and Kerner, JJ., concur.

consequences in evidence that have led us to this conclusion. We  
 feel impelled, however, to state that directly related to  
 this is the fact that the same person who is alleged to have  
 been the author of the letter (see also letter of 1/10/50) is  
 members of the same family (see also letter of 1/10/50) is  
 I called to have them go on with the case. They promised me they  
 would have the marriage annulled and I advised. I. and you were  
 waiting to have the marriage annulled, weren't you? I. and you were  
 That was in January, 1950, wasn't it? I. and you were  
 The subject of the letter of 1/10/50 is

referred to the same is referred.

THE END OF THE MATTER.

Stefan and Kerner, 11, corner.

34247

RICHARD J. WARD,  
Appellee.

v.

ELGIN, JOLIET & EASTERN RAILWAY  
COMPANY, a corporation,  
Appellant.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

259 I.A. 672

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff while working as a switchman for defendant in its yard at Gary, Indiana, there was a trial before a jury in January, 1930, resulting in a verdict and judgment against defendant for \$9,000. This appeal followed.

Plaintiff's declaration consisted of one count in which defendant's claimed liability is predicated upon provisions of the Federal Safety Appliance Act as to the coupling or uncoupling of cars. Defendant pleaded the general issue.

As to the details of the accident the evidence disclosed in substance that about 1:30 o'clock a. m., on March 6, 1929, an engine attached to several freight cars was pushing them in a westerly direction in defendant's yard, preparatory to having the car which was farthest from the engine switched off from the train; that plaintiff was standing on a ladder on the side of the next car with his feet upon the lowest step or stirrup; that his left hand was above his head holding onto the ladder; that reaching around the end of the car with his right hand to pull a coupling pin lever, the device, being loose or in some manner defective, gave way as he pulled, and he lost his balance, and, seeing that he was about to fall between the cars, he, by using his feet, "threw" himself away from the train and fell to the ground alongside the train and suffered the



RECEIVED  
JAN 14 1935

WILLIAM J. WALKER  
ATTORNEY AT LAW  
JAN 14 1935

IN REPLY TO YOUR LETTER OF JANUARY 10, 1935.

It is an action for damages for personal injuries received by plaintiff while working as a workman for defendant in its yard at Gary, Indiana, there was a trial before a jury in January, 1935, resulting in a verdict and judgment against defendant for \$2,000. This appeal follows.

Plaintiff's declaration contained of one count in which defendant's claimed liability is predicated upon provisions of the Federal Safety Appliance Act as to the coupling or uncoupling of cars. Defendant pleaded the general issue.

As to the details of the accident the evidence disclosed in substance that about 1:30 o'clock a. m., on March 6, 1935, an engine attached to several freight cars was backing them in a westerly direction in defendant's yard. Approximately 50 yards from the car which was backed from the engine switched off from the track that plaintiff was standing on a ladder on the side of the next car with his feet upon the lowest step or stringer. That his left hand was above his head holding onto the ladder that reaching around the end of the car with his right hand to pull a coupling pin lever, the device, being loose or in some manner defective, gave way so he fell. And he lost his balance, and, seeing that he was about to fall between the cars, he, by using his feet, "kicked" himself away from the train and fell to the ground alongside the train and suffered the

injuries complained of.

It is further disclosed by the evidence in substance that in March, 1927, Ward (plaintiff) applied to defendant for a position as switchman; that at the time no physical examination of such applicants was required by defendant; that, however, upon request, Ward filled out in his own handwriting and signed and delivered the customary written application for such position, dated Gary, Indiana, March 13, 1927; that in question 7 therein he was asked to give a record of his services for the past five years and to state what railroad experience, if any, he had had, with what railroads, in what capacity employed and the length of service with each railroad; that in his answer to the question the only railroad company mentioned was the "Mocking Valley R. R.," at Walbridge, Ohio, with which, as he stated, he worked as a switchman from "4-13-24 to 11-1-24"; that no mention was made that he ever had worked for the Baltimore & Ohio R. Co.; that in question 8 he was asked to state if he had ever been injured and, if so, when, where and how, and the extent of the injuries; that his answer thereto, written by himself, was "No"; that defendant in employing Ward and continuing him in its employ relied upon the truth of his answers as contained in the application; that as a matter of fact the answer to question 8 was untrue and known to be untrue by Ward when made; that on February 20, 1924, he was working as a brakeman for the Baltimore & Ohio R. Co., on which day he received serious injuries at Cincinnati, Ohio, to his head, shoulder and back, which "incapacitated" him for about eight months to a year; and that he brought suit for these injuries in Ohio in May, 1924, and thereafter the suit was "settled". Ward testified on cross-examination that "when I stated in the application I had never been injured before I knew I had been injured with the B & O". It further appears from the evidence that Ward, after commencing to work for defendant shortly after signing said application, continued to work

RICHARD J. WILSON

Attorney

CHAS. J. WILSON & SOUTHERN RAILWAY  
COMPANY, a corporation  
of Indiana

CHAS. J. WILSON  
COUNTY, COOK COUNTY

3521A.672

MR. JUSTICE IN CHIEF: THE ATTORNEY AT THE COURT.

In an action for damages for personal injuries received by plaintiff while working as a switchman for defendant in its yard at Gary, Indiana, there was a trial before a jury in January, 1930, resulting in a verdict and judgment against defendant for \$2,000. This appeal followed.

Defendant's decision consisted of one count in which defendant's claimed liability is predicated upon provisions of the Federal Safety Appliance Act as to the coupling or uncoupling of cars. Defendant pleaded the general issue.

As to the details of the accident the evidence disclosed in substance that about 1:30 o'clock a. m., on March 6, 1929, an engine attached to several freight cars was working upon a western division in defendant's yard, preparatory to moving the car which was detached from the engine switched off from the track; that plaintiff was standing on a ladder on the side of the west car with his feet upon the lowest step or sillings; that his left hand was above his head holding onto the ladder; that reaching around the end of the car with his right hand to pull a coupling pin lever, the device, being loose or in some manner defective, gave way so he pulled, and he lost his balance, and, seeing that he was about to fall between the cars, he, by using his feet, threw himself away from the train and fell to the ground alongside the train and suffered the



injuries complained of.

It is further disclosed by the evidence in substance that in March, 1927, Ward (plaintiff) applied to defendant for a position as switchman; that at the time no physical examination of such applicants was required by defendant; that, however, upon request, Ward filled out in his own handwriting and signed and delivered the customary written application for such position, dated Gary, Indiana, March 13, 1927; that in question 7 therein he was asked to give a record of his services for the past five years and to state what railroad experience, if any, he had had, with what railroads, in what capacity employed and the length of service with each railroad; that in his answer to the question the only railroad company mentioned was the "Hocking Valley R. R.," at Walbridge, Ohio, with which, as he stated, he worked as a switchman from "4-13-24 to 11-1-24"; that no mention was made that he ever had worked for the Baltimore & Ohio R. Co.; that in question 8 he was asked to state if he had ever been injured and, if so, when, where and how, and the extent of the injuries; that his answer thereto, written by himself, was "No"; that defendant in employing Ward and continuing him in its employ relied upon the truth of his answers as contained in the application; that as a matter of fact the answer to question 8 was untrue and known to be untrue by Ward when made; that on February 20, 1924, he was working as a brakeman for the Baltimore & Ohio R. Co., on which day he received serious injuries at Cincinnati, Ohio, to his head, shoulder and back, which "incapacitated" him for about eight months to a year; and that he brought suit for these injuries in Ohio in May, 1924, and thereafter the suit was "settled". Ward testified on cross-examination that "when I stated in the application I had never been injured before I knew I had been injured with the B & O". It further appears from the evidence that Ward, after commencing to work for defendant shortly after signing said application, continued to work

inquiries concerning it.

It is further disclosed by the report in paragraph

that in 1937, "and (approximately) reported as defendant for a

period of approximately one to two years no physical examination of

such specimens was required by defendant, 1937, defendant, when removed,

and filed out in his own handwriting and signed and delivered the

documentary evidence required for such position, under duty, defendant,

March 12, 1937. When in question 7 therein he was asked to give a

record of his services for the past five years and to state what

business experience, if any, he had had, with what results, in what

occupational positions and the results of service with various firms

in his answer to the question the only relevant company mentioned was

the "American Railway & ...", as indicated, which, also stated, as he

stated, he worked as a warehouseman from "4-18-34 to 11-1-34" and he

mentioned was with him as that had worked for the Baltimore & Ohio R.

Co. I found in question 8 he was asked to state if he had ever been

indicted, and, if so, when, where and how, and the extent of the

indictment and the charges therein, which he stated, was "not" and

defendant in question 9 was asked to state if he had ever been

upon the basis of his answer as contained in the explanation that

as a matter of fact the answer to question 8 was untrue and known to

be untrue by "and the answer given on February 12, 1937, was as stated

as a defendant for the Baltimore & Ohio R. Co., on which day he re-

ceived various letters of reprimand, also, to his head, shoulder and

back, which "reprimanded" him for about eight months to a year; and

that he worked with the same parties in this in May, 1934, and

thereafter the only one "replied". "and thereafter on 1934-

commenced in 1937 when I started in the explanation I had never been

indicted before I was I had been indicted with the B & O. It further

stated that the defendant had been, after commencing to work for

defendant as clearly after stated with explanation, continued to work



in that capacity until during July, 1927, when, as he testified, he was "laid off on account of depression in business"; that he resumed his work in March, 1928, and continued therein until he was again laid off for the same cause; that he again resumed his work for defendant in January, 1929, and continued therein until the day of the accident (March 6, 1929); and that defendant had no knowledge of the concealments and untruths contained in the application until after the present action was commenced.

G. H. Ireland, trainmaster of defendant at Gary, Indiana, for 15 years, testified in substance that in such capacity he examined and passed upon all applications made by switchmen; that he passed upon Ward's application, which is "the usual form employees seeking employment as switchmen fill out for the company"; that he never employed men to work for defendant as switchmen who had been seriously injured while working for another railroad company, if he knew of the fact; that if he knew that an applicant for such a position, while working for another such company had received an injury to his back which had disabled him for months, he would not employ the applicant; that when he employed Ward he did not know that Ward, while working for the B. & O. Railway Co. in February, 1924, had received such a disabling injury; that had he known of that fact, he would not have employed him; and that had he subsequently been informed of Ward's prior injury he would have discharged Ward from his employment with defendant.

The main contention of defendant's counsel is that because of the concealments and untruths contained in Ward's application, amounting to a fraud upon defendant, the judgment should not be allowed to stand. Under the evidence, and in view of the legal principles as enunciated in Minneapolis, etc. R. Co. v. Beck, 279 U. S. 410, a case arising under the Federal Employers' Liability Act, we think there is substantial merit in the contention. In that





case a judgment for \$15,000, in Rock's favor, was entered in the circuit court of Cook County, and was affirmed by this appellate court (247 Ill. App. 600). On certiorari the Supreme Court of the United States reversed the judgment, saying in the opinion in part (pp. 413-5):

"The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the Act is calculated to stimulate them to proper performance of that duty. \* \* Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he (respondent) subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes <sup>to be</sup> advanced by the Act. \* \*

Respondent's position as employee is essential to his right to recover under the Act. He in fact performed the work of a switchman for petitioner but he was not of right its employee, within the meaning of the Act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justify or reasonably be rested on a foundation so abhorrent to public policy."

We deem it unnecessary to discuss or pass upon the further contentions of defendant's counsel, viz., (1) that the Court erroneously excluded competent and material evidence offered by defendant, and (2) that the verdict is excessive.

For the reasons indicated the judgment of the superior court is reversed and the cause remanded.

Kerner, J., concurs.

REVERSED AND REMANDED.

MR. PRESIDING JUSTICE SCANLON SPECIALLY CONCURRING:

As this case is based upon a Federal Act, Minneapolis, etc. R. Co. v. Rock, supra, governs and I am, therefore, forced to concur in the above judgment.







34269

PEOPLE ex rel. JOHN MAYER,  
Appellee.

v.

CITY OF CHICAGO et al.,  
Appellants.

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

259 I.A. 672

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a mandamus proceeding, commenced on October 23, 1928, there was a trial without a jury, at which evidence was introduced by both parties, resulting in the court entering a judgment order in favor of the petitioner on January 25, 1930. The present appeal followed.

In the judgment order the court found inter alia that on January 23, 1929, the City had restored petitioner to his position of "Junior Mechanical Engineer" and had paid him his salary from that date to the present; that at the time of the filing of the petition, and at all times thereafter up to January 23, 1929, he was entitled in this suit to a mandamus, commanding the City and the other respondents to restore him to said position; that inasmuch as the City did restore him thereto, it is now needless to award a mandamus for that purpose, and "this cause now proceeds to compel appropriation for and payment of the salary due him for the period from August 22, 1928 to January 23, 1929;" and that there is due to him for the period during which he has been excluded from his position the sum of \$1120. (On the trial the attorney for the respondents admitted that this amount was correct, if any sum was legally due to petitioner.)

And in said order the court adjudged that a writ of mandamus forthwith issue commanding the City, certain named officers



thereof, its city council and the members thereof (naming them), and their and each of their successors in office, that they (each to do his part) in the appropriation ordinance to be enacted next following the issuance of this writ, cause to be appropriated said sum of \$1100, with interest, etc., "for the payment to petitioner of the amount of the salary of his said position due to him from August 22, 1928 to January 23, 1929," and further commanding them to cause to be paid to him said sum, together with costs, etc.

The questions presented by this record are substantially the same as in People ex rel. Deutch v. City of Chicago, 256 Ill. App. 609 (opinion of this court filed March 11, 1930, not published). In that case it appears that Deutch held a similar position of "Junior Mechanical Engineer" in the service of the City, from which position he was unlawfully removed on January 17, 1928, and to which he was restored on January 31, 1929. On Deutch's petition and defendants' second amended answer, and after a trial without a jury, the circuit court, on July 10, 1929, awarded him a writ of mandamus in which said defendants were commanded "to cause an appropriation ordinance to be passed and to appropriate the sum of \$2,742.66, and interest, for payment to Deutch of the amount of his salary from January 17, 1928 to January 31, 1929, and that upon said sum being appropriated defendants cause it to be paid to him." This court affirmed the judgment of the circuit court, and upon application of defendants to the Supreme Court a writ of certiorari was denied. (256 Ill. App. LIV). In our opinion we said:

"To think the facts as contained in the present transcript disclose a noticeable violation of the letter and spirit of the Civil Service law, that petitioner was for more than a year unlawfully separated from his position solely for political reasons, and that the court was fully justified under the facts and the law in issuing the writ of mandamus as stated, whereby petitioner will be enabled to recover the back salary of which he has unlawfully been deprived. Counsel for defendants, contending that the court erred in awarding





the writ, place considerable reliance upon the case of Fittsimmons v. O'Neill, 214 Ill. 494, where it was decided in substance that the failure of a city council, acting in good faith and for the purpose of reducing expenses, to make an appropriation for a position in the civil service, the duties of which are added to those of another office without additional compensation, amounts to an abolishment of the first mentioned position and is not a violation of the Civil Service Law. But the case is not applicable to the facts of the instant case. Here there was an absence of good faith on the part of some of the defendants and there was no apparent desire to reduce expenses. In the 1928 appropriation ordinance the number of 'Junior Mechanical Engineers' for the department was considerably decreased, but the number of so-called 'Boiler Inspectors' was greatly increased, indeed doubled, and the total appropriation for the department was increased. The amount and character of the work to be done in the particular 'Smoke' division remained the same. The change in the name of some of the positions from that of 'Junior Mechanical Engineer' to that of 'Boiler Inspector' was apparently a mere subterfuge, and made for the purpose of lending color to the position taken by Nye, as head of the department, that some of said engineering positions had been abolished, and to his subsequent actions, concurred in by the Commission, in making and continuing to make said sixty-day appointments of persons who were assigned to do, or to attempt to do, the same character of work which had been done by petitioner, and others similarly affected, prior to January 17, 1928. In People v. Coffin, 232 Ill. 599, 610, it is said:

'While the city has a right to actually and in good faith discontinue any position when the same becomes no longer necessary or useful, yet neither it nor the commission had any right to continue the position in force and to remove appellee until charges had been preferred against him and sustained by the commission in the manner provided by section 12 of the Civil Service law. (City of Chicago v. Luthardt, 191 Ill. 516.) Neither the city nor the commission, nor both combined, can legally abolish a position temporarily for the unlawful purpose of later re-establishing it and installing therein another person as employee.'

See, also, in this connection, the case of McArdle v. City of Chicago, 216 Ill. App. 343, 354-5. And in People v. Thompson, 316 Ill. 11, 16, it is said:

'A judgment awarding the writ of mandamus to compel reinstatement in office may include a command to pay salary. (People v. Coffin, 279 Ill. 401; 18 R. C. L. 260; State v. Sundberg, (Mo.) 226 S. W. 986.) The rule in this State is, that the payment in good faith of the salary of an officer to a de facto officer constitutes a bar to an action by the de jure officer for the salary paid to the de facto officer. (People v. Schmidt, 281 Ill. 211.) The well defined exception to the above rule is that where the relator is illegally removed from his office and the salary has been paid to another person illegally appointed in his stead a writ of mandamus will be awarded requiring the reinstatement of the relator in office and the payment of his salary during his illegal removal. (People v. Brady, 262 Ill. 578; People v. Stevenson, 270 id. 569; People v. Coffin, *supra*.)'

In the present case we have considered the pleadings and the evidence adduced upon the trial, as well as the printed briefs and arguments of opposing counsel, and we find nothing that would justify us in reaching a different conclusion from that in the







Deutch case. The facts in the two cases are very similar and our stated reasons for the affirmance of the judgment rendered in favor of Deutch are, we think, good reasons for the affirmance of the judgment now in question.

Accordingly, the judgment of the circuit court of January 25, 1939, appealed from, is affirmed.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.

English name. The first in the list was very small and  
 was placed between the two specimens of the Japanese variety  
 in order to distinguish them, we placed, with the following  
 of the Japanese was in question.

Consequently, the Japanese of the same kind of

English name, this, a species name, is different

English.

English, V. L. and English, L. name.

34293

WILLIAM J. GUYER,  
Appellee,

v.

THE AMERICAN ELECTRIC  
FUSION CORPORATION,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

259 I.A. 673<sup>1</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action in assumpsit, commenced February 24, 1927, to recover commissions for the sale, for \$25,000, of certain shares of the capital stock of defendant to one W. P. Seng, there was a trial before a jury in December, 1929, resulting in a verdict and judgment against defendant for \$2500, and the present appeal followed.

Plaintiff's declaration consisted of two special counts and the common counts. In the special counts it is alleged in substance that on, to-wit, November 1, 1925, defendant, an Illinois corporation, by its duly authorized agent, employed plaintiff to procure a person who would invest additional capital in defendant's business or would purchase some of its capital stock; that it was agreed between plaintiff and defendant that if plaintiff procured a person who would make such an investment or purchase, defendant would pay to plaintiff, as compensation for his services, ten per cent (10%) of the amount invested or amount of stock purchased; that thereafter plaintiff, pursuant to said employment and agreement, interested one W. P. Seng in defendant's business and on, to-wit, December 1, 1925, procured him to invest \$25,000 in defendant's capital stock; and that by reason of the premises defendant became indebted to plaintiff in the sum of \$2500, which it has refused to pay, although often requested, etc. Defendant's plea was that of the general issue.



2591.A.673

THE UNITED STATES  
DEPARTMENT OF JUSTICE  
WASHINGTON, D. C.  
JAN 10 1937

in an action in assumpsit, commenced February 28, 1937,  
to recover commission for the sale, for \$25,000, of certain shares  
of the capital stock of defendant to one W. F. Long, there was a  
trial before a jury in November, 1937, resulting in a verdict and  
judgment against defendant for \$2500, and the present appeal followed.  
Plaintiff's declaration consisted of two special counts  
and the common count. In the special counts it is alleged in  
substance that on, to-wit, November 1, 1935, defendant, an Illinois  
corporation, by its duly authorized agent, employed plaintiff to  
procure a person who would invest additional capital in defendant's  
business or would purchase some of its capital stock; that it was  
agreed between plaintiff and defendant that if plaintiff procured a  
person who would make such an investment or purchase, defendant would  
pay to plaintiff, as compensation for his services, ten per cent  
(10%) of the amount invested or amount of stock purchased; that  
thereafter plaintiff, pursuant to said agreement and agreement,  
introduced one W. F. Long in defendant's business and on, to-wit,  
December 1, 1935, procured him to invest \$25,000 in defendant's  
capital stock; and that by reason of the present defendant became  
indebted to plaintiff in the sum of \$2500, which it has refused to  
pay, although when requested, etc. Defendant's plea was that  
of the general issue.

On the trial plaintiff testified in his own behalf and called as a witness S. S. Levings, defendant's "sales manager" or "director of sales" in November and December, 1925. The two witnesses for defendant were said W. P. Seng and Edmund J. Henke, president of defendant since its organization. All four witnesses were examined and cross-examined at length and certain writings were introduced.

On July 21, 1925, Levings and defendant entered into a written contract in the form of a proposition or letter, addressed to defendant and signed by Levings, and marked on its face "Accepted" above defendant's name "by Edmund J. Henke, president". A part of the contract, here material, is as follows:

"I am offering to you my services as a sales manager and salesman of your products on the following basis:

You are to pay me at the start a salary of \$300 per month, or a commission of 15% on the sales completed by my own efforts, whichever amount is greater.

Simultaneously with my duties as a sales manager I am to devote part of my time and efforts towards procuring for your corporation an additional working capital to the extent of not less than \$25,000, within a reasonable time and on terms agreeable to you. When my efforts are successful in that regard and this capital is paid into your company, you are to make the following arrangement with me:" (Here follow details as to the new arrangement as to salary, commissions, etc., in case such an amount of additional capital is received by defendant).

It appears from the testimony of Levings and Henke that after the execution of the contract Levings interested the Fiscal Engineering Co., and it agreed to endeavor to raise the \$25,000 additional capital for defendant and for a commission of 13 per cent; that Henke on behalf of defendant refused to pay such a large commission and he told Levings that defendant would not agree to pay commissions in excess of 10 per cent; and that further negotiations with said Fiscal Co. were discontinued. It appears from the testimony of Levings and plaintiff that thereafter, with Henke's knowledge and consent, Levings so interested plaintiff that the latter agreed to endeavor to raise said sum for defendant on the basis of a 10 per cent







commission to be paid him by defendant, and Levings promised plaintiff that in case the money was procured through plaintiff's efforts defendant would pay him such a commission; that thereafter plaintiff conducted negotiations with Seng resulting in Seng purchasing of defendant certain shares of its capital stock and paying defendant \$25,000 therefor, but on condition that a son of Seng should be given a position as salesman for defendant, which condition defendant agreed to and the son was employed by it; and that after defendant had received the money, Henke, on its behalf, refused to pay any sum as commissions to plaintiff. Levings further testified that "the reason Mr. Henke gave for defendant not paying Mr. Guyer was because of young Mr. Seng coming into the business, which wasn't contemplated when the negotiations were first taken up with Mr. Seng, and that he did not intend to pay both the commission and take Mr. Seng's son into the business."

Counsel for defendant here contend that the verdict and judgment are against the manifest weight of the evidence on the questions (a) whether plaintiff was the procuring cause of the sale of the stock by defendant to Seng for \$25,000, and (b) whether Levings had any authority, as defendant's agent, to agree to pay plaintiff a commission of 10 per cent for bringing about such sale. We cannot agree with the contention. As to the first question, while the evidence was conflicting, we think that the jury was justified in finding that plaintiff's efforts were the procuring cause of the sale. As to the second question we think it sufficiently appears that Levings was given authority by Henke, defendant's president and manager of its business affairs, to employ plaintiff to bring about a sale of the stock and, if it was effected through the latter's efforts, to pay him a commission of 10 per cent. Even if it be considered that Levings did not have sufficient authority, the evidence discloses that defend-





ant, through Henke, had knowledge of Levings' negotiations with plaintiff and of the latter's negotiations with Seng, resulting in the sale by defendant of the stock to Seng and the receipt by it of the \$25,000. Under these circumstances we do not think that defendant can be allowed to avoid payment of the agreed commissions to plaintiff solely upon the claimed lack of authority at the beginning in Levings to employ plaintiff on the terms agreed upon. In Pittsburg, etc. Ry. Co. v. Kekuk Bridge Co., 131 U. S. 371, 381, it is said: "And when a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract, without objection, it may be presumed to have authorized or ratified the contract of its agent." This principle is reaffirmed in Pace & Co. v. Alexandria Electric Ry. Co., 133 La. 379, where it appeared that the general manager of a corporation contracted with the plaintiff, a broker, to procure a purchaser for certain stock of the corporation and, the broker having succeeded in selling the stock, the corporation received the proceeds of the sale with knowledge of the alleged unauthorized contract of its officer. The Louisiana Supreme court affirmed a judgment in favor of the plaintiff for commissions. (See, also, 7 A. L. R. p. 1456, note; Bowersmith v. Extreme Gold Mining Co., 146 Fed. Rep. 95, 99; Hartford, etc. Transp. Co. v. Plymmer, 120 Fed. Rep. 624, 628; Rowland v. Progressive Invest. Co., 202 S. W. Rep., No. App. 257, 259.)

For the reasons indicated the judgment of the circuit court is affirmed.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.





34420

DESSIE WEISSMAN and  
B. PARESKI,  
Appellees.

v.

W. P. Cooney,  
Appellant.

APPEAL FROM MUNICIPAL COURT  
OF CHICAGO.

259 I.A. 673<sup>2</sup>

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 14, 1928, plaintiffs caused a judgment by confession for \$245, on a written lease, to be entered against W. P. Cooney, the lessee of an apartment in plaintiffs' building at No. 7555 South Shore Drive, Chicago. The amount of the judgment is made up of rent, claimed to be due, for the three months of April, May and June, 1928, at \$75 per month, and \$20 attorney's fees. On defendant's motion the judgment was opened and he was given leave to defend, the judgment to stand as security. He demanded a jury trial, and in March, 1930, such a trial was had. At the conclusion of defendant's evidence the court directed the jury to return a verdict in favor of plaintiffs and they did so. On April 4, 1930, the court adjudged that the judgment for \$245, as confessed on June 14, 1928, "stand confirmed in full force and effect \* \* as of the date of the rendition thereof," etc. The present appeal followed.

It was provided in the lease that defendant was to have and to hold the premises "for and during the term commencing on May 1, 1927, and expiring on April 30, 1928, inclusive, and from year to year thereafter, unless and until this lease shall be terminated at the date last above mentioned, or at a like date in any subsequent year thereafter, by the giving by either party to the other of not less than sixty (60) days' notice in writing of such





termination, which said notice shall be delivered in person or sent by registered mail, when to Lessor, at the place stipulated herein for the payment of rent, and when to Lessee, at the address of the demised premises." The place stipulated in the lease for the payment of rent was "at the office of Carroll, Schendorf & Boenicke, agents, Chicago," and it was further provided that the monthly rent of \$75 should be paid in advance on the first day of each and every month. The lease is signed in the name of plaintiffs by said agents and is on a printed form drafted by said agents.

On the trial Joseph G. Wardell testified for plaintiffs. He was the manager of the renting department of plaintiffs' agents. Plaintiffs also introduced the lease and certain letters passing between defendant and said agents. Defendant alone testified as a witness in his behalf and he introduced other letters written by plaintiffs' agents to him.

The facts are in substance as follows: During February, 1928, defendant received a typewritten letter, dated February 15, 1928, addressed to him and signed by plaintiffs' agents, per Wardell, as follows:

"The lease on premises occupied by you continues in force and effect from May 1, 1928, unless you notify us by March 1, 1928 of your intention to cancel same.

This is in accordance with a clause in your lease which provides that either the lessor or lessee may terminate the lease by giving to the other party 60 days written notice.

We trust it is your intention to continue your tenancy, but if you contemplate moving do not fail to notify us not later than March 1, 1928."

Beneath the signature on the letter, as received by defendant, is the following blank form, in typewriting:

"Reply.

Date:

I hereby notify you that I \_\_\_\_\_ wish to retain the premises above referred to for another term.

\_\_\_\_\_."

Defendant personally wrote on said letter, following the word "Date," the figures "3/1/28," and filled in the blank





on the first line with the words "do not" and signed his name on the blank line. He put the letter in an envelope, stamped it and properly addressed it to plaintiffs' agents in Chicago. He did not cause it to be registered, but he testified that on the way to his office, about 8 o'clock on the morning of March 1, 1928, he personally deposited it in an ordinary mail box at the corner of Roosevelt Road and Michigan Avenue, Chicago. The letter was not received by said agents until Monday morning, March 5th. When received the envelope (introduced in evidence by plaintiffs) bore the post-mark of "Mar. 4th, 4 p.m., 1928." On Saturday, March 3rd, plaintiffs' agents wrote defendant: "Not having heard from you, your lease on the apartment you now occupy continues in force and effect on and after April 30, 1928, and we have so entered same on our books." On Monday, March 5th, they, having received defendant's letter, wrote defendant: "You will have already received a letter from this office to the effect that, inasmuch as we had not heard from you on or before March 1st, your lease was automatically renewed. Under the existing conditions, you are obligated to take care of the rental of this apartment for period May 1, 1928 to April 30, 1929, and from year to year thereafter until lease is cancelled as per stipulated clause in lease."

Defendant further testified that his signature was on the lease which plaintiffs had introduced in evidence, but that he was "never given a copy of it," and that he was indebted to plaintiffs for rent for the month of April, 1928, only, which rent (\$75) he tendered in court. The evidence further disclosed that defendant vacated the apartment on April 12, 1928, and the keys were delivered to the janitor of the building; that on April 15th defendant sent to plaintiffs' agents a check for \$75, bearing the notation "for rental April, 1928, \* \* final rental due and completing full payment of lease," which check was returned because of the notation; and that





said agents diligently endeavored to re-rent the apartment but it remained vacant during the months of May and June, 1928.

Defendant's counsel contends that the court erred in directing a verdict for plaintiff, and for the reason that if the jury believed defendant's testimony (that he personally mailed his letter to plaintiffs' agents on the morning of March 1, 1928, notifying them that he did not wish to retain the leased premises for another term) they would have been justified in returning a verdict finding in substance that the term of the lease had ended on April 30, 1928, and that defendant was only indebted to plaintiffs for rent for the month of April, 1928, inasmuch as defendant had sufficiently and in apt time complied with the provisions of the lease relative to termination, supplemented as they were by the letter of plaintiffs' agents of February 15, 1928. Plaintiffs' counsel, on the other hand, contend that there was no disputed question of fact for the jury to pass upon because (a) defendant's notice of termination, dated March 1st, was neither "delivered in person" nor "sent by registered mail," and (b) the notice was not mailed in time as appears from the post-mark on the envelope.

It will be observed that in the letter of plaintiffs' agents, dated February 15th, defendant is advised that the lease will continue in force and effect from May 1, 1928, unless "you notify us by March 1, 1928, of your intention to cancel same," and that in the letter no suggestion is made that such notification should be sent by registered mail. We think that the letter, especially as it appears from the evidence that defendant was "never given a copy of the lease" which was drafted by plaintiffs' agents, should be considered as amounting to a waiver of the provision of the lease that defendant's notification, if sent by mail, should be by registered mail. Such or similar provisions in leases may be







waived (35 Corpus Juris, p. 1020, sec. 149.) And we do not think that the fact that the envelope containing defendant's letter bears a post-mark, indicating that the latter was not mailed until March 4th, conclusively and as a matter of law overcomes defendant's testimony that he personally mailed it early in the morning of March 1st, in apt time to comply with the provisions of the lease and plaintiffs' letter of February 15th. In our opinion under the conflicting evidence it was for the jury, properly instructed, to determine whether or not defendant's letter, containing notice of the termination of the lease, was mailed on March 1st or March 4th. It has been decided that a post-mark on the envelope of a letter is not conclusive, but only prima facie, evidence of the date of mailing. (Shelburne Falls Bank v. Townsley, 102 Mass. 177, 181; New Haven Bank v. Mitchell, 15 Conn. 206, 224; 16 Cyc. p. 1069, sec. d. 1.)

Our conclusion is that the trial court erred in directing a verdict for plaintiffs. Accordingly, the judgment appealed from is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan, P. J., and Kerner, J., concur.



34429

FRANCES ROSTENKOWSKI,  
Appellee,

v.

CHICAGO NATIONAL LIFE INSURANCE  
COMPANY, a corporation,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 L.A. 673<sup>3</sup>

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment against it for \$1445, rendered on March 16, 1930, in an action of assumpsit, tried without a jury, on a life insurance policy, dated April 3, 1929. The stipulated premium to be paid was two (\$2) dollars per month. Plaintiff, as the wife of the insured, Albert Rostenkowski, was the named beneficiary. He died at the age of 52 years on May 28, 1929, less than two months after the issuance of the policy, from "hemorrhage from stomach" and "cirrhosis of liver" as stated in the certificate of death of the attending physician, Dr. E. H. Warszewski, who also was a witness for defendant on the trial. There was no dispute as to the amount due under the policy, if any sum was legally due. Defendant's defense, as stated in its affidavit of merits, was in substance that in the insured's application he made false statements or representations, which were material to the risk and were relied upon by it as being true when the policy was issued. In the policy is the provision that "this policy and the application therefor, a copy of which is hereto attached and made a part of the policy, constitute the entire contract."

The application, signed in the name of Albert Rostenkowski by his son, Edwin, and with his authority, is dated February 21, 1929, about six weeks before the policy was issued. No medical examination of the proposed insured was required or then or later had. Some



1900

FOR THE UNITED STATES OF AMERICA

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

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RE NEW YORK TELETYPE TO BUREAU APRIL TWENTY LAST

April 2, 1966. The following specimens to be paid two (\$2) each

RECEIVED AT THE OFFICE OF THE ATTORNEY GENERAL, DISTRICT OF COLUMBIA, APRIL 10, 1918.

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as stated in the certificate of death of the deceased physician.

Initial. There was no dispute as to the amount due under the policy, and the insurance company was not a party to the dispute.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

no more like statements or representations. With all were material to

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... had total no effect on his behavior and he was not aware of it.

of the statements and representations in the application are:

"I, the undersigned, hereby apply for one of your special advertised Annual Renewable and Convertible Term Policies; and hereby represent and declare that I am now in good health, and of sound mind to the best of my knowledge and belief, \* \* .

I further agree and declare that all statements and answers to questions herein are and shall be treated as material to the risk and shall form part of the policy contract issued to me and the whole truth of such statements and answers is the basis of and part of the consideration for such insurance which, if granted, is conditional on there having been no intentional misrepresentation or suppression of facts, \* \* ."

Among the questions in the application and the written answers thereto are the following:

"13. Have you ever been treated or operated on by a physician or surgeon? (Ans.) 'No.'

15. Have you ever been treated for any of the following diseases or ailments: Heart, lung, stomach, liver, kidney, \* \* intestines, \* \*? (Ans.) 'No.'

18. Have you ever been refused a policy as applied for by any life insurance company, association or society? If so, which? Give name. (Ans.) 'No'."

On the trial, after plaintiff had made a prima facie case, by the introduction of the policy (to which was attached a copy of the application), etc., and had rested, defendant, to sustain its defense, introduced various writings and eight witnesses testified in its behalf. In rebuttal plaintiff called as witnesses Joseph Lusez and Edwin Rostenkowski. The following facts appeared in substance:

Defendant advertised its policies in the "Chicago Journal", a newspaper published in Chicago. Solicitors for subscriptions to the paper also solicited applicants for insurance written by defendant. Lusez was one of these solicitors, and, through his efforts the application in question was secured, on February 21, 1929, at the insured's office. Lusez turned it in to the Journal and the Journal delivered it in its present form to defendant about March 19, 1929. E. H. Zahner, defendant's agent employed to pass upon applications and determine whether policies should be issued or not, examined the particular application, approved it and the risk, and advised the issuance of the policy, which was issued and delivered,







with copy of the application attached, to the insured about April 3, 1929. The delivery was by mail in a letter properly addressed to the insured. When Zahner passed favorably upon the application, he acted on the assumption and had no knowledge to the contrary that the insured's statements and representations therein were true. When the policy was finally issued defendant relied upon the truthfulness of said statements and representations and had no knowledge to the contrary. After proofs of death had been furnished, defendant refused to pay anything on the policy, because it for the first time learned that the insured was not in good health when the application was made, and when the policy was issued, and that the answers to questions Nos. 13, 15 and 18 in the application (above set forth) were false and fraudulent. It appears that the insured had suffered from cirrhosis of the liver for six months prior to his death; that about March 1, 1929 (more than one month before the policy was issued) he suffered a severe hemorrhage of the stomach; that he was immediately and thereafter treated by Dr. Warszewski for this and other ailments, and that said stomach ailment was the principal cause of his death, - the liver ailment being a secondary cause. It further appears that the insured made written application for a \$10,000 policy of life insurance to the New York Life Insurance Company about January 20, 1927; that about the middle of February, 1927, before the making of the application here involved, the insured received notice that his application to said New York company had been rejected, on account of his suffering from high blood pressure, heart trouble and sugar in the urine.

After reviewing the evidence, and considering the printed briefs and arguments of respective counsel, we have reached the conclusion that the judgment appealed must be reversed. It is clear that the insured was not in good health on February 21, 1929, as was





stated he was in said application to defendant. It is also clear that the answers to questions, Nos. 13, 15 and 18, in the application, were false and were material misrepresentations, relied upon by defendant as being true. In U. S. Fidelity Co. v. First National Bank, 233 Ill. 475, 481, it is said: "The law is well settled, in its application to insurance contracts, that a misrepresentation of a material fact, in reliance upon which a contract of insurance is issued, will avoid the contract, and it is not essential, in equity, that such a misrepresentation should be known to be false. A material misrepresentation, whether made intentionally and knowingly or through mistake and in good faith, will avoid the policy." (See, also, 1 May on Insurance, 3rd Ed., Sec. 181, pp. 348-9; Hancock v. Knights and Ladies of Security, 303 Ill. 66, 71.) And the false answers to questions, Nos. 13 and 15, being material to the risk, render the policy void and bar a recovery thereon. (Crosce v. Knights and Ladies of Honor, 254 Ill. 80, 84; Mueller v. New York Life Ins. Co., 221 Ill. App. 420, 423; Gulski v. Metropolitan Life Ins. Co., 196 Ill. App. 76, 78; Feeney v. Knights and Ladies of Security, 172 Ill. App. 51, 53.) And, as to the false answer to question No. 18, the rule is the same, (Karaffa v. Independent Order of Foresters, 189 Ill. App. 498, 500-1; Peterson v. Manhattan Life Ins. Co., 115 Ill. App. 421, 424; 37 Corpus Juris, p. 467, Sec. 181.)

It is contended by plaintiff's counsel, however, that because of certain testimony given in rebuttal by plaintiff's witnesses, Luszcz and Edwin Rostenkowski, these principles cannot be applied in the present case. Luszcz, agent for the Chicago Journal in procuring the application, testified in substance that, when he solicited the insured in the latter's office on February 21, 1929, the latter's son, Edwin, also was present; that the insured said that he was in an "awful hurry" to leave the office and before leaving directed his son to sign the application in his (insured's) name;



There is no record of any such investigation in the files of the FBI. It is also noted that the Bureau has received no information from the FBI, New York, in the past, and that the Bureau has no information from the FBI, New York, in the past, and that the Bureau has no information from the FBI, New York, in the past.

232 Ill. App. 479, 481, is in this: "The law is well settled, in the application of insurance contracts, that a misrepresentation of material facts, in relation upon which a contract of insurance is issued, will avoid the contract, and it is not essential, in such cases, that such a misrepresentation should be known to be false. A material misrepresentation, whether made intentionally or knowingly or through mistake and in good faith, will avoid the policy." (Emphasis added.)

10-11-1964

It is considered by specialists as a valuable, however, small.

that he was in an "awkward hurry" to leave the office and hence, leaving the latter's card, Edwin, also was present; that the instant said application was filed in the latter's office on February 25, 1932, in procuring the application, doubtless in substance that, when he was applied in the present case. Thus, agent for the Chicago Bureau witnesses, James and Edwin Rosenbergs, those principles cannot be drawn at certain testimony given in respect to Einstein's

that he (Luscz) did not ask the insured any of the questions in the application, but did ask questions of the son and received answers from him; that he (Luscz) filled in the answers to the questions; and that after this had been done the son signed the application in the insured's name. The testimony of the son, Edwin, was substantially the same, but he further testified that when the policy and the attached copy of the application subsequently was delivered to the insured, he (insured) "saw the application". We cannot agree with the above contention of plaintiff's counsel. The insured made his son, Edwin, his agent to sign the application in his name and his purpose in so doing was to obtain insurance. Defendant issued the policy, relying upon the truthfulness of the answers in the application. When the insured received the policy, to which was attached a copy of application, he saw the instrument. He must conclusively be presumed to have read the application which was a part of the policy. (Brown v. U. S. Casualty Co., 58 Fed. Rep. 38, 41; New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 529.) And a reading of it must, under the evidence, have disclosed to him that certain statements and representations therein, material to the risk, were untrue. Yet he did not notify defendant of the falsity of said statements and representations but kept the policy. By these acts he ratified and adopted the application as his, as well as the answers to the questions therein contained. And plaintiff cannot now claim any benefit from the policy, based as it is upon said false statements. (National Union v. Arnhorst, 74 Ill. App. 482, 489; McGreavy v. National Union, 152 id. 62, 66-6; Cohen v. New York Life Ins. Co., 356 id. 348, 352.)

Furthermore, the uncontradicted evidence introduced by defendant discloses that after the date of the application (February 21, 1929), and before the issuance of the policy (April 3, 1929), to-wit, on March 1, 1929, the applicant had a second and very severe hemorrhage of the stomach and became very ill, and that he then and



that he [insured] did not know the contents of the questions in the application, and the answers of the same and received answers from him [insured] in the answers to the questions; and that after this had been done the one signed the application in the insured's name. The testimony of the son, Edwin, was immaterially the same, and he further testified that when the policy and the attached copy of the application respectively was delivered to the insured, he (insured) "saw the application". We cannot agree with the above contention of Plaintiff's counsel. The insured was his son, Edwin, and went to sign the application in his name and his purpose in so doing was to obtain insurance. Defendant issued the policy, and the insured was the beneficiary of the money in the application. Then the insured received the policy, and when he received a copy of the application, he saw the insurance. He must conclusively be presumed to have seen the application when it was part of the policy. Edwin v. The Insurance Co. of New York, 100 N.Y. 217, 1892. And a finding of fact that the evidence, have disclosed to him that certain statements and representations made by him, were untrue, and that he was not really defendant of the policy of said insurance and representation that he kept the policy. If these facts be established and accepted in the application on his, as well as the answers to the questions therein contained, and Plaintiff cannot now claim any benefit from the policy, based on it in upon said false statements. (Edwin v. The Insurance Co. of New York, 100 N.Y. 217, 1892.) Edwin v. The Insurance Co. of New York, 100 N.Y. 217, 1892. Edwin v. The Insurance Co. of New York, 100 N.Y. 217, 1892. Furthermore, the undersigned witness interviewed by defendant disclosed that after the date of the application (April 2, 1929), and before the issuance of the policy (April 5, 1929), to wit, on March 1, 1929, the applicant had a second and very severe hemorrhage of the stomach and became very ill, and that he then and



thereafter knew of his critical condition, but he did not make any disclosure of the facts to defendant. When the policy was delivered, and at a time when his condition was still very serious, he made no disclosure but accepted the policy. The principal cause of his death on May 28, 1929, was said stomach ailment. And in the application he had agreed that the insurance should not become effective until he had received the policy. Under these facts and circumstances we think that it was his duty, before accepting the policy, to advise defendant of his changed condition and serious illness, and of which it was ignorant, and that his failure so to do, especially as he must be presumed to have then known the falsity of material statements in the application, amounted to such a fraud on defendant as avoids the policy. In 32 Corpus Juris, p. 1272, Sec. 490, it is said: "Where a statement has been made by insured with reference to the subject matter of the insurance in his application therefor, if a material change occurs before the policy is issued of which the company is ignorant, the duty of disclosure rests upon insured, provided he has knowledge thereof." And in Equitable Life Assur. Soc. v. McElroy, 83 Fed. Rep. 631, 637, it is said: "An intentional omission to discharge that duty perpetrates a plain fraud upon the company, which necessarily avoids the contract." (See, also, Cable v. U. S. Life Ins. Co., 111 Fed. Rep. 19, 28-29.)

For the reasons indicated the judgment of the municipal court is reversed with finding of facts.

REVERSED WITH FINDING OF FACTS.

Scanlan, P. J., and Kerner, J., concur.



34429

FINDING OF FACTS.

We find as facts in this case that the insured, Albert Restenkowski, on February 21, 1929, directed his son, Edwin, to sign the application here in question for him and in his name for the purpose of procuring the policy of insurance which defendant issued and delivered to him on April 3, 1929; that certain statements and representations contained in the application, to the effect that he was in good health, had never been treated by a physician, had never been treated for a disease or ailment of the stomach, and had never been refused a policy of insurance as applied for by any life insurance company, were false; that defendant received said application and, believing and relying upon said statements and representations as being true, and having no knowledge to the contrary, issued the policy; that when the insured received the policy he saw a copy of said application and knew that said statements and representations, on the strength of which the policy was issued, were not true; that he further knew at the time that he was seriously ill with a stomach ailment which had increased in severity from March 1, 1929; that he did not notify defendant that said statements and representations in said application were false, or that his stomach ailment had increased in severity and that he was then seriously ill, but he accepted the policy; that the principal cause of his death, less than two months later, on May 28, 1929, was said stomach ailment; and that defendant is not indebted to plaintiff, the named beneficiary in the policy, in any sum.



STATE OF NEW YORK

To find as facts in this case that the deceased, Albert  
Kosciuszko, on February 22, 1929, obtained his own, certain, to  
the application here in question for him and in his name for  
the purpose of procuring the policy of insurance which defendant  
issued and delivered to him on April 2, 1929; that certain state-  
ments and representations contained in the application, to the  
effect that he was in good health, had never been treated by a  
physician, had never been under for a disease or ailment of the  
stomach, and had never been issued a policy of insurance as applied  
for by any life insurance company, were false; that defendant re-  
ceived said application and, believing and relying upon said state-  
ments and representations as being true, and having no knowledge to  
the contrary, issued the policy; that when the insured received the  
policy he saw a copy of said application and knew that said state-  
ments and representations, on the strength of which the policy was  
issued, were not true; that he further knew at the time that he was  
seriously ill with a stomach ailment which had increased in severity  
from March 1, 1929; that he did not notify defendant that said state-  
ments and representations in said application were false, or that  
his stomach ailment had increased in severity and that he was then  
seriously ill, but he accepted the policy; that the principal cause  
of his death, less than two months later, on May 22, 1929, was said  
stomach ailment; and that defendant is not indebted to plaintiff.

The named party is the policy, in any case.

34453

DAVE CAHE,  
Complainant and Appellee,

v.

EVA SNYDER et al.,  
Defendants.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

On appeal of FANNY GOLDBERG,  
Appellant.

259 I.A. 673

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On June 26, 1929, complainant filed a bill in the circuit court to foreclose a second trust deed on certain premises in Cook county. The trust deed, dated April 1, 1929, had been executed and delivered by Eva Snyder, then the owner of the premises. After the cause was at issue there was a reference to a master in chancery who, after hearing evidence, recommended that a decree of foreclosure be entered, subject to a first trust deed. On the hearing it appeared that Eva Snyder on June 15, 1929, by warranty deed, had conveyed the premises to A. George Woods, and that on June 17, 1929, Woods, by warranty deed, had conveyed them to Fanny Goldberg, both conveyances being subject to said first and second trust deeds; that Fanny Goldberg, on June 17, 1929, had executed a third trust deed on the premises to S. B. Barnett, as trustee, purporting to secure four principal notes aggregating \$10,000; that she and Barnett, as trustee, were made parties defendant to complainant's bill; that she answered the bill but that Barnett, as trustee, was defaulted; and that, when the bill was filed complainant did not know who the owners and holders of said four notes were and they were made parties defendant as "unknown owners, etc." and they had been served as such by publication in the usual manner and had not appeared and had been defaulted.

14-00000

DATE WHEN

RECEIVED AND

BY

NAME OF THE

LOCAL BANK  
CITY OF NEW YORK  
NEW YORK

ON BEHALF OF THE

THE UNITED STATES OF AMERICA

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said Court at New York, this 14th day of June, 1900.

JOHN W. WALKER, Clerk of the Court.

14-00000



During the progress of the hearing, Fanny Goldberg, who it then appeared was the wife of Barnett, objected to the taking of any further evidence in the cause until A. George Woods had been made a party defendant to the bill by his proper name. The objection was based on the assumption that Woods was the owner and holder of the four notes secured by the third trust deed. From evidence taken at the time it appeared that neither complainant nor his solicitor had any knowledge, when the bill was filed or at any time thereafter, as to the whereabouts of Woods or that he was the owner and holder of the notes or any of them; that neither Fannie Goldberg nor Barnett knew where Woods lived, it appearing that he did not have a "very permanent residence;" that Barnett did not know whether or not Woods was the owner and holder of the notes; and that personal inquiry, made by complainant's solicitor, at the place in Chicago, where Barnett said he had addressed communications to Woods, disclosed that Woods was not known at that address. The master overruled the objection and the hearing continued, resulting in his making a report recommending that a decree of foreclosure be entered in favor of complainant. Fanny Goldberg filed formal objections to the report upon the same ground, which were overruled and subsequently ordered to stand as exceptions before the chancellor. On February 13, 1930, after a hearing on the exceptions, the court overruled them, confirmed the master's report and entered the foreclosure decree in question. Fanny Goldberg alone has appealed.

She here contends that the decree should be reversed upon the sole ground as urged before the master and the court. The contention is without merit. Some of the adjudicated cases cited by her as supporting her contention are cases where it appears in substance that the complainant, knowing the name of a defendant but desiring to conceal the fact from him of the institution of the suit, fraudulently attempts to obtain service upon him under the

During the progress of the hearing, Henry Williams, who is then  
 appeared and the wife of George, objected to the taking of any  
 further evidence in the cause until a George Woods had been made  
 a party defendant to the bill by his proper name. The objection  
 was based on the assumption that Woods was the owner and holder  
 of the four notes secured by the third trust deed. When evidence  
 came at that time it appeared that neither Williams nor his  
 solicitor had any knowledge, when the bill was filed as to any other  
 character, as to the ownership of Woods or that he was the owner  
 and holder of the notes or any of them; that neither Henry Williams  
 nor Williams knew where Woods lived, it appearing that he did not have  
 a "very permanent residence"; that Williams did not know whether or  
 not Woods was the owner and holder of the notes; and that Williams  
 industry, made by complaint, a solicitor, at the time in Chicago,  
 where Williams said he had extensive communications in Woods, disclosed  
 that Woods was not known at that address. The matter resulted in  
 objection and the hearing continued, resulting in his making a report  
 recommending that a report of Williams be ordered in favor of  
 complaint. Henry Williams filed formal objections to the report  
 upon two main grounds, which were reviewed and subsequently upheld  
 to stand as exceptions before the chancellor. On February 12, 1911,  
 after a hearing on the exceptions, the court overruled them, and  
 allowed the master's report and ordered the respondents to answer in  
 question. Henry Williams' motion was overruled.

The facts contained in the report should be reviewed upon  
 the sole ground as upon which the master and the court. The  
 objection is without merit. One of the objections stated upon  
 by her as grounds for complaint and upon which it appeared in  
 substance that the complaint, however the name of a defendant was  
 desired to control the fact that the defendant of the  
 wife, Williams, although he should advise upon him under the

designation or description of "unknown owner," etc. But this is not such a case. It does not appear from the evidence that either at the time the bill was filed, or when the hearing was had before the master, either complainant or his solicitor knew who was the owner and holder of the four notes secured by the third trust deed executed by Fanny Goldberg. And there was no positive proof that anybody knew that Woods was the owner and holder of any of them or knew where he resided or could be found. And it is not contended that there were any irregularities in the manner in which the owners or holders of said notes, whoever they may be, were brought into court under the designation of unknown owners or holders. Furthermore, it is well settled law that a party on appeal can only complain of an error which affects his or her own rights, and that a defendant to a bill to foreclose a mortgage, as Fanny Goldberg is, and who is properly before the court, cannot assign as error that another defendant, not objecting to the decree, was not properly brought into court by publication. (Short v. Raub, 81 Ill. 509, 510; Culver v. Cougle, 165 Id. 417, 419-20; Donham v. Joyce, 257 Id. 112, 117-8.)

The decree of February 18, 1930, appealed from, should be affirmed and it is so ordered.

AFFIRMED.

Scanlan, P. J., and Kerner, J., concur.





34441

HAROLD MANDELBAUM,  
Appellee,

v.

AETNA ACCEPTANCE COMPANY,  
a corporation,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

259 I.A. 674'

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

This was an action commenced by Harold Mandelbaum against Aetna Acceptance Company in replevin for the recovery of an automobile. The car not being found, plaintiff by his amended statement of claim proceeded in trover. The cause was tried before the court without a jury, who found the defendant guilty and assessed plaintiff's damages at \$447.30. This appeal followed.

Defendant is in the automobile finance business buying paper secured by conditional sale contracts. Plaintiff purchased an automobile from Auburn Woodlawn Motors, Inc., for which he was to pay \$1,550; he was allowed \$250 for his old Nash automobile and paid sufficient cash so as to reduce his debt for said automobile to \$1,148.40 for which he executed a promissory note and conditional sale contract. This note was payable in monthly installments of \$95.70 commencing January 10, 1930, until paid. The note and conditional sale contract were assigned to defendant who received the first payment from plaintiff January 10, 1930. February 10, 1930, an employee of defendant informed plaintiff that he represented the defendant; that defendant felt insecure because of some act on the part of the company that sold plaintiff the automobile; that the people who sold him the automobile had put two or three mortgages

1934

STATE OF TEXAS

COUNTY OF DALLAS

JOHN W. HARRIS

ATTEST: My commission expires

2581A 64

NO. 121111

This was an action commenced by Harold Handelman against  
 State Automobile Company in replevin for the recovery of an automobile.  
 The car was being towed, plaintiff by his amended statement of claim  
 presented as item. The court was told that the car was being  
 a jury, and found the defendant guilty and awarded plaintiff's  
 damages of \$2,112.12. This appeal followed.

Defendant is in the automobile business and during  
 paper secured by conditional sale contracts. Plaintiff purchased  
 an automobile from Arthur Rosenberg, Inc., for which he was  
 to pay \$1,000. He was allowed \$200 for his old car and automobile  
 and paid sufficient cash so as to reduce his debt for said automobile  
 to \$1,112.12 for which he executed a promissory note and conditional  
 sale contract. This note was payable in monthly installments of  
 \$20.00 commencing January 10, 1933, until paid. The note and  
 conditional sale contract were assigned to defendant who received  
 the first payment from plaintiff January 10, 1933. February 10,  
 1933, he notified defendant informed plaintiff that he represented  
 the defendant and returned his insurance because of some act on  
 the part of the company that said plaintiff and automobile that  
 the people who sold him the automobile had put two or three mortgages



on their automobile deals and that the property would have to be taken in. Defendant said: "All right, I will go down with you." Plaintiff drove the automobile to defendant's office and garage where he was asked for the keys; he gave the keys to defendant's employee, and was given a receipt for the automobile. Plaintiff had no further communication with defendant until February 18, 1930, when he appeared with a deputy bailiff of the Municipal court of Chicago and caused a replevin writ to be served on defendant. On the same day before plaintiff arrived the sheriff of Cook county executed a replevin writ on defendant in a certain cause pending in the Circuit court of Cook county in which the Gordon Motor Finance Company was plaintiff and the Aetna Acceptance Corporation was defendant and took possession of the Packard automobile in question in the instant case, consequently the defendant was unable to deliver possession of the automobile to the bailiff of the Municipal court. February 27, 1930, plaintiff was advised that the automobile in question had been taken possession of by the sheriff of Cook county under a writ of replevin issued by the Circuit court of Cook county in case No. 196165, entitled Gordon Motor Finance Company v. Aetna Acceptance Corporation.

The plaintiff introduced in evidence in this cause the conditional sale contract dated December 10, 1929, between the plaintiff and the Auburn-Woodlawn Motors, Inc., who had assigned the contract to defendant, which contract provided, that the title to the automobile shall not pass to the purchaser until all installments of said note are paid in full, and until such payments shall have been made said automobile shall remain the property of the seller. It also provided that if the seller shall feel insecure, the seller, at his option, may take possession thereof.

[illegible]



It is insisted that plaintiff cannot recover on the evidence for the reason that defendant's title to the automobile was paramount to that of plaintiff, and having obtained possession of the automobile rightfully no action for conversion could be maintained against it.

A conversion is any unauthorized act which deprives a man of his property, permanently or for an indefinite time. It is essential, that the plaintiff at the time of the conversion should have not only the right of property in the chattel, but also the right to its immediate possession. (Ridge v. Ciffrow, 220 Ill. App. 590, and cases cited. See also Montgomery v. Brush et al., 121 Ill. 313; Lanton et al. v. Ewing, 240 Ill. App. 607.) It is clear from the conditional sale contract in evidence, that the title to the automobile did not pass to the plaintiff until the automobile was paid for in full. On the day the automobile was delivered by plaintiff to defendant it had not been paid for. Furthermore, under the conditional sale contract the seller, if it should feel insecure, had the right to take possession of the automobile. True, the right to take possession under the conditional sale contract is not an arbitrary one, but the defendant had the right to exercise its judgment in good faith and it must have such grounds for feeling insecure as amount to probable cause. (Hogan et al. v. Akin, 181 Ill. 448.) This the defendant had and so informed plaintiff. The evidence in the instant case justified defendant in feeling insecure and it acted in good faith and upon probable cause. "The essence of conversion is not acquisition of property by the wrongdoer, but the wrongful deprivation of it to the owner," \* \* \* (38 Cyc. 2007.) To maintain trover, the plaintiff must show a tortious conversion of the personal property by defendant. (Owen et al. v. Weedman, 32 Ill. 409.) If there was a conversion it must be regarded as having taken place on February 10, 1930, when plaintiff was informed that the people who had sold him the automobile





had put two or three mortgages on their automobile deals, therefore the automobile would have to be taken in, to which plaintiff agreed and drove the automobile to defendant's garage and there gave the keys to defendant, receiving a receipt for the automobile. It is not claimed that defendant took possession of the automobile with any evil intent or from any improper motive, or that it thereby acted with a want of good faith. The voluntary delivery of the automobile and the keys under the circumstances in this case gave defendant a right of possession. His possession, therefore, was lawful and plaintiff had no right to immediate possession, which was essential to his cause of action. (Spaar v. Elakis, 188 Ill. App. 304; Genuine Panama Hat Works v. Paragon Hat Co., 245 Ill. App. 531.)

The judgment will be reversed with finding of facts.

REVERSED WITH FINDING OF FACTS.

Scanlan, P. J., and Gridley, J., concur.





34441

FINDING OF FACTS.

We find as facts in this case that defendant, Aetna Acceptance Company, on February 10, 1930, had title to the automobile in question; that on that date plaintiff surrendered possession of the same to defendant; and that defendant did not unlawfully convert said automobile to its own use.

1944

UNITED STATES

It was in fact in this case that the defendant, John

Associates Company, on January 10, 1930, was filed in the

automobile in question; that on July 10, 1930, was filed in the

possessor of the car in question; and that the defendant did not

actually receive the automobile in the car.

34465

MARGARET GUNSS,  
Appellee.

vs.

EASTHOLM, MELVIN and YEAGER, Inc.,  
Appellant.

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

259 I.A. 674<sup>2</sup>

MR. JUSTICE KERNER DELIVERED THE OPINION OF THE COURT.

On November 8, 1927, plaintiff while attempting to cross Sheridan road, walking westerly on the south cross walk at Albion avenue, in Chicago, was injured by a south bound automobile belonging to defendant and operated by one of its employees. She sued for damages and upon trial with a jury obtained a verdict for \$20,000. Judgment was entered on the verdict and defendant appealed.

The amended declaration consisted of four counts and four additional counts. The first count of the amended declaration alleges that defendant negligently, carelessly and unskillfully managed and operated the automobile; the second, that defendant drove through the residence portions of Chicago at a rate of speed in excess of fifteen miles per hour, contrary to the statute; the third, that defendant drove the automobile through the streets of Chicago at a rate of speed greater than was reasonable and proper, having regard to the traffic and use of the way, so as to endanger the life or limb or injure the property of any person, contrary to the statute; the fourth charges in combination the same as the second and third. The first additional count charges that on November 8, 1927, the defendants were possessed of a motor vehicle used in their business, and by their servants caused said motor vehicle to be driven over divers public highways, to-wit: Sheridan road between two other public highways, to-wit: North Shore avenue and Loyola avenue, in Cook County, Illinois; that plaintiff in the exercise of ordinary care for her own safety, rightfully and





lawfully did pass in, along, upon and over said highway at the intersection of Albion avenue; that it was the duty of defendants to exercise ordinary care on their behalf in operating said motor vehicle, yet defendants, by their servants, not regarding their duty, so carelessly and negligently ran, managed and operated and propelled said motor vehicle over said highway, that the same forcibly and violently ran into and struck the plaintiff while she was in the exercise of ordinary care for her own safety, and she was thereby greatly injured, etc. The second additional count charges that defendants drove the automobile at a rate of speed greater than was reasonable and proper and at the rate of thirty-five miles per hour; the third additional count charges that defendants in passing and overtaking a vehicle caused their vehicle to pass on the right-hand side and by reason of such negligence caused the injury to the plaintiff.

The fourth additional count charges that defendants wantonly and recklessly caused said motor vehicle to be propelled in a southerly direction in said highway at and beyond a dangerous rate of speed at the rate of, to-wit: thirty-five miles per hour, and wantonly and recklessly caused said motor vehicle then and there operated by the defendants to pass on the right side of said other motor vehicle then and there in said highway at said high and dangerous rate of speed, and to and across the intersection of another public highway, to-wit: Albion avenue, so that by reason thereof said defendants then and there wantonly and recklessly caused said motor vehicle so operated by them to forcibly and violently run into and strike against the plaintiff, etc. The defendants pleaded the general issue, and that they did not own, operate or control the automobile alleged to have caused the injuries. The other defendant in the case was Paul M. Melvin.





On motion of plaintiff he was dismissed out of the case.

Four witnesses in addition to the plaintiff testified to the occurrence. Thomas J. Miller testified that the vicinity of Sheridan road and Albion is <sup>business</sup> a district where there are many stores. Commencing where the elevated road crosses Sheridan road, south to Loyola, Sheridan road is built up as a solid block. On the east side of the street is Loyola University and two business establishments, and then for a block is vacant property up to Albion. On the southeast corner of Albion and Sheridan road there is a vacant building. At the northeast corner is a Standard Oil station and the rest of the block are studios. He was on the northeast corner of Sheridan road and Albion and saw plaintiff. She was on the southeast corner and started across the street. He saw a Packard sedan coming from the north, stop in the inside lane of Sheridan road between the north and south side of Albion. The driver of the Packard stopped his car about ten, fifteen or twenty feet north of her and as she started to walk across the street to the west he saw an Auburn sedan, the car in question, also coming from the north, going south on Sheridan road, moving between thirty and thirty-five miles an hour. It moved to the west when it got back of the Packard, passing it and struck plaintiff with the front fender and bumper. She flew through the air and then dropped on the pavement twenty feet down the street. On cross-examination he testified the accident happened while he was crossing from the north to the south side of Albion avenue; that the Packard was about fifteen feet long and the Auburn car was about fifteen or twenty feet back of the Packard when it turned from behind the Packard. That particular morning was just about the time when the people were beginning to come down to work; there was considerable traffic along the street, going toward town.

William C. Mettrick testified that on November 8, 1927,

the matter of eligibility he was dismissed out of the race.

Two witnesses in addition to the witnesses mentioned

in the foregoing, Thomas J. Smith testified that the witness

of mention here and claim is a witness who was seen

before. Concerning these the witness testified

that, though he knows, that the witness is a solid black

on the east side of the street in the vicinity of the hotel

near the intersection, and that he is a witness who was

seen. In the witness's account of the witness's testimony

is a recent building. As the witness's account is a witness

that the witness is a witness who was seen on the street

near the corner of the street and the witness's testimony

on the witness's account and the witness's testimony

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at about 7:45 a. m., he was on the southwest corner of Sheridan road and Albion and saw plaintiff in the center of Sheridan road walking west. It had been raining, drizzling and was a cold, dark morning and the streets were wet; that he saw coming south the Packard car; it stopped at Albion and she walked in front of it. She glanced around to the rear of the Packard. A car that was back of the Packard pulled out from the rear and passed to the right and hit her with the left front fender and bumper. The car that struck her was going at least thirty miles an hour. On cross-examination he testified plaintiff had taken about one step from the west edge of the Packard before she was struck. The car that struck her came to within three or four feet of the Packard when it turned to the west.

John V. Dwyer testified that on November 8, 1927, he was driving north on Sheridan road, south of Albion avenue; that he first saw plaintiff when she was crossing from the east side of Sheridan road to the west on the south cross walk of Albion. She was walking in a normal way. There was a car standing at the intersection of Albion and Sheridan road in the south bound lane of traffic to the west of the middle of Sheridan. The front end of this car was probably about ten feet from the south crosswalk. She turned her head to the north and continued to walk in a westerly direction when this fellow came along on the right side of the Packard car, and as he came to the south crosswalk he applied his brakes and skidded and the left fender struck her and threw her to the pavement. She was four or five feet west of the Packard car at the time she was struck. He did not hear any horns blown and his hearing was good. Paul M. Melvin is the man who was driving the car that struck her. After he struck her, his car stopped about fifteen feet south of the south crosswalk. On cross-examination he testified that at the time the young lady was hit she was probably twenty-five or thirty feet south



at about 7:30 a.m., he was on the highway about a quarter  
road and then he saw a light in the center of the road  
which was. It was a light, a light, and was a light, a  
morning and the lights were very. That he was coming from the  
back of it stopped at a light and she walked in front of it.  
The light was at the rear of the car. One that was  
back of the car pulled out from the rear and passed to the right  
and his car with the left front fender and bumper. The car that  
stopped was going at about thirty miles an hour. On cross-  
examination he testified that he had taken about one step from the  
west side of the car and was at the car. The car was at the  
back of the car and at the rear of the car it was  
to the west.

John F. Taylor testified that on December 12, 1937, he was  
driving north on Highway 101, south of Alameda Avenue; that he  
first saw plaintiff when she was crossing from the east side of  
Highway 101 to the west on the south side of Alameda. She was  
walking in a normal way. There was a car standing at the intersection  
of Alameda and Highway 101 in the south bound lane at traffic to the  
west of the light at the intersection. The light was at the  
probably about ten feet from the south crosswalk. She walked her  
head to the north and continued to walk in a westerly direction when  
this light was also on the right side of the Highway 101 and as  
he came to the south crosswalk he applied his brakes and alighted and  
the left fender struck her and threw her to the pavement. She was  
four or five feet west of the Highway 101 and was at the  
he did not hear any other person and his hearing was good. That he  
Helen in the man who was driving the car that struck her. After the  
struck her, his car stopped about fifteen feet south of the south  
crosswalk. On cross-examination he testified that at the time the  
young lady was hit she was probably twenty-five or thirty feet south

of the south crosswalk; that he did not see the car until it practically struck her, the Packard obscuring his vision; that he noticed a man in the Auburn change his brakes as the front end of the car was passing her.

Harvey Paine testified that he is an automobile mechanic and a chauffeur; that on November 8, 1927, about 7:30 a. m., he was on the southwest corner of Albion and Sheridan road, walking east on Albion, crossing Sheridan in the opposite direction to what the plaintiff was going. He first saw her when she was on the east side of the street. She came across Sheridan road to the center of the street. There was a car coming from the north. She stopped just about the middle of the intersection on the crosswalk. The Packard car came to a stop about the middle of Albion avenue on the east lane of Sheridan road; then she continued across west; then the other car came from behind the Packard and struck her. She was a couple or three feet west of the Packard car when she was struck by the bumper and left front fender. The car that struck her was going thirty to thirty-five miles an hour. It was an Auburn sedan. On cross-examination he testified that the Auburn car came up to within three feet of the Packard and then turned out. It was pretty nearly straight behind the Packard before it turned to the southwest.

The plaintiff testified that she was twenty-five years old at time of accident, was born in Chicago and had lived there all her life; that on November 8, 1927, she was going south on Sheridan road toward Albion. When she got to Albion she stood there and that is the last thing she remembers. She does not recall crossing the street at all - just remembers coming to Albion and stopped there. The next thing she remembers she woke up at the hospital. The only other witness to the occurrence was Paul E. Melvin, the driver of the Auburn automobile and an employee of the defendant. He testified that he was thirty-four years old; that when he arrived at Sheridan road and







Albion avenue he saw the Packard standing at the intersection and as he got just about even with the front of the car, about two feet west of the Packard, the plaintiff appeared; that he threw on his brakes and put out his clutch as quickly as possible and turned the front wheels to the curb. The street was very wet and a lot of leaves and stuff were on the street. The front wheel of the car swerved and struck her. She was coming toward the car. Her body hit the left rear mud guard. When coming down the street he did not come within three feet of the back end of the Packard and then turn it. It was possibly seven or eight feet. It was much farther than three feet. He passed two feet west of the Packard car. There was never any time when he was directly behind the Packard car. The Packard did not stop suddenly; it slowed down gradually. When he first saw the plaintiff come into view the front of his car was possibly a foot or two behind the front of the Packard car and he threw on his brakes and clutch and swerved the car around toward the curb. When he came along Sheridan road he was going twenty to twenty-five miles at the outside when he passed the Packard car. When he saw the Packard car coming to a stop he eased around him and started down the road, started south on Sheridan. On cross-examination he testified the first time he noticed the Packard car was when he pulled right in back of it. He did not recall whether it was a block or two or three blocks that he had been following it. When he started to pass the Packard he was not traveling faster than seven or eight miles but was picking up speed. While following the Packard, he was traveling at about twenty-five to thirty miles an hour; when he first started to pull out to go by the Packard, he was going eight or ten miles an hour; when the front end of his car was even with the rear end of the Packard, he was going twelve to fifteen miles an hour; when he passed the Packard he was about one foot from it. He had a clear view of what was straight ahead and saw her coming across Sheridan road; she

William never saw the black car until it was in the rear view of the car, about 100 feet behind it. The black car was moving on his tracks and was not in a position to pass him. The black car was very close and turned the front wheels to the right. The front wheel of a lot of leaves and dirt were on the street. The car swerved and struck him. The car was coming toward the car. He body hit the left rear wheel. When coming down the street he did not come within three feet of the back end of the black car. There turn it. It was possibly seven or eight feet. It was much farther than three feet. He passed the front of the black car. There was never any time when he was directly behind the black car. Backward the car was moving and it showed down gradually. When he lifted the black car into view the front of his car was possibly a foot or two behind the front of the black car. When he broken and struck and swerved the car struck toward the car. When he came right behind him he was going twenty to twenty-five miles an hour. When he saw the black car, when he saw the black car coming to a stop he moved forward and started down the road. Afterward he was in a position to see the black car when he pulled right in back of it. He did not recall whether it was a black or was on three wheels. He had been following it. When he started to pass the black car he was not traveling faster than seven or eight miles an hour. While following the black car, he was traveling at about twenty-five to thirty miles an hour. When he first started to pass the black car, he was going eight or ten miles an hour. When the front end of his car was even with the rear end of the black car, he was going twelve to fifteen miles an hour. When he passed the black car he was about one foot from it. He had a clear view of what was straight ahead and was not coming across William's road.



was just in front of the Packard car. She took about two steps when he struck her, and at that moment he put on his brakes. The car was possibly two feet beyond the front end of the Packard car when he first saw her. She was at that moment perhaps twelve feet south of the Packard car. At the moment he struck her he was going possibly twenty-five miles an hour. He further testified that the street was very wet and that there were a lot of leaves and stuff from the trees on the street, so much so that the car went just as if it were a sled. He said the Packard did not stop suddenly because the roads were too slippery to stop suddenly. There were leaves on the street; it was greasy. He knew as he went along there that a person was apt to be crossing that street at that time; that there were many people that passed up and down across Sheridan road at that point in the morning going to the station.

Defendant contends that the cause should be reversed on the ground that there is no evidence of negligence on the part of the defendant; that plaintiff was guilty of contributory negligence as a matter of law and fact; that there was no evidence to justify the court in sending the case to the jury as to the wilful count; that the declaration does not properly charge wilful and wanton conduct; that the court erred in instructing the jury; that the verdict is excessive. We are satisfied by a preponderance of the evidence that the premises at Sheridan road and Albion avenue were devoted to business; that at the time of the accident it was raining and the street was wet and slippery; that people were apt to be crossing that street at any time; that there were many people passing up and down and across Sheridan road at that point in the morning, going to the elevated station; that immediately before the plaintiff was struck a Packard car stopped at Albion avenue in the center of Sheridan road and the defendant's automobile followed, coming at the rate



was just in front of the window. The door was open  
when he came out, and at that moment he put on his shoes. The  
car was possibly the first beyond the front end of the building and  
then he left the car. The car was a dark color, possibly black or  
dark blue. At the moment he started he was going  
generally twenty miles an hour. He further testified that the  
driver was very fast and that there was a lot of power and speed  
from the car on the street, so much so that the car went down as if  
it were a sled. He said the driver was very much excited because  
the roads were too slippery to stop suddenly. There were many  
on the street, it was crowded. He knew as he went along there were  
a person was up to be arrested and there was a crowd that there  
were many people that passed up and down across the street that  
point in the morning, in the afternoon.

Defendant contends that the case should be thrown out  
the ground that there is no evidence of negligence on the part of  
the defendant; that plaintiff was guilty of contributory negligence  
as a matter of law and facts. That there was no evidence to justify  
the court in finding the case as the jury did in the trial court.  
That the defendant was not guilty of contributory negligence and was not  
guilty of negligence in the morning, the jury, and the verdict  
is sustained. It is sustained by a preponderance of the evidence  
that the plaintiff was negligent and that the defendant was not  
negligent. That at the time of the accident it was raining and the  
street was wet and slippery; that people were up to be arrested  
that street at any time; that there were many people passing up and  
down and across the street and at that point in the morning, going  
to the street station; that immediately before the accident was  
stated a truck was stopped at a station across the street at which  
time and the defendant's automobile followed, coming at the rate

of about thirty to thirty-five miles an hour, and when the Packard came to a stop, defendant's car swerved to the right and continued to the south two or three feet west of the Packard car and there struck plaintiff, throwing her some twenty feet. The driver of the automobile admitted that the street was very wet; that there was a lot of leaves on the street; that the street was greasy; that he knew as he went along there, that a person was apt to be crossing that street at any time and he knew there were many people that passed up and down and across Sheridan road at that point in the morning, going to the station. Whether the driving of an automobile under such conditions as are shown in this record was wilful and wanton conduct on the part of the driver of the automobile was a question of fact for the jury to determine. (Bernier v. Illinois Central R. R. Co., 296 Ill. 464.) It is claimed by defendant that the driver of the automobile did not see the plaintiff until his automobile struck her, and, therefore, it cannot be said under all the circumstances that the defendant is guilty of wilful and wanton negligence. It was said in the case of Brown v. Illinois Terminal Co., 319 Ill. 326, 330:

"It has been frequently said by this and other courts that whether an injury is the result of wilful and wanton conduct is a question of fact, to be determined by the jury from all the evidence. Where there is no evidence tending to support the charge of wilful and wanton conduct there is no question of fact to submit to the jury, and the motion to direct a verdict on those counts would present a question of law for the court to decide. Courts have recognized the difficulty of accurately stating under what circumstances a defendant may be held guilty of wilful and wanton misconduct in causing an injury. Such conduct imports consciousness that an injury may probably result from the act done and a reckless disregard of the consequences. Ill-will is not a necessary element to establish the charge. Plaintiff and defendant had a legal right to pass over the highway crossing, and each was required, in doing so, to observe due regard for the legal right of the other. A wilful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care." (Citing cases.)

It was the duty of the driver of the automobile to have regard for the safety regulations provided by law and to take into consideration







existing conditions at the place where an injury may occur, and to be on his guard and have his car under control, at a street intersection where he was bound to know that pedestrians might be crossing; he must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury. It is difficult, if not impossible, to lay down a rule of general application by which may be determined what degree of negligence the law considers equivalent to a wilful or wanton act. Whether an act is wilful or wanton is greatly dependent upon the particular circumstances of each case, but under the authority of Brown v. Illinois Terminal Co., supra. and Robeson v. Greyhound Lines, Inc., 257 Ill. App. 273, 282; Walldren Express Co. v. Krug, 291 Ill. 472; Layton v. Gzenoski, 256 Ill. App. 461; Williams v. Kaplan, 242 Ill. App. 166, 180; Mantonys v. Wilbur, 251 Ill. App. 364; Gannon v. Kiel, 252 Ill. App. 550, and the record in the instant case, the court did not err in submitting the case to the jury and the jury was justified in finding that defendant was guilty of wilful and wanton conduct, which was the proximate cause of the injury to plaintiff, and we approve of that finding in that regard.

The defendant contends that the fourth additional count did not properly charge wilful and wanton conduct, and cites the case of Harris v. Piggly Wiggly Stores, Inc., 236 Ill. App. 392. The count in the instant case charges defendant wantonly and recklessly caused said motor vehicle so operated by it to forcibly and violently run into and strike the plaintiff. In the Harris case one count charged that the defendant negligently drove the motor truck in Wabash avenue over the intersection of a certain highway, that by means whereof, it injured the plaintiff, while in other counts it charged that the defendant wilfully drove the motor truck at a high, dangerous and reckless speed so that by means thereof the plaintiff was run into. Such charges were there held not to be a charge of an





injury wilfully inflicted. In the instant case the defendants are charged that they recklessly caused said motor vehicle to forcibly and violently run into and strike the plaintiff. The case of Harris v. Piggly Wiggly Stores, supra, was not taken to the Supreme Court. The exact question, however, was later presented to the Appellate Court in the case of Williams v. Kaplan, supra, in which a certiorari was denied in the Supreme Court; in that case the declaration charged that, "the defendant so wilfully, wantonly and maliciously ran, managed, operated and drove a certain automobile, by him driven in a westerly direction on said Diversey boulevard that the said automobile, \* \* \* <sup>was</sup> caused to, and did, run into, upon and against the deceased." It was contended that the declaration should have alleged that the defendant knew that the victim of his negligence was in such a position that he was likely to be injured. The court reviewed all of the Illinois cases and concluded (p. 179):

"In the instant case, therefore, although the defendant may not have known that Williams was in such a position as to be likely to be injured, and had no intention, as a matter of fact, to injure him, such knowledge and such intention, in fact, were not necessary elements of his, the defendant's, liability for wilful and wanton negligence. The conclusion follows, therefore, that the declaration properly stated a cause of action based upon wilful and wanton negligence. In so far as the decision of this court in Harris v. Piggly Wiggly Stores, Inc., 236 Ill. App. 392, is to the contrary, it must be considered as not to be followed, especially in view of the later decision of the Supreme Court. The Bremner case, supra."

See Bremner v. L. B. & W. R. F. Co., 318 Ill. 11; Ames v. Armour & Co., 257 Ill. App. 449.

The court, at plaintiff's request, gave to the jury the instruction in the words of the first sentence of the Motor Vehicle Act. This instruction informed the jury as to the law upon which the plaintiff based her right of action. The instruction did not direct a verdict but was a preliminary instruction calling attention of the





jury to the Act on which the action was based, which must be the basis of their deliberation. The court did not err in the giving of this instruction. (Devine v. C. R. I. & P. Ry. Co., 266 Ill. 243.) We have examined the other instructions tendered by the plaintiff and given by the court and find no error therein. The defendant requested the court to instruct the jury on the law of contributory negligence and by these instructions endeavored to have the court instruct the jury that contributory negligence on the part of plaintiff was a complete defense. Contributory negligence is no defense or excuse for wilful and wanton misconduct on the part of a defendant. (Heidenreich v. Bremner, 260 Ill. 439; L. S. & M. S. Ry. v. Bodemer, 139 Ill. 596; Wabash R. R. Co. v. Speer, 156 Ill. 244.) There was no error in the refusal of this instruction. The remaining question presented for review is the contention that the verdict is excessive. The accident occurred on November 3, 1927. She was immediately taken to a hospital where she remained until December 24. She was unconscious for three days; she remained in bed for four weeks after she returned to her home. She was at home five months before she again resumed her work. Prior to the accident she was in good health; she sustained a fracture of the skull, two fractures of the pelvis and an injury to the lower spine. She has severe headaches, nausea and dizziness. These conditions are permanent. We would not be justified in holding that the damages were excessive.

We find no reversible error and the judgment will be affirmed.

AFFIRMED.

Scanlan, P. J., and Gridley, J., concur.

jury in the fact of which the parties were bound, which was the basis of their deliberation. The court did not in the opinion of this institution. (Travis v. G. E. L. & F. Co., 200 Ill. 222) We have examined the other instructions tendered by the plaintiff and given by the court and find no error therein. The defendant requested the court to instruct the jury on the law of contributory negligence and by these instructions answered to have the court instruct the jury that contributory negligence on the part of plaintiff was a complete defense. Contributory negligence is no defense or excuse for willful and wanton misconduct on the part of a defendant. (Wright v. Wright, 200 Ill. 422; L. & F. Co. v. Y. B. Co., 212 Ill. 521; L. & F. Co. v. Y. B. Co., 212 Ill. 521) There was no error in the refusal of this institution. The question presented for review in the contention that the verdict is excessive. The accident occurred on November 5, 1927. The was immediately taken to a hospital where she remained until December 24. She was unconscious for three days; she remained in bed for four weeks after the accident in her room. The was at home five months before she again resumed her work. There is no evidence that she was in good health and without a fracture of the skull, the fracture of the pelvis and no injury to the lower spine. She has severe headaches, nerves and ailments. These conditions are permanent. It would not be justified in holding that the damages were excessive. It is no reversible error and the judgment will be

affirmed.

IT IS ORDERED.

Given, at St. Louis, Mo., this 11th day of January, 1928.



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in  
the year of our Lord one thousand nine hundred and thirty,  
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

259 I.A. 674<sup>3</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
SEP 20 1934 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



M. J. Plonsker,

appellee,

Appeal from the Circuit Court of

vs.

Lake County.

Joseph Cabonargi,

appellant,

JONES, J:

Plaintiff, M. J. Plonsker, instituted an action in assumpsit against Joseph Cabonargi, defendant, to recover a balance alleged to be due, under a contract, for the installation of a hot-water heating plant. A jury trial resulted in a verdict and judgment in favor of plaintiff for \$396.00, and this appeal is prosecuted by the defendant.

William G. Day was having a residence built in Ravinia, Highland Park, Illinois. D.W.F. Turbyfill was the architect, Van Ness was the general contractor, and Cabonargi, a sub-contractor. Plaintiff claims he contracted to install a hot water heating plant at the price of \$660.00 and defendant claims the contract called for a steam heating plant at a cost of \$485.00.

Plaintiff, in a letter written to Turbyfill, dated April 6, 1926, submitted a bid to install a steam heating plant for \$485. He testified that prior to May 20th, 1926, and after he had submitted this bid, he told defendant in a telephone conversation that two bids had been submitted, one for a steam plant at ~~\$2~~ \$485 and one for a hot water plant at \$660.00; that defendant replied he would want to put in the hot water job, to which plaintiff said, "Well, the price will be \$660.", and defendant responded, "Well, I will let you know."

On May 20, 1926, plaintiff received the following letter from defendant:- "Your proposition is hereby accepted for heating to be done on Mr. Day's residence to be erected at Ravinia Park, Illinois, and when the job will be ready for



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your work, I shall notify you, hoping you will be in a position to take good care of it. As I am the general contractor for the above job, Mr. D.W.F. Turbyfill has turned your proposition over to me." On May 28th, plaintiff wrote defendant that he did not know which proposition was accepted -- the hot water or the steam. Defendant introduced in evidence a carbon copy of a letter which he testified he wrote plaintiff stating that the proposition accepted was for steam. Plaintiff denied receiving the letter.

In July or August, Plaintiff proceeded to install a hot water heating plant and in September, defendant sent him an order for \$300.00 on account. On the order it was stated that the contract price was to be \$485.00. Plaintiff by letter replied that the amount should be \$660 for the hot water system, instead of \$485.00. Thereupon, defendant wrote plaintiff: "In reply to your letter of recent date, you may go to Mr. Van Ness of the Van Ness Realty Co., and he will give you a check for the difference between the steam and the hot water prices, that is, the difference between \$660 and \$485. The balance due you will be paid when the job is completed."

The testimony is somewhat conflicting, but the record not only shows plaintiff performed his contract under defendant's supervision, but that defendant knew a hot water system was being installed and made no protest against it. Without further detailing the testimony, we are inclined to the opinion that the verdict of the jury is supported by the weight of the evidence.

Pursuant to the suggestion contained in defendant's letter, plaintiff called on Van Ness with reference to the balance due him, and testified that Van Ness claimed he had nothing to do with the heating job. In view of the fact that defendant had referred plaintiff to Van Ness, it was competent to permit plaintiff to tell what Van Ness said in this connection. (Bartoletti v. Hoerner, 154 Ill. App. 336; McBride v. Griffin, 59 Ill. 227.)

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It is urged that some of the radiators were not placed as shown on the plans, and that therefore plaintiff cannot recover under the common counts. Both Cabonargi and the owner of the premises were frequently in and about the building while the heating plant was being installed, and neither of them made any complaint about the location of the radiators. The owner never objected until about a year after he moved into the house. When there has been performance of a contract and the work has been accepted as completed, recovery may be had under an indebitatus assumpsit. (Concord Apartment House Co. v. O'Brien, 228 Ill. 360.)

We have reached the conclusion from an examination of the record that the rulings on evidence offered were correct. The judgment of the trial court is affirmed.

Judgment affirmed.



STATE OF ILLINOIS,

SECOND DISTRICT

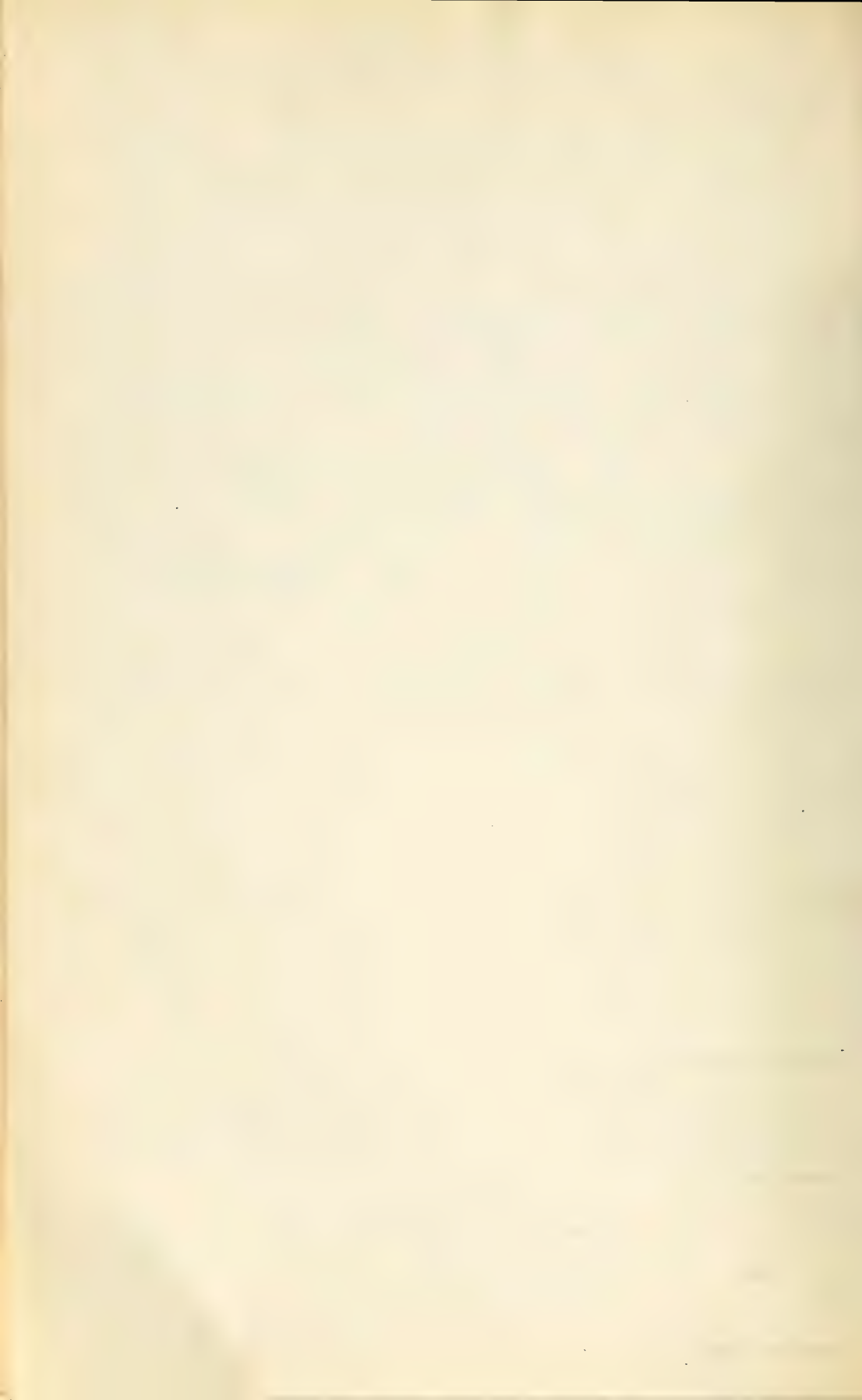
} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and twenty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in  
the year of our Lord one thousand nine hundred and thirty,  
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

259 I.A. 674<sup>4</sup>

BE IT REMEMBERED, that afterwards, to-wit: On

SEP 30 1930

the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





T. J. Stahl and L. E. Hulse,  
Co-Partners, doing business as  
T. J. Stahl & Co.,  
Appellees,

vs.

Wilbur Glenn Voliva,  
Appellant,

Appeal from  
Circuit Court  
of Lake County.

JONES J:

Plaintiffs, T. J. Stahl and L. E. Hulse, partners doing business as T. J. Stahl & Company, instituted an action in assumpsit to recover commissions for the sale of real estate belonging to defendant, Wilbur Glenn Voliva. The first Count of the declaration averred that plaintiffs were employed by defendant to find a purchaser for real estate valued at \$100,000 and that defendant agreed to pay them a commission at 5% of the purchaser price. The other count is the common counts. A jury trial resulted in a verdict and judgment in favor of plaintiff for \$5,000.

The parties concede that the evidence is quite conflicting and that the case is close on the facts. It therefore follows that unless the trial court committed reversible error in its rulings, the verdict of the jury should be sustained. (Baldwin v. Alwine, 109 Ill. App. 92.)

The Court admitted conversations of plaintiff Stahl with the witnesses Leech and Pihl, who represented themselves to be agents of the defendant. An agency cannot be shown merely by the declarations of the alleged agents. However, under the whole record, the agency of Leech and Pihl was fully established and the defendant was not prejudiced by the court's early rulings.

Hurd Clendinen was defendant's attorney in fact and under the power granted him, he was authorized to lease, demise, bargain, sell, and convey all personal property and lands owned



by the defendant, and to transact any and all kinds of business of whatsoever nature pertaining to any phase or department of the defendant's business. He took up the matter of the commissions contract between the plaintiffs and the defendant, and in a letter (plaintiff's Ex. 2) stated that the commission on the Kleinman deal would be forwarded to plaintiffs the following Monday or Tuesday; that it was expected the Todd & Warner deal would be closed within a day or two; and that the Walker deal would be closed immediately. The letter further stated that on all future sales of real estate, plaintiffs must make all arrangements with Mr. Leech as to commissions. It then concluded as follows: "All listings with you are hereby cancelled until new arrangements are made that will comply with the above facts. You may call upon Mr. C. C. Leech or call at our office in the Administration Building." The letter was signed "Wilbur Glenn Voliva" by "W. Hurd Clendinen His attorney in fact." This letter leaves no room to doubt the employment of plaintiffs by the defendant.

The trial court did not err in admitting parol proof of the transfer of lands, which plaintiffs claim they sold. If the title to the lands is not directly in issue, the rule requiring the productions of deeds or records does not apply. (Pumphrey v. Giggey, 150 Ill. App. 473.)

Testimony was admitted with reference to an attempt to reach a settlement. As a general rule offers to compromise and statements made in relation thereto are not admissible in evidence; but in this instance the conversations did not deal with an attempt to compromise. There was no disposition shown by anyone to buy peace and to avoid threatened litigation. There was a discussion concerning the whole subject matter in controversy. The parties to it defined their respective contentions. There was not a definite offer of compromise or settlement made by either party. Under the circumstances the rules pertaining to the inadmissibility of offers of compromise cannot be applied in this case. The law favors the settlement of controversies



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out of Court and will protect a party in his endeavor to buy his peace, by making his offers and admissions inadmissible in evidence; but the rule does not extend so far as to protect a party against his admissions where no effort of compromise is attempted.

The Court did not err in refusing defendant's 5th, 6th, and 8th instructions. So far as they stated correct principles of law, they were covered by other given instructions.

The Court orally instructed the jury as to the form of verdict and this is assigned as error. While the statute requires all instructions given by the Court to be in writing, such requirement applies only to instructions relative to the law and not to forms of verdict. (Illinois Central R. R. Co. v. Wheeler, 149 Ill. 525.) Complaint is made of other instructions, but the defendant is not in a position to complain of them, as the bill of exceptions does not recite that it contains all of the instructions given by the court. (T. M. & N. Ry. Co. v. Haws, 194 Ill. 92; Netcher v. Bernstein, 110 Ill. App. 484; Hasterlik v. Strong, 107 Ill. App. 347; Reavely v. Harris, 239 Ill. 526.)

Finding no reversible error in the record, the judgment of the trial court is affirmed.

Judgment affirmed.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and twenty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



13 AT A TERM OF THE APPELLATE COURT, 17

Begun and held at Ottawa, on Tuesday, the Sixth day of May, in  
the year of our Lord one thousand nine hundred and thirty,  
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

259 I.A. 674<sup>5</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
SEP 30 1930 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





IDA M. HINKLE,

Appellee,

VS.

BLOCK & KUHLE CO.,  
a corporation,

Appellant,

APPEAL FROM THE  
CIRCUIT COURT OF  
PEORIA COUNTY.

JONES J:

This cause was before us at the May term, 1929 (Gen. No. 8076) and a judgment in favor of plaintiff was reversed and the cause remanded because we deemed the judgment to be against the manifest weight of the evidence.

The original declaration consisted of two counts which charged general negligence. After the cause was reinstated in the trial court, two counts charging wilful and wanton misconduct were added, but at the close of plaintiff's evidence, they were excluded on motion of defendant. The second trial resulted in a verdict and judgment for plaintiff for \$5,000.

Plaintiff was injured by falling down a stairway in defendant's store. The facts sufficiently appear in our former opinion. On this appeal it is admitted by counsel that there is no substantial change in the evidence.

The declaration charged that the stairway opening was unguarded and not apparent to plaintiff. She contended that the accident occurred as a result of insufficient light where the stairway was located, and that the railing on the west and south sides of the opening in the floor was entirely concealed by furniture and rugs packed around and over it, thus rendering the opening dark and obscure. On appeal to this court, her briefs and arguments conceded that this was the only disputed fact of consequence.

We believed the weight of the evidence was so against plaintiff's contention and the judgment was not allowed to stand.





Upon the question of light, we said the inference is irresistible that if Mrs. Hinkle had been in the exercise of ordinary care for her own safety, she could have observed the stairway and prevented her injuries.

Where a judgment is reversed without specific directions, it is entirely abrogated and the cause stands as if no trial had ever occurred. The parties are entitled to a trial de novo. (Roggenbuck v. Breuhaus, 330 Ill. 294.) The conclusion of the reviewing court upon matters of fact does not control upon the second trial. (People v. Lord, 315 Ill. 603.)

The stairway down which plaintiff fell is located against the east wall of the building. Rolls of linoleum were standing near the wall a short distance from the head of the stairs. The west and south sides of the opening in the floor were protected by a railing of iron pipe. Plaintiff walked east from the center of the store towards the linoleum in an aisle between rows of furniture. The aisle led to the space at the head of the stairway. She passed the newel post of the railing, reached the linoleum, and stopped to examine it. Her daughter was standing at a davenport placed against the west railing of the stairway. There was a light in the basement about twelve feet from the stairway, and at the place where plaintiff was standing she was able to see the pattern and colors of the linoleum. She called her daughter's attention to a particular piece of it and almost immediately thereafter she fell down the stairway.

Where a given state of facts has been successively submitted to juries, and they reached the same conclusion, and that conclusion has been approved by the trial Judge, a court of review is not warranted in reversing the judgment, even if it is inclined to take a different view of the facts from that taken by such juries. (City of Elgin v. Nofs, 113 Ill. App. 618; Shannon v. Swanson, 109 Ill. App. 274; 208 Ill. 52; Stephens v. Neilson, 154 Ill. App. 67; Uptegrove v. Chicago Great Western R. R. Co., 168 Ill. App. 89; C. & A. R. R. Co. v. Flaherty, 105 Ill. App. 14; 200 Ill. 151.)

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THE CHAIRMAN: I have the honor to acknowledge the receipt of your letter of the 10th inst. and in reply to inform you that the same has been forwarded to the proper authorities for their consideration. I am, Sir, very respectfully,  
Yours obedient servant,  
J. H. [Signature]

[illegible]

There was evidence tending to support the declaration and the trial court could not direct a verdict on either trial. Plaintiff was entitled to have her case submitted to a jury, unless it could be said, that as a matter of law, the testimony did not fairly tend to prove her cause of action. While we are not impressed with the present verdict any more than with the former one, still we cannot say, as a matter of law, that plaintiff was guilty of contributory negligence. The question of fact had to be submitted to the jury. (Radebaugh v. F. W. Woolworth Co. 214 Ill. App. 365.)

Courts are slow to set aside a verdict on the ground that it is not sufficiently supported by the evidence, even in the first instance; but where a second verdict is the same as the first, still greater reluctance is felt. (City of Elgin v. Nofs, supra.) Whether or not plaintiff was guilty of contributory negligence has been twice decided by a jury adversely to defendant's contention. The course of this case furnishes us no reason to believe a different verdict would result from another trial.

For the reasons mentioned, the judgment is affirmed.

Judgment affirmed.





STATE OF ILLINOIS, }  
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and twenty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of October, in  
the year of our Lord one thousand nine hundred and thirty,  
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

259 I.A. 675'

---

BE IT REMEMBERED, that afterwards, to-wit: On

OCT 14 1930

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:



MARY SCANLON,

Appellant,

vs

ASA BEEBE, MARK BEEBE, et al,

Appellees

Appeal from

Circuit Court,

Kankakee County.

JETT, P. J.

Appellant filed a bill in the circuit court of Kankakee County in the nature of a creditor's bill, to which appellees were made parties defendant. On hearing, said bill was dismissed for want of equity, and an appeal was prosecuted to the supreme court. The allegations of the bill are substantially as follows: that

Appellant recovered a judgment against appellee Asa Beebe in the sum of \$800 in the circuit court of said county in a suit for personal injuries, in which suit Mark Beebe, the father of Asa Beebe, was a co-defendant. On the trial the court directed a verdict for Mark Beebe. Several executions were issued on said judgment, all of which were returned not satisfied; that since the rendition of said judgment Asa Beebe came into possession of \$3000 as a "devisee" under the will of Lyman C. Mellen. Appellant by garnishment proceedings recovered only \$327.38 of said \$3000 because Asa Beebe had "contrived or pretended" to have received all of said sum from the executor except said sum of \$327.38; that there is still due appellant on the judgment the full amount thereof, with interest, less \$327.38; that with the amount received from the executor, the Rogers Auto Supply Store was purchased; that Asa Beebe is owner or interested in said business. But Mark Beebe pretends to be the owner of said business for the purpose of defeating the collection of appellant's judgment; that on June 9, 1926, one Cooley made a warranty deed to Mark Beebe to a house and lot in Kankakee which should be held to belong to Asa Beebe; that the purpose of having the deed made to Mark Beebe instead of Asa Beebe was to evade the enforcement of said judgment. Asa Beebe took possession of said



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[illegible][illegible]

premises immediately after its purchase and has lived therein ever since; that the First Trust and Savings Bank and Edgar Legg, executor, may have in their possession property belonging to Asa Beebe or information relating to the Rogers Auto Supply Company, 'alias Asa Beebe.'"

Said bill prayed for discovery, and that appellees be required to answer certain interrogatories propounded in said bill; that appellant's judgment be satisfied out of property found to belong to appellee Asa Beebe, and that appellees be required to pay appellant's judgment, and for general relief. The interrogatories propounded to appellees respectively were required to be answered under oath.

Separate answers were filed by appellees respectively. The answer of Asa Beebe and Mark Beebe was to the effect that Asa Beebe had no interest in the property referred to in appellant's bill; that appellee Mark Beebe was the owner of the Rogers Auto Supply Store and of the real estate and automobile referred to in said bill; that Asa Beebe was only the manager of said auto business; that the money received as devisee by Asa Beebe, to wit, \$2,050, was not used to purchase said store, but same was purchased by Mark Beebe with his own money.

Appellee Asa Beebe in his answer further sets forth his ownership of an interest in certain real estate in the state of Missouri, valued at \$50. He did not answer the questions relating to his income and to the business of said Supply Store. Mark Beebe did not answer said questions relating to said business, and further set forth that he had no knowledge of the financial affairs of Asa Beebe.

Edgar Legg, executor, etc., answered that he paid appellee Asa Beebe \$2,050, and paid appellant \$327.38; that he knows nothing further relative to the allegations of the bill or as to the financial condition of Asa Beebe.

Appellant First Trust and Savings Bank made answer to the effect that Asa Beebe had no account with it; that Mark Beebe had \$90.12 in his account; that Asa Beebe signed checks on the

[illegible]

and the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the country.

THE SECRET OF THE GREAT WALL OF CHINA

and that it is not the intention of the Government to use the same for any other purpose.

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account of the Rogers Auto Supply Store; that said auto supply company had to tis account \$334.03; that while said bank had dealings with Mark Beebe, Asa Beebe and the Rogers Auto Supply Company, it had not knowledge as to the ownership of said auto supply store.

Exceptions filed by appellant to the answers of Mark Beebe and Asa Beebe on account of the failure to answer with reference to the affairs of said Supply Co. were overruled.

Prior to 1913, appellant recovered a judgment for \$800.00 against appellee Asa Beebe for injuries sustained by appellant in an automobile accident. ~~Number~~ Numerous executions were issued on said judgment and returned unsatisfied, the only payment ever having been made on said judgment being a payment of \$327.38, which was recovered in a garnishment proceeding against the above mentioned executor.

Appellant placed appellees Asa Beebe and Mark Beebe on the stand as her witnesses. Appellee Asa Beebe testified that the Rogers Auto Supply Company was purchased by and belonged to his father; that he was the manager of and operated said business for his father; that at the time of the trial he was drawing a salary of \$40 per week. He also testified that the real estate in question was purchased by his father from one Cooley, who conveyed the same to his father by warranty deed; that he, Asa Beebe, had occupied said property since the purchase of the same by his father, but that he had no interest whatever therein.

The testimony of Asa Beebe and Mark Beebe and also of certain witnesses who had worked for the auto supply company was to the effect that Asa Beebe was the manager thereof; that he ~~had~~ drew the checks issued by said company, hired the help, and in fact transacted practically all of the business of said supply company. The evidence is also to the effect that about the year 1918 appellee Asa Beebe received from the Lyman C. Hellen estate, through Edgar Legg, executor, \$2050. He testified that he turned said amount over to his father at the time the same was

... ..

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The first thing I noticed when I stepped out of the plane was the cold, crisp air. It felt like a fresh blanket after a long, hot journey. The ground below was a patchwork of green fields and small villages, each with its own unique charm. As I walked through the town, I was greeted by friendly faces and warm smiles. The people here seemed to have a special way of life, one that was both simple and profound. I was struck by the sense of community and the shared values that bound them together. It was a beautiful sight, and I felt a deep connection to the land and its people.

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received, to repay his father for the amount expended toward his education. He further testified that he had attended Purdue University two years and the University of Illinois for a year and a half. Mark Beebe testified that while he made no record of the amount so expended, he was of the opinion that he had expended more than \$2050 in and about said college education.

Appellant, by her bill, makes specific charges against appellees Asa and Mark Beebe to the effect that, for the purpose of defeating appellant's judgment, they were covering up the property of Asa Beebe, and that, said real estate and supply business had both been purchased with property or moneys belonging to Asa Beebe, and which he had turned over to his father in order to defeat said judgment. Appellant propounded interrogatories requiring appellees Asa Beebe and Mark Beebe to answer under oath with reference to said charges. The answers under oath, specifically denied said charges, and were to the effect that said real estate and said Rogers Auto Supply Company belonged to Mark Beebe. The answers and testimony of appellee First Trust and Savings Bank, and of Edgar Legg, executor, etc., throw no light on the questions involved in this case, as neither of said parties purported to have any information with reference to the ownership of the property sought to be charged.

On this record, the trial court entered a decree, dismissing appellant's bill for want of equity. To reverse said decree, this case was appealed to the supreme court, on the theory that a freehold was involved. The supreme court held that a freehold was not involved, and transferred said cause to this court.

One of the grounds urged for a reversal of the decree is that the court erred in ~~xx~~ overruling <sup>certain of</sup> the exceptions to the answers of Asa and Mark Beebe, and in its rulings on the evidence.

The court, in overruling the exceptions to said answers and in excluding the evidence complained of, held that, until there was evidence tending to show that Asa Beebe owned or had an interest in the Rogers Auto Supply Company, appellant was not entitled to inquire into the business of said company. As such interest was





not shown, the court did not err in said ruling.

Where as in this case the bill charges a fraudulent transfer or covering up of property it must be supported by substantial and satisfactory proof. "All transactions are presumed to be fair and honest until the contrary is proved. Fraud will not be presumed, but must be proven as a fact by such clear and convincing evidence that leaves the mind well satisfied that the allegations of fraud are true. McKinnon v. Mickelberry, 242 Ill. 117; Carter v. Carter, 283 Ill. 324-332.

Appellant having called appellees as witness on her behalf, she cannot question their credibility. Their testimony, so far as pertinent to the issue, is to be taken as true, as there is no countervailing testimony. Luthy & Co. v. Paradis, 299 Ill. 380; American Hoist & Derrick Co. v. Hall, 208 Ill. 397; Bowman v. Ash, 143 Ill. 649; Sawyer v. Moore, 109 Ill. 461; Gross v. Mendota Nat'l Bank, 239 App. 415-521.

In view of said sworn answers which can only be overcome by the testimony of two witness or by the testimony of one and by facts and circumstances equal in weight to another (Phillips v. White, 18 Ill. 41; Myers v. Kinsey, 26 Ill. 36; Merchants Nat'l Bank v. Lyons, 185 Ill. 342-352) and of the testimony in the record, we are clearly of the opinion that the court rightly held that appellant had failed to prove the allegations of her bill, and did not err in dismissing the same for want of equity.

For the reasons above set forth, the decree of the trial court will be affirmed.

Decree affirmed.





STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and twenty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of October, in  
the year of our Lord one thousand nine hundred and thirty,  
within and for the Second District of the State of Illinois:  
Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

259 L.A. 625<sup>2</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
OCT 18 1930 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





Cornelius S. Tarbox,	:	
	:	
Appellee,	:	
	:	Appeal from the
-vs-	:	Circuit Court of
	:	Du Page County.
Joseph Schirka,	:	
	:	
Appellant,	:	

Jones, J:

Plaintiff, Tarbox, a florist, brought an action of trespass on the case to recover damages for injuries to his crops and plants, caused by an alleged wrongful act of defendant, Schirka, in polluting a stream running through plaintiff's land.

The declaration consisting of one count, charges that during the year 1928, plaintiff was lawfully possessed of certain premises and that defendant was possessed of certain other premises adjoining the real estate of plaintiff; that there was flowing through the premises of plaintiff a natural stream of clear and pure water, which he used for farming operations and for watering his plants and crops; that defendant's premises were above those of plaintiff and adjoined said stream, which flowed onto the premises of plaintiff; that said defendant emptied into the stream above plaintiff's premises, strong, vile smelling, poisonous and dangerous liquids and fluids, all of which rendered the stream as it flowed into and across plaintiff's premises unhealthy and dangerous for any purpose; that plaintiff was engaged in conducting farming and gardening operations on his premises and in raising and cultivating for the market and for other use, flowers, plants, vegetables, and other crops; and that the defendant, by polluting said stream, greatly damaged and injured the crops, plants, and trees of plaintiff. A jury returned a verdict for \$1500 in favor of plaintiff and from a judgment thereon, defendant prosecutes this appeal.





It is defendant's contention that he leased the barn and the house on his premises to certain tenants prior to the alleged pollution of the stream, and that if the stream was polluted, it was done by the acts of his tenants; and that therefor he was not responsible or liable therefor. Defendant lived in the premises for six years next prior to the alleged leasing and he testified he rented the house and barn to tenants the last part of August, 1928, and then moved to Chicago, where he maintained his home. He visited his farm nearly every day to feed his horse and cow. On September 12, 1928, the premises were raided by Federal prohibition agents; and they found in the barn 60 barrels of mash, each containing about 250 gallons. They broke and emptied the barrels, and the contents ran from the barn down to the stream and across plaintiff's premises. Defendant was in the house at the time of the raid. He and his alleged tenants were arrested.

The defendant offered a witness to prove a conversation which was had between the defendant and one of his so-called tenants when the premises were alleged to have been leased. The Court sustained objections to such testimony, but no harm was done to defendant by the ruling. There is no evidence in the record that defendant surrendered possession of the house or the barn to any tenant, or that any tenant ever took possession under such an alleged leasing.

Plaintiff testified that he had lived there six years; that during all that time the water in the creek had been clear and he used it for watering his plants; that there are a number of sheds, a huge barn, and an old house on defendant's premises; that in 1927 defendant put in a tile drain from the barn to the creek; that in the summer of 1928, the air was polluted and had the odor of a dump; that the water ran down and filled the creek to overflowing, which killed the plants anywhere near it; that in heavy rains, the objectionable matter was conveyed over the surface of his ground; and that he followed the course of the pollution of the stream and that it came from the defendant's land. Plaintiff's testimony was corroborated



by his employee, Joe Dobrow, who testified that he saw and helped defendant put in a six inch tile drain during the summer or the fall of 1927, running from the stream in front of plaintiff's land up to the barn of defendant; that he visited defendant's barn, saw defendant's horse, barrels, and a still, and that the water ran day and night from the barn. Red and yellow mash flowed from the tile connection in the creek. It had a bad odor and fish died from the pollution in the creek. He further testified that he told defendant to stop the pollution of the creek, and that defendant made no reply. The testimony in the whole case fairly establishes that the defendant was in possession of the premises; that the stream was polluted by the mash from his barn; and that plaintiff's crops and plants were damaged by said pollution.

The first instruction given on behalf of plaintiff told the jury that it is the right of any owner of land having a natural stream of water flowing through it, to have such stream flow unobstructed and undefiled; and that no one has the right to pollute or injure the quality of the water flowing in said stream, and anyone doing so to the injury of the owner of land, through which it flows is liable to such owner for such damages as may be caused by such pollution of the stream. The instruction correctly states the law. (Tetherington v. Donk Bros. Coal Co., 232 Ill. 522.)

The second instruction given on behalf of plaintiff is to the effect that if the jury believe from the evidence that the defendant constructed a tile drain running into a stream of water, flowing through the land of the owner, and caused impure liquids to flow through such tile into the stream, and that thereby the waters of the stream were polluted, and damaged the plants and crops of plaintiff, then the jury may allow the plaintiff such damages as the evidence shows he has suffered, because of such pollution of the stream. The instruction properly confined the damages to those shown by the evidence.

The judgment of the trial court is affirmed.

Judgment affirmed.



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The first question is, what is the purpose of the study? The purpose of the study is to determine the effect of the treatment on the outcome. The second question is, what is the design of the study? The design of the study is a randomized controlled trial. The third question is, what are the variables in the study? The variables in the study are the treatment, the control, and the outcome. The fourth question is, what are the results of the study? The results of the study are that the treatment group had a significantly higher outcome than the control group. The fifth question is, what are the conclusions of the study? The conclusions of the study are that the treatment is effective in improving the outcome.

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STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and twenty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of October, in  
the year of our Lord one thousand nine hundred and thirty,  
within and for the Second District of the State of Illinois:  
Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

259 I.A. 675<sup>3</sup>

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BE IT REMEMBERED, that afterwards, to-wit: On  
OCT 13 1930 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:



Thomas Fleming,

appellee

vs.

City of Elgin, a corporation,  
appellant,

Appeal from the City Court  
of Elgin, Kane County,  
Illinois.

JONES, J.

The City of Elgin constructed a concrete pavement and a concrete sidewalk in front of the premises of Thomas Fleming. Each of the improvements was made by special assessment. Fleming thereafter instituted suit against the city to recover damages resulting from elevating the grade of the street in front of his property. A jury returned a verdict for \$1600 in his favor and judgment was entered thereon.

Id neither of the special assessment proceedings did plaintiff interpose any objection to the amount assessed as benefits against his property or otherwise. The question of damages to his premises was not and could not have been raised in either of those proceedings. (White v. City of Alton, 149 Ill. 626; Botsford v. City of Elgin, 213 Ill. App. 598.)

It appears that the Clerk of the trial court inadvertently omitted from the bill of exceptions, defendant's written motion for a new trial. The praecipe for record directed that it be included, but the bill of exceptions shows only that such a motion was made and overruled. Defendant has suggested a diminution of the record and asked leave to file an amendment thereto, supplying the omission. The proper practice is to supply the motion by making it a part of the bill of exceptions, and the same is accordingly done. (Anderson v. Karstene, 297 Ill. 76.)

Defendant contends that plaintiff's Exhibit 3 is not a part of the original bill of exceptions, although it appears in the copy thereof, included in the transcript filed in this Court.



Thomas Lewis,

appellant

against JOHN and JEFF DAVIS

vs.

JOHN and JEFF DAVIS,

appellees, a corporation,

Illinois.

appeals.

1908, 1.

The bill of exceptions was presented to the court on the 10th day of March, 1908, and was read by the clerk. The court then proceeded to consider the same. The bill of exceptions was presented to the court on the 10th day of March, 1908, and was read by the clerk. The court then proceeded to consider the same. The bill of exceptions was presented to the court on the 10th day of March, 1908, and was read by the clerk. The court then proceeded to consider the same.

In answer to the question whether the bill of exceptions was properly presented to the court, the court held that it was. The court then proceeded to consider the same. The bill of exceptions was presented to the court on the 10th day of March, 1908, and was read by the clerk. The court then proceeded to consider the same. The bill of exceptions was presented to the court on the 10th day of March, 1908, and was read by the clerk. The court then proceeded to consider the same.

It appears from the bill of exceptions that the bill of exceptions was presented to the court on the 10th day of March, 1908, and was read by the clerk. The court then proceeded to consider the same. The bill of exceptions was presented to the court on the 10th day of March, 1908, and was read by the clerk. The court then proceeded to consider the same. The bill of exceptions was presented to the court on the 10th day of March, 1908, and was read by the clerk. The court then proceeded to consider the same.

Upon examination of the record and proofs submitted, we are of the opinion that the exhibit was included in the original bill of exceptions when it was signed and sealed by the trial judge.

The first, third, and fifth instructions given on behalf of plaintiff are to the effect that if plaintiff's property was injured by raising the grade of the said street, he was entitled to recover damages from the city, and ignored the element of special benefits, if any accruing to the premises by reason of the construction of the improvement. These instructions are inaccurate. Under some circumstances, they would constitute reversible error, but in the case at bar, it is not contended, and it does not appear that the damages awarded are excessive. There is ample evidence in the record to sustain the amount of the award, and it seems to us that if the instructions have correctly stated the rule, no different verdict would have been reached. It is not every error which will reverse a judgment, but to justify a reversal it must appear that defendant was deprived of some substantial legal right and that upon another trial, if the error did not recur, a different result might be expected. (Schmidt v. Chicago and Northwestern Ry. Co., 83 Ill. 405.)

The court refused an instruction offered by defendant which told the jury no damages could be allowed for injury to the appearance of plaintiff's buildings or premises, except such as were caused by the impairment of the entrance to and exit from the premises by reason of the change of grade of the street, although the paving may have affected the appearance of plaintiff's buildings and premises and have caused a difference in opinion as to matters of taste and fancy. Plaintiff's father had lived in the premises for a number of years and died there during the pendency of this suit. The testimony shows that the premises had been used exclusively for residence purposes for

upon examination of the report and party resolution, as well as  
the finding that the report was included in the original bill  
of introduction when it was signed and sealed by the House.

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a number of years and were so used at the time this action was commenced. The adjoining property was also used for residence purposes.

It was the theory of defendant that the premises were not suitable for residence purposes, but that after the construction of the pavement, their highest and best use was for industrial purposes, and that the damages, if any, should be based upon their use for those purposes. The owner of property condemned for public use is entitled by way of compensation to the highest market value of the same for any purpose to which it is adapted or may be used. If the land is devoted by the owner to a particular use and for that use has a special value, he is entitled to receive what it is worth for that purpose. (Cahill v. The Village of Norwood Park, 149 Ill. 156.) The rule is the same as to property damaged for public use. Plaintiff was entitled to damages for the best use to which his property was adapted. Its best use was to be ascertained from the evidence. He had the right to show the value of the land for the best use to which he thought it was adapted, and defendant had a similar right. The jury were entitled to inspect the land, and from such inspection, and all the other competent evidence to determine what was the best use to which the property was adapted, and the damages to such use from the raising of the grade of the street in front of the property. (Hartshorn v. Illinois Valley Ry. Co. 216 Ill. 392.) The question for the jury was whether, upon the whole evidence, and for any and all purposes for which the property might be used or sold, the market value would be less with the improvements than without them. (Snodgrass v. Chicago, 152 Ill. 600.) They were not bound to base their verdict upon the supposition that it would be appropriated to a use other than which it was already devoted. (Phillips v. Scales Mound, 195 Ill. 353.) The appearance of residence property is an element of its



market value. Plaintiff had the right to have the jury pass upon the question of damages to the use of the property for residence purposes. The trial court properly refused the instruction.

The order of the County Court of Kane County, showing final completion of the pavement and an abatement of a portion of the assessment therefor was admitted in evidence. It provided that the assessment should be reduced proportionately to the public and the property owners, and credited pro rata upon the respective assessments, in the amounts set forth in the reduced assessment roll therewith filed. The Clerk of the County Court was permitted to testify that no such reduced roll had been filed. Whether or not such roll had been filed was inconsequential. The jury had before it the amount assessed upon each tract embraced in the roll, the total amount of the assessment, and the total amount of the rebate. The order recited that the rebate could be credited pro rata upon the respective assessments. The jury could have determined by simple computation the amount which was to be credited upon the assessment on plaintiff's property. The ruling of the Court in permitting the Clerk to testify that no reduced roll had been filed was not prejudicial.

Plaintiff's counsel in his argument to the jury stated, "We do not know how many loads of dirt it is going to take to fill their lots." This statement was objected to and a motion to instruct the jury to disregard it was denied. The testimony shows that after the pavement was completed, hundreds of loads of dirt were used in filling a portion of the premises. While the matter of the amount of dirt necessary to fill the lot was not involved, the testimony shows that after the pavement and sidewalk were built, the lot was left about four feet below the level of the sidewalk at the north side of the house and about eight feet below it at one side of the lot. Testimony relative to the dirt filling on the lot was produced by both plaintiff and defendant.

A witness for defendant testified that he had received





an offer for plaintiff's property the previous week. He was then asked, "For what price?" and the Court sustained an objection to the question. No effort had been made to show that the offer was bona fide or that the person who made it was able, ready, and willing to buy at his offer. No error was committed by sustaining the objection.

After a careful examination of the record, we are of the opinion that the verdict is supported by the weight of the testimony, and that substantial justice has been done. While the record is not free from error, it is not apparent that if such errors were omitted, upon another trial, a different result might or ought to be expected. Under such circumstances, it is the duty of this Court to affirm the judgment of the trial court and the same is accordingly affirmed.

Judgment affirmed.

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It is the duty of the Government to protect the rights of the people and to maintain the peace and order of the country. The Government is responsible for the welfare of the people and for the development of the country. The Government is also responsible for the defense of the country and for the protection of its borders. The Government is the guardian of the people's rights and interests and is responsible for the execution of the laws of the country. The Government is the highest authority in the country and is responsible for the administration of the country. The Government is the representative of the people and is responsible for the representation of the people's interests. The Government is the executor of the people's will and is responsible for the implementation of the people's decisions. The Government is the defender of the people's rights and interests and is responsible for the protection of the people's rights and interests. The Government is the maintainer of the peace and order of the country and is responsible for the maintenance of the peace and order of the country. The Government is the promoter of the development of the country and is responsible for the promotion of the development of the country. The Government is the guardian of the people's rights and interests and is responsible for the execution of the laws of the country. The Government is the highest authority in the country and is responsible for the administration of the country. The Government is the representative of the people and is responsible for the representation of the people's interests. The Government is the executor of the people's will and is responsible for the implementation of the people's decisions. The Government is the defender of the people's rights and interests and is responsible for the protection of the people's rights and interests. The Government is the maintainer of the peace and order of the country and is responsible for the maintenance of the peace and order of the country. The Government is the promoter of the development of the country and is responsible for the promotion of the development of the country.



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and twenty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of October, in  
the year of our Lord one thousand nine hundred and thirty,  
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

259 I.A. 6754

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BE IT REMEMBERED, that afterwards, to-wit: On

the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

JAN 15 1931



THE UNIVERSITY OF CHICAGO  
LIBRARY  
1000 S. MICHIGAN AVE.  
CHICAGO, ILL. 60607  
TEL. 733-4331  
CIRCULATION DEPARTMENT  
300 S. MICHIGAN AVE.  
CHICAGO, ILL. 60607  
TEL. 733-4331

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TEL. 733-4331

In the Appellate Court of Illinois

Second District

May Term, A. D. 1930.

Chicago Trust Company,

appellee,

vs.

Alex Sandroff, et al,

appellants,

Appeal from the Circuit Court

of Kankakee County.

OPINION by BOGGS, J.

On May 14, 1928, judgment by confession was entered in the circuit court of Kankakee county in favor of appellee and against appellants, for the sum of \$2595.67. On motion of appellants, the judgment was opened and they were given leave to plead. Four pleas were filed. The first plea was a plea of the general issue. The second in its tenor and effect was of like character. The third and fourth pleas were pleas of payment. To the third and fourth pleas appellee filed a general replication.

A trial was had, and at the close of all the evidence, on motion of appellee, the court excluded the evidence of appellants and directed a verdict in favor of appellee. A motion was thereupon made by appellants for a new trial, which motion was overruled. The court entered judgment, confirming the original judgment, and for costs. To reverse said judgment, this appeal is prosecuted.

The principal ground urged for a reversal of said judgment is that the court erred in directing a verdict for appellee.

The judgment by confession was based on two promissory notes, of \$1,000 each, dated October 6, 1925, executed by appellants as the Merit Cap Company, payable to the order of the Momence State & Savings Bank on demand, with interest at the rate of 7% per annum.

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Appellant William Sandroff testified that on November 7, 1925, he called at the Momence bank and informed Charles W. DeWolfe, the assistant cashier, that appellants desired to pay said notes; that DeWolfe informed him that the notes were not at the bank, but that he would procure them. Sandroff further testified that it was his recollection that he gave a check on that day in payment of one of said notes, and that on November 10 he gave a second check in payment of the other.

DeWolfe testified that on November 7, he forwarded to appellee three notes held by the local bank, aggregating a principal sum equal to the notes here sued on, and requested that they be substituted and that the Merit Cap Company notes be returned, but that appellee failed to return them. DeWolfe further testified that the checks left by Sandroff were "put through" on November 12, and were charged to the account of the Merit Cap Company in said bank, which at that time amounted to about \$5,000; that, following the business of November 12, said bank passed to the control of the State Auditor and his receiver, on account of insolvency.

In the latter part of November, 1925, William Sandroff and his attorney, Irving H. Flamm, had a conference with Mr. Masters, one of the vice presidents of appellee bank, in reference to the Merit Cap Company notes. Sandroff testified that he inquired of Masters as to whether appellee bank had received the notes which DeWolfe had sent, and that "Mr. Masters said he had received the notes to replace ours." He was then asked the following questions and made the following answers:

"Q. Did you ask him at that time for your notes?

"A. Yes.

"Q. What did he say?

"A. Well, I asked him for either our notes or the other notes, because our notes had been paid, I paid those, and he said he didn't know anything about it, he hasn't decided.



"Q. You don't know of your own knowledge whether any of these notes were substituted or not, all you know is what Mr. DeWolfe told you, is that right?

"A. The notes were substituted.

"Q. Yes.

"A. Mr. DeWolfe and Mr. Masters both told me."

Flamm, a witness on behalf of appellee, testified among other things, that Masters said: "They had two notes of the Merit Cap Company as collateral on a loan made by the Momence bank, and that they had never received payment; we told him the Momence bank claimed to have sent two or three other notes to the Chicago Trust Company in substitution at the time the Momence bank received payment; \* \* \* that they were not justified in keeping both sets of notes; Masters said something about the bank not having decided what to do, that they were going to turn it over to the law department. \* \* \* Masters did not commit himself as to what they would do. \* \* \* It would rest with the law department, or they had not decided upon that themselves. \* \* \* They didn't turn them over."

The Momence bank, prior to its closing, was indebted to appellee in the principal sum of \$30,000, covered by four notes. Appellee held collateral notes from the Momence bank, amounting to some \$47,000. At the time of said trial after applying all amounts received on said collateral, and after applying a cash balance of something less than \$250, there was still owing to appellee more than \$22,000.

A trial court is not warranted in directing a verdict for the plaintiff, on motion at the close of the defendant's evidence, unless it can be said that the evidence in the record, taken in its most favorable aspect to the defendant's case, does not fairly tend to show a defense. Unless this can be said, the case should be submitted to the jury, *Bailey v. Robison*, 233 Ill. 614-616; *Bechtel v. Marshall*, 283 Ill. 486-491. In the latter case the court at page



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Small-scale (1000-10000) "low-level" and "high-level" : 0.1m resolution, 1995-2000

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Page and the other officers of the United States Army.

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... ..

1988. *Journal of the American Statistical Association*, 83, 103-113.

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491 says:

"This court has said that the fact that the court, upon weighing all the evidence, may be of the opinion that a verdict against the plaintiff would have to be set aside if returned, does not justify the directing of a verdict for the plaintiff if there is any evidence tending to support the defendant's contentions with reference to the controverted questions of fact material to the right of recovery."

The offer and admission in evidence of the notes in question made a *prima facie* case for appellee. The question therefore for our determination is whether, under the pleadings, the evidence, taken in its most favorable aspect toward the appellants' defense, fairly tended to prove the same.

While the pleas do not set forth the same, the real defense sought to be made by appellants is that appellee accepted the notes sent to it by the local bank in lieu of the notes sued on, and is estopped from enforcing payment as against appellants. Under the earlier holdings of the supreme and appellate courts, waiver and estoppel could be shown under the general issue, and need not be specially pleaded. *German Fire Ins. Co. v. Grunert*, 112 Ill. 68-76; *Evans v. Howell*, 211 Ill. 85-93; *Dickson v. New York Biscuit Co.* 211 Ill. 468-495; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474-487; *Rosater v. Peoria Life Assn.*, 149 App. 536-538; *Gray v. Merchants Ins. Co.* 125 App. 370-375. Under the more recent decisions, however, it is held that defenses of this character should be specially pleaded. *Feder v. Midland Casualty Co.* 316 Ill. 552-560.

The affidavit of merits filed with appellants' plea in effect gave notice with considerable detail that appellants were intending to rely on the defense of estoppel. Evidence was offered and admitted in support thereof without objection that the same was not admissible under the pleadings. We would therefore not be warranted in holding that appellants were not entitled to the benefit of said defense, if the evidence tended to support the same.





The evidence was sufficient to warrant the jury in finding that the notes sent by the local bank were sent on condition that they be substituted for the notes here sued on; that appellee had knowledge that appellants had paid into the local bank the principal and interest owing on said notes; that the local bank had become insolvent and that if appellee retained the notes offered in substitution, and collected the same in whole or in part and applied the amount collected on the indebtedness owing to it from the Momence bank, then the assets of the Momence bank, to which appellants must look for reimbursement, would be lessened. To that extent appellants would be prejudiced by such action on the part of appellee.

Appellee takes the position that its action was warranted by an agreement entered into by the Momence bank in connection with the collateral notes held by appellee. The agreement referred to is in substance as follows:

"With the right on the part of the said Bank (appellee) or the legal holder hereof from time to time to call for additional security of such kind and value as will be satisfactory to said Bank or the legal holder thereof, and on failure to respond, \* \* \* then the whole of the above note shall be deemed immediately payable at the election of the said Bank or the legal holder hereof, with full power in said Bank or the legal holder hereof on maturity thereof, either by its terms or by election as aforesaid, \* \* \* to at any time, and from time to time, sell, assign and deliver the whole of said property and all additions thereto and substitute therefor, or any part of said property, additions and substitutes, at any public or private sale, at the option of said bank or the legal holder hereof, \* \* \* and, after deducting all legal and other costs and expenses, \* \* \* from the proceeds of such sale or sales, to apply the remainder on any one or more of said liabilities, whether due or not, as said Bank or the legal holder hereof shall deem proper, and return the surplus, if any, to the undersigned. \* \* \* Said Bank or the legal



holder hereof is hereby authorized and empowered at any time to apply to the payment of any liability or liabilities, whether the same be due or not, of the undersigned, to said Bank or to the legal holder hereof \* \* \* whether the same be due or not, all property, real and personal, of every kind and description, including balances, credits, collections, moneys, drafts, checks, notes, bills or accounts (whether on hand or in transit) of the undersigned."

The construction of this agreement is for the court. We hold that the provisions of this agreement are not broad enough to warrant appellee in retaining both the notes here sued on and the notes sent in substitution, no request having been made by appellee for additional security, and said notes not having been sent for said purpose and not being bills of exchange in transit, etc., as contemplated by said agreement. The record also tends to disclose that appellee, after knowledge of the insolvency of the local bank, and after said payment by appellants to the local bank, collected something over \$1,000 on the notes sent in substitution. Had this amount been paid into the local bank, it would have increased the fund for distribution to its creditors.

Without further discussion of the evidence, we hold that, taken in its most favorable aspect, it fairly tended to prove appellants' defense of estoppel, and that the court erred in directing a verdict and entering judgment against appellant.

It is also insisted by appellants that the court vacated the judgment which had been taken by confession, and that in order to render judgment against appellants, it was necessary that there be a verdict for the amount due. Inasmuch as this question might arise on another trial, we deem best to pass on the same. It is only necessary to say that the motion which is a part of the bill of exceptions discloses that it was to open the judgment, and not to vacate it. In the common law record, made by the clerk, there appears a copy of a motion to vacate the judgment, but that motion is not a





part of the record, not being incorporated in the bill of exceptions. People v. Ellsworth, 261 Ill. 275; People v. Cowan, 283 Ill. 308.

Other errors were assigned on the record, but it will not be necessary for us to pass on the same, as they are not likely to arise on another trial.

For the reasons above set forth, the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

part of the report, and which is the result of investigation.  
People v. Thompson, 121 Ill. 275; People v. Thompson, 120 Ill. 261.  
Said report was made in the month of May, 1911, and is  
necessarily for the use of the court, and is not to be  
used in any other trial.  
For the reasons above stated, the payment of the bill  
ought still be ordered and the same will be ordered.

Very truly yours,  
[Signature]



STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and twenty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*



1931 7  
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the Seventh day of October, in  
the year of our Lord one thousand nine hundred and thirty,  
within and for the Second District of the State of Illinois:

Present--The Hon. THOMAS M. JETT, Presiding Justice.

Hon. NORMAN L. JONES, Justice.

Hon. FRANKLIN H. BOGGS, Justice.

JUSTUS L. JOHNSON, Clerk.

FLOYD S. CLARK, Sheriff.

259 T.A. 675

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BE IT REMEMBERED, that afterwards, to-wit: On

JAN 15 1931 the opinion of the Court was filed in the  
Clerk's office of said Court, in the words and figures  
following, to-wit:





In The  
APPELLANT COURT OF LIVINGSTON  
Second District  
October Term, A.D. 1930.

William A. Klein,

appellee,

vs.

George L. Fennar,

appellant,

Appeal from Circuit Court of  
Livingston County.

OPINION by BOGGS, J.

Suit was instituted by appellee against appellant before a justice of the peace of Livingston county, to recover damages to appellee's car, received in a collision with appellant's truck. The suit was appealed to the circuit court, where a trial was had, resulting in a verdict and judgment in favor of appellee for \$109.41. To reverse said judgment, this appeal is prosecuted.

The collision occurred on a public highway, running east and west in said county and consisting of a dirt track about seven feet wide and one of gravel or crushed rock about ten feet wide, north of the dirt track and separated from it by a space of something like four feet. Appellant was hauling limestone in a truck, and was proceeding easterly on the south side of said highway, on the graveled part of the road. A neighbor with a truck load of limestone was following appellant. Appellee's car, driven by his sister, was also proceeding in an easterly direction along said highway, and as she attempted to pass appellant's truck, appellant turned to the left, and appellee's

Page 12

General Number 100

IN THE

COURT OF THE DISTRICT OF COLUMBIA

IN RE

THE ESTATE OF

WILLIAM H. HARRIS

DECEASED

VS.

JOHN H. HARRIS

AND

ET AL.

FILED

with the intention of acquiring special knowledge of the  
contents of the books of accounts which, in respect to the  
appellate's work, resulted in a judgment with significant results.  
The bill was appealed to the circuit court, where a trial was had,  
resulting in a verdict and judgment in favor of appellee for  
\$10,000. The appellee's bill, which was presented, was  
the same as the one presented on a former trial, showing that  
and was in said county and consisting of a large tract of  
never lost and one of several or several that were lost  
lost and, north of the city track and separated from it by a  
road, at which point the road, which was being built  
across the track, and was proceeding centrally on the north side  
of said highway, on the gravelled part of the road. A neighbor  
with a truck load of limestone was following appellee's  
car, driven by his sister, was also proceeding in an easterly  
direction along said highway, and as the truck was passing  
appellee's car, a collision occurred between the two, and appellee's



automobile struck appellant's truck on the left side, a little to the front of the rear wheel.

At the close of appellee's evidence and again at the close of all the evidence, appellant entered a motion for a directed verdict in his favor. Said motions were denied, and the ruling of the court thereon is assigned as error.

The evidence on the part of appellee was to the effect that she was proceeding in an easterly direction along said highway, and was driving from twenty to twenty-five miles per hour; that she saw the two trucks ahead of her and turned to the left, on the dirt road, and honked her horn twice; that she was then about 200 feet from where the collision occurred; that appellant turned to the left, toward the north, with his truck; that she applied the brakes, grabbed her little brother, who was riding with her, and let go of the steering wheel, and the collision occurred.

Appellant testified that he had been going about fifteen miles per hour, but had slowed up to change his gears so as to turn into the field, and that at the time he turned he was only going two or three miles per hour. Appellee's sister admitted that appellant's truck was proceeding slowly, although she didn't know how fast, and didn't know whether it was two or three miles an hour. The testimony is to the effect that the truck had proceeded across the road, and that the front wheels were entering the field at the time of the collision.

Without going into a further discussion of the evidence, it is only necessary to say that, taking the testimony of appellee's witnesses as true, with all reasonable inferences to be drawn therefrom, we cannot say that this testimony did not fairly tend to prove appellee's case. This being the state of the record, we would not be warranted in reversing the judgment for error in overruling the motion to direct a verdict.

It is next insisted that the court unduly restricted the cross examination of Lucille Klein, the driver of appellee's automo-



bile. Without going into a discussion of this question, it is only necessary to say that, while the court possibly was not as liberal in the cross examination as it should have been, appellant was not seriously prejudiced thereby.

It is also insisted that the court erred in permitting appellee, in testifying to a conversation with appellant, to state what appellee's sister had said to him with reference to the collision, said testimony being as follows: "I told him my sister had said she did not receive any warning and she didn't know that - - a thing about it until she saw it was too late to avoid the accident, she was so close to the truck, it was impossible for her to either come to a stop or avoid the collision."

While we are of the opinion the court should not have admitted said testimony, still the error was not a serious one, and would not warrant a reversal.

It is also insisted that the court erred in sustaining an objection to this question: "Do you know whether or not the plaintiff and his sister Lucille were in the habit of passing back and forth along that road where the accident happened, immediately prior to the time of the accident?" There was no error in such ruling, especially as the question included what appellee might have known in that regard. Appellee was not the driver of the car, and certainly what he may have known in reference thereto would not have been material.

It is also insisted that the court erred in sustaining an objection to the following question, propounded to appellant: "Did the driver of that car (appellee's) give any warning at all of any intention to pass your truck?" The question was leading and asked for a conclusion, and the court did not err in sustaining an objection to the same.

Other complaints were made as to the rulings on the evidence, but, without going into a detailed discussion of the same, it is only necessary to say that no serious error occurred in connection therewith.



all of which, including the 1941-42 season, were  
only made available to the public in 1942-43  
and in the 1943-44 season, when the public was  
not permitted to see the film.

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It is also pointed out that the word "and" is used in the original text of the following sentence, "and the word 'and' is used in the original text of the following sentence."

THIS COMPLAINT WAS MADE BY THE FOLLOWING AT THE FOLLOWING  
DATE, TIME, PLACE, AND IN THE PRESENCE OF THE FOLLOWING  
AND IN THE PRESENCE OF THE FOLLOWING

It is next insisted that the court erred in giving the second, fourth, fifth and sixth instructions given on behalf of appellee, said instructions being as follows:

"2. You are further instructed that the 'Motor Vehicle Law' of the State of Illinois provides that 'No driver of a vehicle shall suddenly stop, slow down, or attempt to turn around, without first signalling his intentions, with outstretched arm or otherwise, to those following closely in the rear.'"

"4. You are further instructed that said 'Motor Vehicle Law' provides that a person operating a motor vehicle, on a public highway, and overtaking another vehicle, shall pass on the left side thereof, and the driver of such other vehicle shall, as soon as practicable, upon signal, turn to the right of the center of the beaten track of such highway, so as to allow free passage on the left."

"5. You are further instructed that if you believe from a preponderance of the evidence that the driver of plaintiff's car, as she approached the defendant, signaled her intention to pass, and the defendant heard said signal, or, by the use of ordinary care could have heard such signal, and, thereafter, turned his car across the track which plaintiff's car was following, and did not permit the latter car to pass, and that such action of the defendant, if any, was the proximate cause of the injury, then the defendant was negligent."

"6. You are further instructed that if you believe from a preponderance of the evidence the defendant did not have the truck in which he was driving equipped with a mirror, that would afford him a view of the road behind him, and that such failure, if any, was the proximate cause of the collision in question, then the defendant was negligent."

It is complained that instruction No. 2 does not apply, where the testimony tends to show that the driver in question was proceeding slowly at the time of making the turn. We do not think the

It is also pointed out that the report makes no mention of the fact that the investigation was conducted by a committee of the House of Representatives.

1. The first of these is the fact that the Government has been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the country. This has been due to a variety of factors, including the fact that the Government has been unable to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the country.

1. The first thing I noticed when I stepped out of the plane was the cold. It was a sharp contrast to the warm, humid air of the tropics. I had heard that the weather in the north was harsh, but I didn't realize just how cold it would be. The wind was biting, and the sun felt like a distant star. I wrapped my coat around myself and shivered. The ground beneath my feet was a mix of snow and ice, and the trees were bare and skeletal. I had never seen anything like this before. It was a strange and beautiful sight, but also a little scary. I had come here for a job, but I didn't expect to feel so out of place. The people I met were friendly, but they spoke a different language, and their customs were so different from what I was used to. I was a stranger in a strange land, and I was starting to feel like I had been thrown into a completely new world. I was alone, and I was scared. I was a young woman, and I was so far from home. I was a stranger in a strange land, and I was starting to feel like I had been thrown into a completely new world. I was alone, and I was scared. I was a young woman, and I was so far from home.

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statute should receive the construction appellant seeks to place upon it.

As to instruction No. 4, it is insisted that it was not relevant to the issues. In this connection it is contended that appellant's truck was turning into the field at the time it was struck. Appellee's sister testified that she honked her horn twice, when about 200 feet from where the collision took place. It was for the jury to say whether or not, at the time appellee honked her horn, appellant should have kept to the right or turned to the right and given appellee's car an opportunity to pass.

Said second and fourth instructions are in the language of the statute, and are applicable to the facts appearing in evidence. The court therefore did not err in giving the same. *Green v. Fish Furniture Co.*, 272 Ill. 148-157; *Martins v. Southern Coal Co.*, 235 Ill. 540-551; *Mt. Olive Coal Co. v. Rademacher*, 190 Ill. 538-543; *Denning v. City of Chicago*, 321 Ill. 341-345.

The complaint as to instruction No. 5 is that the court was telling the jury what facts would constitute negligence, and that that should have been left to the jury. We do not think this instruction is subject to the criticism made.

As to instruction No. 6, appellant states in his brief: "The principal points for criticism in this instruction, however, are that it submits to the jury the question whether or not failure to equip the truck with a mirror was the proximate cause of the collision, and that the instruction invades the province of the jury by its determination, as a matter of law, that certain facts constitute negligence."

The statute provides for the equipment of trucks with a mirror. If a truck is not so equipped and as a direct consequence thereof, an accident occurs, it would constitute negligence, and the court did not err in so stating in said instruction.

It is next insisted that the court erred in refusing appellant's instructions 16, 17 and 18. There was no error in refusing in-

single or more continuous differential or system block delays

1980

*Journal of Interpersonal Violence* 26(10)

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and 19. *Journal of the American Statistical Association*, 1997, 92, 1001-1010.

Journal of Management Inquiry 20(4) 409-424

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8 JULY 1955 THE PRESIDENTIAL AIRCRAFT WAS NOT AVAILABLE; AIRCRAFT LEFT

1944-1945

See, e.g., *United States v. Smith*, 199 F.2d 100, 103 (9th Cir. 1955).

the party did not say in its statement to the press.

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1947-1948-1949-1950-1951-1952-1953-1954-1955-1956-1957-1958-1959-1960-1961-1962-1963-1964-1965-1966-1967-1968-1969-1970-1971-1972-1973-1974-1975-1976-1977-1978-1979-1980-1981-1982-1983-1984-1985-1986-1987-1988-1989-1990-1991-1992-1993-1994-1995-1996-1997-1998-1999-2000-2001-2002-2003-2004-2005-2006-2007-2008-2009-2010-2011-2012-2013-2014-2015-2016-2017-2018-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579-2580-2581-2582-2583-2584-2585-2586-2587-2588-2589-2590-2591-2592-2593-2594-2595-2596-2597-2598-2599-2600-2601-2602-2603-2604-2605-2606-2607-2608-2609-2610-2611-2612-2613-2614-2615-2616-2617-2618-2619-2620-2621-2622-2623-2624-2625-2626-2627-2628-2629-2630-2631-2632-2633-2634-2635-2636-2637-2638-2639-2640-2641-2642-2643-2644-2645-2646-2647-2648-2649-2650-2651-2652-2653-2654-2655-2656-2657-2658-2659-2660-2661-2662-2663-2664-2665-2666-2667-2668-2669-2670-2671-2672-2673-2674-2675-2676-2677-2678-2679-2680-2681-2682-2683-2684-2685-2686-2687-2688-2689-2690-2691-2692-2693-2694-2695-2696-2697-2698-2699-2700-2701-2702-2703-2704-2705-2706-2707-2708-2709-2710-2711-2712-2713-2714-2715-2716-2717-2718-2719-2720-2721-2722-2723-2724-2725-2726-2727-2728-2729-2730-2731-2732-2733-2734-2735-2736-2737-2738-2739-2740-2741-2742-2743-2744-2745-2746-2747-2748-2749-2750-2751-2752-2753-2754-2755-2756-2757-2758-2759-2760-2761-2762-2763-2764-2765

instruction 16. Gehrig v. Chicago & A. R. R. Co., 201 App. 287-292. Instruction 17 is substantially covered by appellant's given instruction No. 12. Instruction 18 does not state a correct principle of law, and the court did not err in refusing it.

Finding no reversible error in the record, the judgment of the trial court will be affirmed.

Judgment affirmed.





STATE OF ILLINOIS,

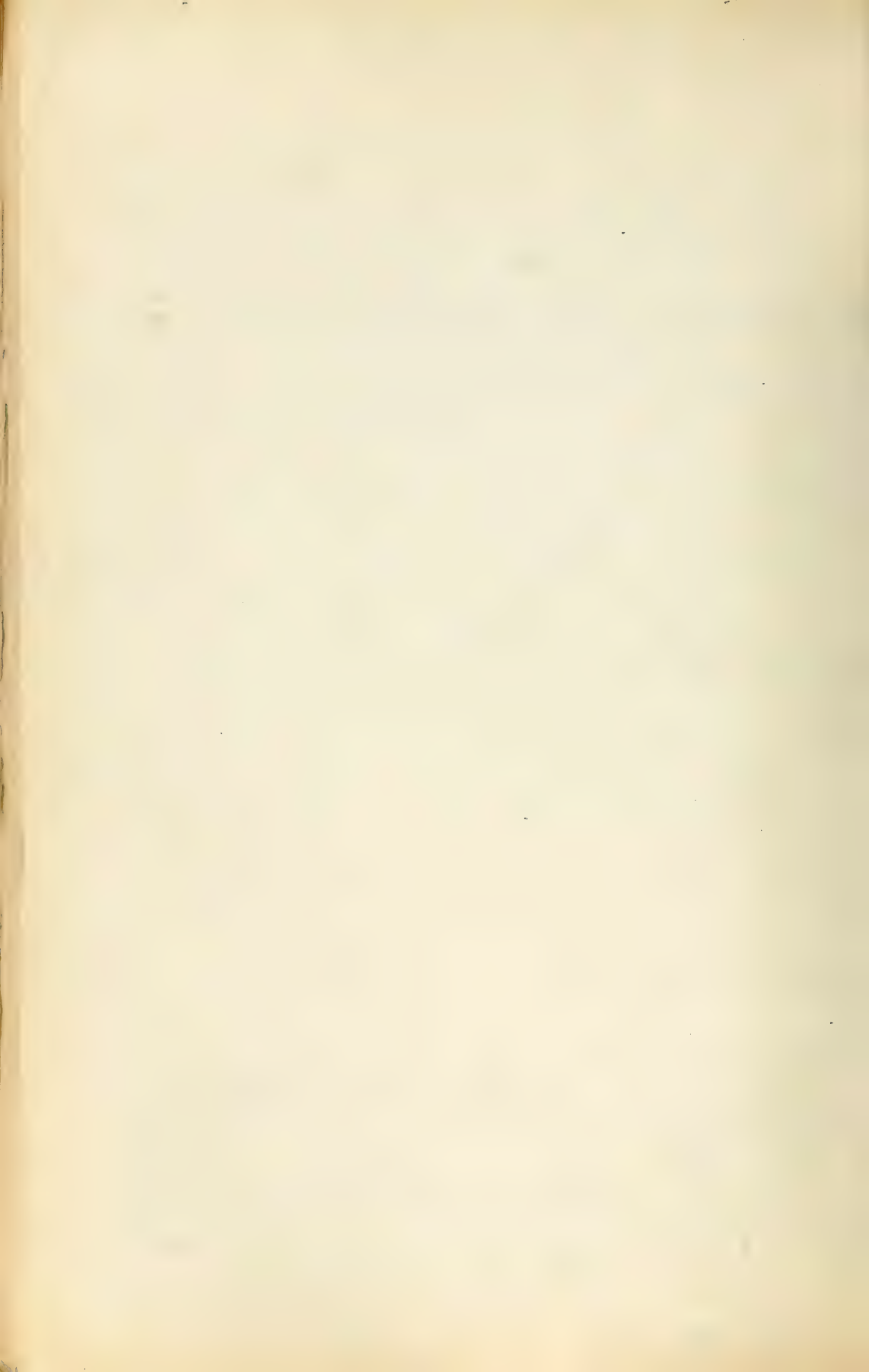
SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord one thousand nine hundred and twenty-\_\_\_\_\_

\_\_\_\_\_  
*Clerk of the Appellate Court*





259 I.A. 676'

Page 1



It is objected that the sentence is void because it is not made to apply to each count independently, and is made in the general form. It has been held that, where an information consisting of three counts charged the plaintiff in error with the unlawful sale, unlawful possession of intoxicating liquors, and with maintaining a common nuisance, to which a plea of guilty was entered to each count, the Court sentenced the plaintiff in error to the Illinois State Farm for a period of six months and fined him \$1000 and costs, "The judgment of the trial court was not void because the trial court did not sentence the plaintiff in error under each count of the information; that if sentence was incorrect, the judgment would be reversed with directions to the trial court to enter a proper sentence; that the sentence imposed is not a proper sentence under the second or third counts of the information; that it is a proper sentence under the first count; and that under the decisions of the Supreme Court the sentence should be construed as applying to the charge for which such punishment might be imposed under the law. It is therefore unnecessary to reverse with directions to sentence plaintiff in error under each count of the information." Judgment was affirmed. (**People v. Clark**, 254 Ill. App. 210; **People v. Lawrence**, 314 Ill. 295; **People v. Welch**, 331 id. 23.)

As to that part of the sentence committing plaintiff in error to the Illinois State Farm until the fine and costs are fully paid, the court in **The People v. Lavendowski**, 329 Ill. 233, has held such a sentence valid and legal, upon a review of all the authorities, and thereupon said: "Section 4 of the State Farm act (Cahill's Stat. 1925, p. 256; Smith's Stat. 1925, p. 2096; assumes the existence of this power, for it





provides: "Every person sentenced or committed to the Illinois State Farm for a definite period, or for failure to pay a fine and costs, shall be entitled to a diminution of his sentence or confinement, in accordance with the general law relating to diminution of sentences in jails for good behavior.' "

This ruling was affirmed in **The People v. Welch**, 331 Ill. 23. What was said in **The People v. Stavrakas**, 335 Ill. 581; had reference to a sentence to the state penitentiary and does not apply to this case.

It is contended that it was erroneous to permit a witness to testify that he purchased liquor from plaintiff in error; that it calls for a conclusion and is the ultimate fact to be proven; that the nature of the liquor should be proven. It was shown in this case that the liquor purchased was whiskey and where the liquor is shown to be one of the liquors named in the statute its intoxicating qualities need not be shown. **People v. McCanney**, 205 Ill. App. 100. We can see no merit in this contention.

Objection is made to the giving of the People's third instruction as follows: "The Court instructs the jury as a matter of law that the rule which clothes every person accused with crime with the presumption of innocence and imposes upon the State the burden of proving his guilt beyond a reasonable doubt is a humane provision of the law intended to prevent an innocent person from being convicted, but it is not intended to aid anyone who is in fact guilty of crime, to escape. It is the rule of law by which the necessity for evidence may be determined but is not itself evidence.' "

The presumption of innocence is a rule of law by which the necessity for evidence may be determined, but is not itself





evidence (**People v. Grant** 313 Ill. 83,) and we can see no error in this instruction. By some inadvertance this instruction was read twice to the jury but under the proofs offered we cannot say that that prejudiced plaintiff in error's cause. The jury were fully instructed as to the presumption of innocence by other instructions.

It is contended that the verdict and judgment are against the manifest weight of the testimony and that there is no evidence in the record "which shows that anyone ever purchased any intoxicating liquor from plaintiff in error." A careful reading of the record leads us to a different conclusion.

Finding no error in the record that will warrant a reversal, the judgment of the County Court of De Witt County is affirmed.

Affirmed.



*11 1950  
Official filed  
Prothonotary - Oct 16 1930*

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*2*

259 I.A. 676<sup>2</sup>

General No. 8391

Agenda No. 2

January Term, 1930

PEOPLE OF THE STATE OF ILLINOIS, Defendant  
in Error,  
vs.

OTTIE SCOTT, Alias Otto Scott, Plaintiff in Error.

Error to County Court, DeWitt County.

SHURTLEFF, P. J.

Plaintiff in error was convicted in the County Court of DeWitt County upon an information containing two counts, one count charging the unlawful possession of intoxicating liquor for the purpose of sale, and the second count charging an illegal sale, the conviction being upon both counts, and the record is brought to this court, by writ of error, for review. There is sufficient competent evidence in the record to support the verdict and judgment of conviction. The judgment was entered generally upon the verdict and the sentence was as follows:

"And now the said defendant, Oattie Scott alias Otto Scott, is sentenced by the Court to be committed to and confined on the Illinois State Farm at Vandalia, Illinois, for a period of sixty days and to pay a fine of Two Hundred Dollars (\$200) and the costs of this suit, and in the event that said fine and costs are not paid at the expiration of said sixty days, then the said defendant, Oattie Scott, alias Otto Scott, to stand committed to said Illinois State Farm to work out said fine and costs at the rate of \$1.50 per day or until otherwise discharged by due process of law."





It is objected that the sentence is void because it is not made to apply to each count independently, and is made in the general form. It has been held that, where an information consisting of three counts charged the plaintiff in error with the unlawful sale, unlawful possession of intoxicating liquors, and with maintaining a common nuisance, to which a plea of guilty was entered to each count, the Court sentenced the plaintiff in error to the Illinois State Farm for a period of six months and fined him \$1000 and costs, "The judgment of the trial court was not void because the trial court did not sentence the plaintiff in error under each count of the information; that if sentence was incorrect, the judgment would be reversed with directions to the trial court to enter a proper sentence; that the sentence imposed is not a proper sentence under the second or third counts of the information; that it is a proper sentence under the first count; and that under the decisions of the Supreme Court the sentence should be construed as applying to the charge for which such punishment might be imposed under the law. It is therefore unnecessary to reverse with directions to sentence plaintiff in error under each count of the information." Judgment was affirmed. (**People v. Clark**, 254 Ill. App. 210; **People v. Lawrence**, 314 Ill. 295; **People v. Welch**, 331 id. 23.)

As to that part of the sentence committing plaintiff in error to the Illinois State Farm until the fine and costs are fully paid, the court in **The People v. Lavendowski**, 329 Ill. 233, has held such a sentence valid and legal, upon a review of all the authorities, and thereupon said: "Section 4 of the State Farm act (Cahill's Stat. 1925, p. 256; Smith's Stat. 1925, p. 2096; assumes the existence of this power, for it





provides: "Every person sentenced or committed to the Illinois State Farm for a definite period, or for failure to pay a fine and costs, shall be entitled to a diminution of his sentence or confinement, in accordance with the general law relating to diminution of sentences in jails for good behavior.' "

This ruling was affirmed in **The People v. Welch**, 331 Ill. 23. What was said in **The People v. Stavrakas**, 335 Ill. 581; had reference to a sentence to the state penitentiary and does not apply to this case.

It is contended that it was erroneous to permit a witness to testify that he purchased liquor from plaintiff in error; that it calls for a conclusion and is the ultimate fact to be proven; that the nature of the liquor should be proven. It was shown in this case that the liquor purchased was whiskey and where the liquor is shown to be one of the liquors named in the statute its intoxicating qualities need not be shown. **People v. McCanney**, 205 Ill. App. 100. We can see no merit in this contention.

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The presumption of innocence is a rule of law by which the necessity for evidence may be determined, but is not itself evidence (**People v. Grant**, 313 Ill. 83,) and we can see no error in this instruction. By some inadvertance this instruction was read twice to the jury but under the proofs offered we cannot say that that prejudiced plaintiff in error's cause. The jury were fully instructed as to the presumption of innocence by other instructions.

It is contended that the verdict and judgment are against the manifest weight of the testimony and that there is no evidence in the record "which shows that anyone ever purchased any intoxicating liquor from plaintiff in error." A careful reading of the record leads us to a different conclusion.

Finding no error in the record that will warrant a reversal, the judgment of the County Court of De Witt County is affirmed.

Affirmed.





Abstract

Admission filed - June 11, 1930  
Baltimore -  
Oct 16 1930

3 17

259 I.A. 676<sup>3</sup>

General No. 8420

Agenda No. 12

April Term, 1930

THE PEOPLE OF THE STATE OF ILLINOIS,  
Defendant in Error,

vs.

CLAYTON HOTCHKISS, Plaintiff in Error.

Error to Circuit Court McLean County.

ELDREDGE, J.

Clayton Hotchkiss, plaintiff in error, was convicted of receiving stolen property, to-wit, certain cigarettes stolen from Bunn & Humphreys, Inc., a corporation. The jury found the value of the property to be \$14.00 and the age of the defendant to be 40 years.

It is contended that the evidence fails to prove the guilt of the defendant beyond a reasonable doubt. To this we can not agree. Bunn & Humphreys, Inc, is a corporation organized under the laws of the State of Illinois and is engaged in the wholesale business of selling groceries and other articles in the City of Bloomington. One Lyle F. Trent in December, 1928, was a warehouseman and truck driver for the corporation. Bunn & Humphreys stored a number of their trucks when not in use at a garage operated by the defendant and one McCarthy. This garage was commonly called the Sales Barn. On the second floor of this building was a store room which was kept locked by Hotchkiss





and McCarthy and the key thereto kept in the garage. Trent took tobacco including cigarettes from the warehouse of Bunn & Humphreys to this Sales Barn and left it in the store room. Thereupon Hotchkiss and McCarthy would take the same and sell or otherwise dispose of it and pay Trent about half price for the goods. The defense of plaintiff in error advanced in this court is that he personally had made no deal with Trent to procure the goods but that McCarthy was the one who transacted all the business with Trent. Plaintiff in error admits, however, that when Trent brought the goods to the garage to be deposited in the store room above thereof he would get the key to the store room from either plaintiff in error or McCarthy and admits that he paid money to Trent for such goods but claims that Hotchkiss left the money with him and asked him to pay Trent therefor. He further admits that he knew that the goods were stolen by Trent from Bunn & Humphreys. He thus aided and assisted McCarthy in receiving the stolen goods and became a principal in the crime. In addition to the above admissions of the plaintiff in error made in his testimony, Trent testified that he dealt directly with the plaintiff in error as well as McCarthy. Trent was a very unwilling witness and attempted to evade every material question he was asked by the State's Attorney. He frequently stated he could not remember the amounts paid to him for the cigarettes nor



their value but did in one instance state that for one of his deliveries to the plaintiff in error he received the sum of \$14.00. This was the only time in his testimony where he stated any specific amount as to the value of the goods stolen although the transactions extended over several months and as there was no other evidence produced on this subject the jury was limited in finding the amount of the stolen property to \$14.00.

The twelfth instruction given on behalf of the People is technically erroneous, but in view of the fact that the other instructions given covered the case fully, and the evidence shows the defendant to be guilty beyond any reasonable doubt we are not disposed to reverse the judgment.

The judgment of the Circuit Court is affirmed.





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Obinion filed  
July 11, 1930  
[illegible]  
Oct 16, 1930

259 I.A. 676<sup>4</sup>

General No. 8423                      Agenda No. 15  
April Term, A. D. 1930

ASHER HOLZMAN, ELKAN HOLZMAN, SIMON  
HOLZMAN, JOSEPH H. COHEN, and HARRY  
H. COHEN, Doing Business Under the Firm  
Name of HOLZMAN BROTHERS,  
Appellees,

vs.

WILLIAM S. EHNIE and CHARLES F. EHNIE,  
Doing Business Under the Firm Name of W.  
S. EHNIE & BROTHER, Appellants.

Appeal from Circuit Court, Morgan County.

ELDREDGE, J.

Appellees, plaintiffs in the Court below, recovered a judgment in an action of assumpsit against appellants for the sum of \$742.50. The action was based upon two trade acceptances alleged to have been executed by appellants and Adjustable Displays, Inc., one for the sum of \$247.50 and the other for \$495.00. These acceptances appear in the record as Exhibits A and B respectively and as some of the defenses are different as to either they will be so designated in this opinion. The first count of the declaration declares on Exhibit A, the second on Exhibit B and the third count consists of the common counts. To the first count appellants pleaded, (1) the general issue; (2) failure of consideration; (3) denial of assignment to appellees. To the second count the pleas were as follows:





(1) the general issue; (2) denial of execution by the defendants; (3) denial of the assignment of the trade acceptance by the Adjustable Displays, Inc., to appellees; (4) failure of consideration; (5) general issue verified.

The only error assigned in this Court in regard to Exhibit A is the refusal of the trial Court to admit oral testimony of the failure of consideration on the ground that there was evidence tending to show that appellees were not holders in due course. The evidence is conclusive that Exhibit A was purchased by appellees on July 12, 1928, from Adjustable Displays, Inc., for the sum of \$237.80 and that Exhibit B was purchased on the same date for the sum of \$468.44. Both Exhibits A and B are endorsed on the back by Adjustable Displays Inc. and also, "For collection, Holzman Bros." Holzman Brothers sent Exhibits A and B to the Farrell State Bank at Jacksonville, Illinois, for collection. William S. Ehnle, one of the appellees, testified that when Exhibit A was presented to him for payment at the Farrell State Bank the name of appellants was not endorsed thereon and that this circumstance tended to show that appellants were not holders thereof in due course. We fail to see the force of this contention. The manifest weight of the evidence, however, is to the effect that both Exhibits A and B were endorsed by appellants for



collection when delivered to the Farrell State Bank for that purpose. If, however, these exhibits had not been so endorsed these facts were not evidence tending to show that appellants<sup>cc</sup> became the holders thereof after their maturity. A complete answer to this contention, however, is the fact that there was no plea raising this issue. The third plea to the first count declaring upon Exhibit A avers that the Adjustable Displays, Inc., did not assign and deliver the writing mentioned in manner and form as the plaintiffs have above in that behalf alleged, and likewise the third plea to the second count declaring on Exhibit B is identically the same. These pleas only put in issue the assignment of Exhibits A and B by Adjustable Displays, Inc., and do not put in issue the assignment for collection of said Exhibits by appellees. William S. Ehnle, the only witness who testified on behalf of appellants, stated that when these exhibits were presented to him for collection the endorsement thereon of Adjustable Displays, Inc., was the only endorsement on said Exhibits, thus affirmatively proving what the pleas mentioned denied.

The main defense to Exhibit B is that William S. Ehnle, who transacted the business with Adjustable Displays, Inc., neither signed it on behalf of appellees<sup>ants</sup> nor delivered it to Adjustable Displays, Inc. The only evidence supporting such contention is the testimony of said





Ehnie himself and while there was a verified plea denying its execution the manifest weight of the circumstantial evidence proven is that Exhibit B was signed on behalf of appellants by said Ehnie.

All the contested facts in this case were submitted to the jury under proper instructions, concerning which no complaint is made, and the verdict is in conformity with the preponderance of the evidence. There being no error in the record, the judgment of the Circuit Court is affirmed.





*abstract*

*17*

*Opinion filed -  
June 11, 1930  
Motion denied  
Oct 14, 1930*

*5*

259 I.A. 677'

General No. 8428

Agenda No. 18

April Term, A. D. 1930

MAY J. WAY, Administratrix with Will Annexed of  
the Estate of Virgil G Way, Deceased, Appellant,

vs.

GEORGE F. WAY, Appellee.

Appeal from Circuit Court, Ford County.

ELDREDGE, J.

Virgil G. Way died October 15, 1924, testate. By his will he bequeathed among other things gold watch to his widow who was appointed administratrix with the will annexed. On the day before the funeral Mrs. Way delivered the watch to appellee, as she claims, for safe keeping, while appellee claims that it was given to him as a gift with the statement by Mrs. Way that his father always desired him to have it. Two years afterwards Mrs. Way filed a petition in the County Court for a citation against appellee to compel him to deliver the watch to her. All the debts of the estate had been paid and the estate was amply solvent. The petition for citation was subsequently changed to a trial of right of property. Appellee is supported in his testimony by that of several disinterested witnesses and the clear weight of the evidence. It was purely a question of fact for the jury to determine and while the estate had not been closed in our opinion Mrs. Way had



such an interest in the watch that she could personally dispose of it if she so saw fit under the bequest in the will.

The judgment of the Circuit Court is affirmed.





*Opinion filed -  
Oct. 29, 1930  
abstract*

64 A

259 I.A. 677<sup>2</sup>

General No. 8418

Agenda No. 10

April Term, 1930

THOMAS M. PRITCHETT, Plaintiff in Error

vs.

NIANTIC CARBON COAL CO., A CORPORATION,  
DAVID W. BEGGS, JESSE M. CORZINE, FRANK  
D. SHIELDS, CHESTER F. RUSSELL, BENJA-  
MIN F. WAGGONER, W. W. MILLER, F. J.  
PARR, ANNA M. CORZINE, I. R. GOOD, W. W.  
AUSTIN, C. E. HERSHEY, EDITH CORZINE,  
J. H. HOWARD, JAMES M. CORZINE, H. J.  
DEARTH, C. R. MULLINS AND ROY A. COR-  
ZINE, Defendants in Error.

Writ of Error to the Circuit Court of Macon County  
SHURTLEFF, P. J.

This is a writ of error to review the action of the Circuit Court of Macon County in dismissing complainant's bill for want of equity. The original bill was filed by complainant December 23, 1924. Demurrers were interposed and sustained. The complainant then filed his amended bill on February 4, 1925. This bill in substance charged:

That the Niantic Carbon Coal Co., a corporation and a defendant herein, was organized on December 26, 1917, with a capital stock of \$100,000. It was engaged in coal mining, owning and operating a mine in Niantic, Illinois; that in November, 1924, it became heavily in debt, among others owing the complainant \$647.99, for wages due him, for which amount the complainant recovered judgment against the company in the County Court of Macon County, Illinois, on December 11, 1924. An execution was issued to the sheriff of said county on the judgment. This execution was by him returned no property found on March 9, 1925. Also he made a demand on the company that it satisfy the





execution; that the company ceased doing business, leaving many debts. All stockholders in the company are made parties defendant and it is sought to reach their unpaid stock subscriptions to apply on the company's indebtedness. This bill was brought on behalf of complainant and all other creditors of the Niantic Carbon Coal Company.

The company defaulted. All of the other defendants (the stockholders) filed their respective answers, as required by the bill, under oath.

The court ordered that all unpaid creditors file their claims and claims were filed by employees of the company for wages due and unpaid them, totalling \$6,700. Other creditors filed claims totalling \$2,550.

Upon replications being filed to the various answers, and the defendant company and C. R. Mullins being defaulted, the cause was referred to the master to take proofs and report. This the master did. In his report he found that the Niantic mine was actually worth and had a fair cash value of \$100,000 at the time it was transferred to the defendant company in payment for the \$100,000 stock issue.

Objections were filed by complainant to this report. The objections were overruled. Exceptions were then filed by complainant and they were by the Circuit Court overruled and the master's report was affirmed and the complainant's bill was dismissed for want of equity in the final decree in this cause, filed December 23, 1929. It is to review this decree that this writ is brought.

There is only one question in controversy here, and that is, what was the fair, cash market value of the Niantic mine on December 26, 1917, when it was transferred to the defendant



company in payment for the \$100,000 in stock of the defendant company? If it was worth that sum, then the decree of the lower court should be affirmed, otherwise it should not be.

Plaintiff in error, Thomas M. Pritchett, with a claim for \$647.99, is the only creditor who asks for a review of the decree. Motion to dismiss the writ of error for want of proper parties, plaintiff and defendants, is made by defendants in error and taken with the case. Inasmuch as defendants in error have filed briefs and supplementary abstract and have joined in error we do not pass upon the motion, but shall consider the case upon its merits.

The bill in this case did not waive answer under oath and six defendants in error filed answers under oath. To overcome these answers under oath requires the testimony of two witnesses in each case. We have read the testimony quite carefully. The only proofs in the record tending to sustain the bill are the facts that in 1916 and 1917 the mine property, not equipped and not a going concern under special circumstances was sold for thirty thousand dollars. Several of the defendants in error were purchasers of stock from the incorporators and their assignees. No fraud or bad faith was shown on the part of any of the defendants in error. Proofs were submitted on the part of the defendants in error tending to show that prior to the year 1916 the coal shaft, mine, equipment, lands, coal rights and other property connected with the coal mine at Niantic, Illinois, was owned by Decatur Coal Company. In the fall of 1916 the Decatur Coal Company also owned two other mines situated at Decatur, Illinois. At this time none of these mines was active or in operation. The Decatur Coal Company was in financial difficulty. One of its mines had buckled and was condemned by the State. For some time prior to this the coal industry had been in bad shape and the mines had





made no money for the preceding three or four years. In the fall of 1916 the defendants Corzine and Beggs purchased the stock of the Decatur Coal Company for thirty-five thousand dollars. This was before the beginning of the period of great profits and increase of value of coal mining properties incident to the World War, and as plaintiff in error's witness Armstrong stated, such price would not indicate one way or the other the real value of the properties a short time later.

Commencing in the latter part of the year 1917 war conditions caused a great demand for coal and coal mine properties. About this time a field administrator in the vicinity of Decatur regulated the price of coal and the amount a customer could buy. The price of coal suddenly became unusually high and the mines in Decatur and vicinity had a demand for more coal than could be produced.

Just before this period of activity in the coal industry began, the Decatur Coal Company commenced the rehabilitation of the buckled mine at Decatur. In order to procure funds for this purpose, it was determined that the better policy would be for the Decatur Coal Company to sell the Niantic Mining property, even at a big sacrifice, and put the money received toward the development of the Decatur mine. Some expense had already been incurred by the company in opening and rehabilitating the Niantic property. In August, 1917, in pursuance of its plan to concentrate its capital in the development of the Decatur mine, the Decatur Coal Company sold the Niantic property to Matheny, Senseny and Wilcoxon for thirty thousand dollars. This was, however, before the war time coal boom had in fact really commenced. These men, incorporating as the Niantic Mining Company, put the mine into operation and spent large sums in building up and improving it.





The ventilating system was improved by the installation of a large electric unit at a cost of over two thousand dollars. The power plant was improved by the installation of a reasonably new two hundred horse power boiler, brick settings and smoke stack of the most modern type. These improvements involved an expenditure of approximately six thousand dollars. Wells were cleaned, the mine was retimbered and new pipe lines put in and buildings were repaired. Down in the mine several thousands of dollars were spent in retimbering the shaft bottom proper. Some twenty to fifty thousand dollars was expended in equipping and improving the mine between the time of its sale to Matheny, Senseny and Wilcoxon and December, 1917.

In December, 1917, the coal market suddenly took a boom and the Decatur Coal Company was not able to supply the demands upon it for coal from its Decatur properties. The City of Decatur was attempting to supply coal to its citizens. The United States fuel administrator had issued an order that all coal should be sold as mine run to get it to the people as quickly as possible. Corzine and Beggs, under such circumstances, began to look for additional mining property. The mine at Niantic, although operating as the Niantic Carbon Coal Company seized upon the consent of one Matheny of Springfield. Wilcoxon of Chicago and Senseny of Stonington were the other owners of the stock but were not interested or engaged in the active management of the mine. In December, 1917, the defendant Waggoner called on Matheny at Springfield. At that time Matheny said, "I'm a pretty sick man. I had a leg off and I'm in bad shape and it means a big loss in business in Springfield every time I go out there. I'll sell the Niantic mine." At that time Corzine, Beggs and the other incorporators of the Niantic Carbon Coal Company seized upon the



opportunity to acquire this property because of Matheny's illness and physical inability to get out from Springfield to Niantic to manage this mine. As a result of this situation, the defendants Waggoner, Macknett, Beggs, Corzine, Shields and Russell (incorporators of the Niantic Carbon Coal Company) were able to drive a bargain for the purchase of all the stock of Niantic Mining Company for only thirty thousand dollars. This was, under the proof in this case, actually a forced sale. Russell denominated this transaction figuratively as "stealing the property." The acquisition of this stock was just on the eve of the unparalleled war boom in the coal industry, which lasted for the next several years.

The legal formality by which title to this property was vested in the Niantic Carbon Coal Company in December 1927, was by resolution and conveyance by the Niantic Mining Company. The real substance of the transaction and the understanding of the parties was that the mining property at Niantic, was, at this time, transferred to the Niantic Carbon Coal Company at a valuation of one hundred thousand dollars in payment for the capital stock of this new corporation.

The property transferred at this time in payment of said capital stock included a hoisting engine, four return tube boilers, boiler house of brick construction, brick smoke stack, engine room, generator and steam engine, tippie, shaker screen engine, rescreening plant, machinery for rescreening plant, Fairbanks Morse railroad scale, direct connecting fan and engine, blacksmith shop and tools, barn, shive wheel, hoisting ropes, mine cages, mine cars, hoisting shaft, air shaft, 70 ton of underground steel, five acres of surface land, 160 acres of coal rights, fifty working places and wells for water supply.





The mine as a whole was working and in operation at the time, and it was a good going property. The average vein of coal was five feet four inches in height and was one of the very best domestic coal mined in central Illinois. The mine had a good slate roof and bottom. The entries were high and had plenty of width. The mine was free from explosive gases. There was no water in the mine except such as came through the openings, the shaft had been sunk through. The equipment on top was modern in every respect. The underground roadways were dry and level and had an excellent slate roof. There was approximately sixty working places in the mine in which coal was being mined. The equipment of the mine was modern and the mine was in good condition. At the time of this transfer the mining industry was booming, owing to war conditions, and it would have taken two years to develop a coal mine similar to the one in question so that coal could have been taken from the ground. In addition to the value of the tangible property the war condition of the coal market at the time of the transfer had appreciably increased the existing and prospective value of this and all other mining property.

A fire occurred in this mine in June, 1919, and much money was spent rebuilding and rehabilitating the property thereafter. Corzine, one of the defendants, personally loaned the company in excess of fifty-six thousand dollars. A claim for \$56,317.67 was allowed Corzine for money advanced by him to this corporation as an unsecured creditor. The original cost of \$30,000, plus the earnings allowed to remain in the company, plus the amount advanced by Corzine, largely exceeded \$100,000.

At the hearing before the master in chancery, W. C. Argust, division superintendent of the Peabody Coal Company, and an entirely disinterested witness who had had many years' experience





in the coal industry, testified that in 1924 he made a complete inventory and appraisal of the Niantic mine and estimated its value at that date to be \$182,000. On cross-examination by counsel for plaintiff in error it was brought out by this witness that mining properties would in general have been more valuable in 1917 than in 1924, and that this mine in 1917 would have had a greater market value than in 1924.

W. S. Ridgely, an expert in coal mining and the values of coal mining property, in answering a hypothetical question detailing the equipment and condition of the mine as it existed in December, 1917, estimated that it then had a fair cash market value of \$100,000 or more.

David W. Beggs, who had been in the coal business for some twenty-eight years and at the time of the hearing was general superintendent of the Macon County Coal Company, testified in detail regarding the condition of the mine in the latter part of the year 1917 and fixed the fair cash market value thereof at \$150,000.

J. M. Corzine, who had been connected with the coal industry for fifteen years, described the mining property and equipment in detail and estimated the fair cash market value of the mining property in question in December, 1917, to be at least \$150,000.

Chester F. Russell testified before the master that in his opinion the fair cash value of the property in December, 1917, was \$150,000.

Ben F. Waggoner, who had been in the coal business for fifteen years, testified from a personal knowledge regarding the mining property in question, fixing the fair cash market value thereof in December, 1917, at \$100,000.



Frank D. Shields, who had been connected with the coal industry for thirty-five or forty years, testified from a personal knowledge of the mining property in question, that in December, 1917, it had a fair cash market value of approximately \$150,000.

Thomas J. Farnsworth, called as an expert witness on value of coal mining property by plaintiff in error, by his testimony fixed a fair cash market value of the mine in December, 1917, at only ten thousand dollars.

Each of the witnesses, Argust, Ridgely, Beggs, Corzine, Russell, Waggoner and Shields, took into consideration in their testimony fixing value, the war boom in the coal industry and the unprecedented demand for coal in December, 1917.

After the incorporation of the Niantic Carbon Coal Company, it continued to operate the mine for seven years. During this period until June 30, 1924, the books of the corporation show that the corporate property was carried at a figure exceeding \$100,000 and that some \$53,393.31 during this time was put back into the mine as new machinery and equipment. The work sheet of the income tax report for the year ending June 30, 1924, offered by plaintiff in error, shows the mine and coal rights listed at \$153,393.31. From its incorporation down to June 10, 1919, when a fire occurred at its property, the Niantic Carbon Coal Company made profits in excess of \$20,000, and all such profits were put back into the business in the way of added equipment and improvements. In spite of the putting of earnings back into the business (which earnings were not carried or reported as profits), for the year ending June 30, 1921, the company showed a profit, in addition to amount so put back for improvements and equipment, of \$7,863.35, or more than seven percent on a \$100,000 investment.





After the war depression in the coal industry set in in the fall of 1924, more than seven years after its incorporation the Niantic Carbon Coal Company, as a result of this depression, became insolvent, and was adjudged an involuntary bankrupt. Its assets, after long depreciation and want of care and preservation, were sold at a forced bankruptcy sale. At that time the original incorporators were no longer connected with the business.

No proof was offered by plaintiff in error proving, or tending to prove, that any defendant receiving stock as assignee from the original incorporators, took with knowledge that the same was not fully paid for or in bad faith. The answers under oath of such defendants, denying such knowledge, stand uncontradicted.

Under the proofs as submitted we do not feel warranted in reversing the decree of the court below, and we therefore affirm the decree of the Circuit Court of Macon County.

Affirmed.





Original filed  
Oct 29, 1930  
abstract

65-A

259 I.A. 677<sup>3</sup>

General No. 8421

Agenda No. 13

April Term, A. D. 1930

OSCAR NELSON, as Auditor

vs.

NEW SALEM STATE BANK, et al.

FARMERS STATE BANK OF PITTSFIELD, ILLI-  
NOIS, Receiver under the Cross-Bill, Appellee,

vs.

C. L. DUNHAM,, Impld., etc., Appellant.

Appeal from the Circuit Court of Pike County.

SHURTLEFF, P. J.

This is an appeal by appellant, a stockholder in the defunct New Salem State Bank, from a decree entered in the court below against him for the sum of twelve hundred dollars, the amount of the stock held by him in said bank. We submit the statement made by appellant to this court of the cause of action as follows:

The New Salem State Bank, organized under the Banking Act of Illinois, failed June 7, 1927, whereupon Oscar Nelson as auditor filed his bill for appointment of receiver and to liquidate the bank's affairs. The bill made the persons then owning stock parties, a receiver was appointed and such proceedings had that a "dividend" has been paid and all the assets converted into cash. Under the bill, in order that liability of stockholders might be determined, a number of depositors asked and were made parties to the bill, given leave to file a cross bill, which was done, and afterwards the receiver under the original bill was substituted as cross-complainant. All persons who had owned stock within



three years of the failure were made parties to the cross bill. No complaint is made as to what has occurred under the original bill. On the cross bill a judgment for twelve hundred dollars was rendered against C. L. Dunham, the appellant, who was formerly a stockholder, on account of his liability as a stockholder. This appeal is prosecuted to reverse that judgment.

On the hearing before the master on the original bill, the claims of the depositors and other creditors of the bank were adjudicated with regard to the conditions as they existed the day the bank closed, June 7, 1927. On the hearing before the master on the cross bill, on a reference to ascertain the liability of the stockholder, it was held that the appellant, who did not own stock for more than six months prior to that time, was liable for the indebtedness as it was found of June 7, 1927. This view of the case was sustained over the objections and exceptions of the appellant; that is to say, the appellant is charged with all deposits made during his period of stock ownership, but not given credits for the amounts withdrawn by the depositor. It is the contention of the appellant that his liability is that of the amounts deposited by the respective depositor during his stock ownership, less the amounts withdrawn by the depositor; that is to say, that the amounts withdrawn or checked out by the depositor should be deducted from the deposits the depositor made, crediting each withdrawal to the earliest deposit made during appellant's period of stock ownership, not then balanced; that this rule should apply both as to withdrawals made during appellant's period of stock ownership and after his period of stock ownership and after his period of stock ownership had closed. The appellant further contends that the fact that during his period of ownership there were in addition to his stock one hundred thirty-eight shares outstanding that should have been taken into account, and





that judgment should have been rendered against him for only 12-150ths of the amount the bankers found to have become indebted during appellant's period of stock ownership, properly arrived at, and not for the whole of such indebtedness, in so far as the par value of his stock would justify. The appellant further contends that in one instance he is charged with an indebtedness not properly proven.

The report of the Master disclosed that the Appellant, C. L. Dunham, had held 9 shares of stock from February 24, 1924, to May 11, 1925, during which time \$1101.68 of indebtedness, at present outstanding and unpaid, had been contracted by the Bank; and that said C. L. Dunham had held 12 shares, the said 12 shares consisting of the original 9 shares and 3 additional shares which he then bought, from May 11, 1925, to December 31, 1926, during which time \$4574.87 of indebtedness, at present outstanding and unpaid, had been contracted by the Bank.

This cause, with appellant's statement in his brief: "We shall not attempt to state with particularity the different amounts withdrawn from the deposits with which we are charged in this case. That would involve a great mass of figures for which we refer you to abstract and record," is submitted to this court, by appeal, for review.

It is claimed that some of the charges against the bank are not sufficiently proven, but we are not able to find the decree in the original bill in the abstract. In fact, appellee has moved to affirm the decree on the cross bill for want of a sufficient abstract.

The Master's report and testimony taken upon the cross bill are shown by a certificate of evidence certified to by the judge. This is not the proper practice.

In **Bottiglierio et al, v. Cozzi**, 176 Ill. App. 311, the court held:

"The decree appealed from is based entirely upon the master's report including the evidence submitted therewith and made a part thereof, which, of course, became a part of the record when filed, and which we cannot review except when presented in the form of a transcript of record. Instead of being so presented, it has been inserted in an alleged certificate of evidence which has been certified here as an original document, and incorporated into the transcript of record by stipulation."





In **Martin v. Todd**, 211 Ill. 105, the court held:

"The testimony in this case was taken before the master. The findings of fact contained in the decree warrant the relief awarded. In the transcript of the record there is no transcript of the master's report nor of the evidence taken before him. Instead, the original master's report, including the evidence taken before him, was embodied in a certificate of evidence, the original master's report with the evidence attached, and not a copy thereof, being inserted bodily in that certificate. A stipulation was then made that the original, instead of a copy, of the certificate of evidence be incorporated in the transcript of the record, the result of which is, that the original master's report, together with the original evidence attached, which was taken before him, is now before us and embodied in the transcript of the record.

"It is urged that this case is distinguishable from **Beth Hammidrash, etc. Congregation v. Oakwoods Cemetery Assn**, 200 Ill. 480, for the reason that in that case the original master's report was inserted in the transcript of the record by stipulation, without any action of the court below, there being in that case no certificate of evidence, while in the case at bar there is a certificate of evidence and the master's report is included therein, and it becomes a part of that document by the action of the court and not by the act of the parties. This can make no difference. Where, as here, the evidence is all taken before the master and included in his report, a certificate of evidence is unnecessary and has no proper place in the record. Under such circumstances the master's report, including the evidence therewith submitted, is a part of the record. Inserting it in the certificate of evidence does not change its status, as the only office of such a certificate is to make that a matter of record which without the certificate is not a part of the record."



And substantially the same rule is laid down in **Central Ill. Service Co. v. City of Sullivan**, 294 Ill. 104.

As to the purported master's report on the cross bill, on page 56 of the abstract the master reports: "That all withdrawals of every kind, testified to in this hearing, had been accounted for prior to this hearing and the total liability of the stockholders is as follows:" The master further found on the cross bill that C. L. Dunham owned nine shares from February 24, 1924, to May 11, 1925: debts contracted \$1,101.68; that the total liability of C. L. Dunham on nine shares is \$900. C. L. Dunham owned twelve shares from May 11, 1925, to December 31, 1926; debts contracted \$4,574.87; that the total liability of C. L. Dunham on twelve shares is \$1,200.

Appellant makes no complaint as to the master's report on the original bill and the decree then entered, whatever it is, in which the entire subject of withdrawals by the depositors appears to have been adjudicated. Appellant's entire ground of error, as we take it, is based upon the subject of withdrawals by the depositors, which is fully adjudicated and to which no objection is made, and we especially decline to search the record for "a great mass of figures," which are not pointed out and set out in the abstract and which appear to have been fully adjudicated and to which no objection is made. The record and abstract in this cause are very confusing and uncertain, even if the abstract should be considered at all.

The decree of the lower court should be sustained, as it sets out the ultimate facts. (**Allen v. Henn**, 197 Ill. 486; **Brown v. Miner**, 128 Ill. 148; and **Sullivan v. C. I. P. S. Co.**, 215 Ill. App. 606.)





In this case appellant Dunham is liable for all debts contracted while he held stock up to the face value of the stock, irrespective of the fact that during the same period there were other stockholders of the Bank who incurred the same direct and primary liability.

The matter of difference between the stockholders as to the amounts paid or collected upon the respective judgments, is a matter to be adjusted among themselves. Appellant insists that judgment should be taken against him only according to his proportionate part of the stock held by the stockholders in court. This is not the law. The liability under the constitution is joint and several, and appellant may be held for the entire loss during the time he was a stockholder to the extent of his capital stock.

The decree of the Circuit Court of Pike County is affirmed.

Affirmed.





*Abstract.  
Opinion filed Feb. 27, 1930  
Rehearing denied - June 2, 1931.*

*66*

259 I.A. 677<sup>4</sup>

General No. 8432

Agenda No. 22

April Term, A. D. 1930

EVERY M. PAGET, Appellee,

vs.

ILIFF-BRUFF CHEMICAL CO., Appellant

Appeal from the Circuit Court of Vermilion County  
SHURTLEFF, P. J.

This is a bill in equity, filed in the Circuit Court of Vermilion County January 7, 1926, by Every M. Paget, appellee, against the Iliff-Bruff Chemical Company, appellant, setting forth a contract which was entered into between appellee and appellant on December 21, 1922, under which the appellant employed appellee as its salesmanager for a period beginning January 1, 1923, and ending March 31, 1924, both inclusive.

The bill seeks an accounting against the appellant for commissions on certain products claimed to have been sold by appellee during the time he was acting as salesmanager under said contract. The appellant answered the bill admitting the execution of the contract, but claiming that the appellee was not entitled to an accounting or to recover any commissions, as he had violated the terms of his contract. A formal replication was filed to the answer and the appellant filed a cross bill, alleging that on account of the appellee's failure to comply with his contract he was not entitled to an accounting or to any further remuneration, and claiming damages by reason of such violation. Thereupon special reference of said cause was made to the master in chancery of said court to determine only whether an accounting should be required.



The Iliff-Bruff Chemical Company at the time in question was engaged in the manufacture of Mono Calcium Acid Phosphate and also handled bi-carbonate of soda, sodium-aluminum-sulphate and salt, and had a manufacturing plant located at Hoopeston, Illinois.

The contract in question provided in substance that all former contracts of every kind and nature between the parties should be terminated; that the company employed the appellee as a salesmanager from January 1, 1923, to March 31, 1924, both inclusive; that the company should maintain and keep a suitable office in Chicago, Illinois, for appellee and pay all expenses connected therewith. that the company should pay to appellee, in addition to all traveling expenses, twenty cents on each 100 pounds of Mono Calcium Acid Phosphate sold and shipped by it, and two per cent of the net price of all bi-carbonate of soda, sodium, aluminum sulphate and salt sold and shipped by it, such net price to be determined by deducting from the price at which said products are invoiced to the purchasers the freight charges thereon paid by the company, and the discounts to which said purchasers may be entitled, and any excise or other taxes which the company may have to pay, said compensation to be paid on said products shipped on all contracts entered into by the company prior to March 31, 1924, whether such products were shipped before or after March 31, 1924.

It was further provided that appellee should not be entitled to any compensation because of any shipments made to certain old customers specifically named in the contract.

Appellant guaranteed that appellee should receive from it, while employed under said contract during said period, at least one thousand dollars a month, payable on or before the 15th day of each succeeding month. that the company should submit to appellee statements showing all shipments, that appellee should





have access to the books of the company as far as they related to the shipments of its products, that appellant should not be liable to appellee for any compensation because of any order or contract for which the company might for any reason reject, refuse, cancel or fail to carry out, or any compensation because of any contract or order made or received by the company for its products until shipment to the purchaser actually should have been made.

The contract also contained the following provisions:

“9. The said Paget agrees that during the period of his employment hereunder he will render to the Company faithful and loyal services as its salesman, under the direction of its President, devoting his entire time, efforts and ability to promoting the sales of the Company's products and advancing and protecting its interests, that he will personally call upon and endeavor to secure orders and contracts for the Company's said products from the entire baking powder trade, self raising flour trade and all other persons, firms or corporations who may deal in or use said products, whenever it may be necessary so to do or when requested by the President of the Company.

“And said Paget expressly covenants and agrees that during the said period from January 1st, 1923, to March 31st, 1924, both inclusive, he will not enter into, be engaged or interested as a stockholder, officer, or agent, employe or otherwise, in any business or undertaking which may compete in any manner with that of the company, nor will he during said period render any services to any person, firm or corporation other than said Company, nor give any such person, firm or corporation any information concerning the business, products prices, customers or affairs of the Company, except when and as requested to do in and about the performing of his duties under this contract, nor will he do anything which in the opinion of the President of the





Company may be detrimental or harmful to the Company, its business or interests.

"10. The said Paget at any and all times during the terms of this contract shall instruct, advise and otherwise assist any salesmen whom the said Company may employ, to the end that they may become fully acquainted with the trade using the Company's products and the requirements thereof, giving such all the aid in his power in their efforts to secure orders and contracts for the Company's products and to advance its interests."

The appellee specifically alleged in his bill that he had faithfully performed all these conditions.

The answer of appellant alleged in substance that it furnished and maintained a suitable office in Chicago for appellee as its salesmanager; that it paid to him the sum of one thousand dollars a month in accordance with the terms of the contract; denied that appellee was entitled to any further compensation or to any commission or to an accounting; specifically alleged that at the time said agreement was entered into, and for many years prior thereto, it was engaged in manufacturing at Hoopeston, Illinois, the products mentioned in the agreement; that in the prosecution of its business it had built up a valuable trade in said products with various firms and corporations throughout the country, and had acquired valuable information in regard to the needs and requirements of its customers; that it had in its possession a valuable mailing list of customers and prospective customers throughout the country with whom it kept in touch and to whom it furnished information in regard to its products and prices thereof, all of which was in the possession of appellee as its salesmanager; that during said time appellant also employed other salesmen, whose duty it was to call on customers and



prospective customers and to secure orders and contracts for the company's products and to advance its interests; that during said time various other firms and corporations were engaged in manufacturing like products and were in active competition in placing the same upon the market, and in soliciting orders and contracts within the same territory.

The answer further alleged that appellee, contrary to the provisions of his contract and in express violation thereof, refused to instruct, advise or assist the salesmen in the employe of the company, and refused to give such salesmen any aid in their efforts to secure orders and contracts for the sale of said products; that the appellee hampered and interfered with the efforts of said salesmen in securing business for the company.

The answer further alleged that among the active competitors engaged in the same line of business as appellant in the trade territory served by appellant, was a company known as the Continental Chemical Corporation, located at Vincennes, Indiana, which company was, during the time appellee was employed by appellant and for a long period thereafter, actively engaged in manufacturing, dealing and selling the same line of products as appellant and was an active competitor of appellant within the trade territory; that prior to the expiration of appellee's contract he entered into an arrangement with the said Continental Chemical Corporation and became a stockholder therein and became vice-president and salesmanager thereof and rented an office in Chicago, Illinois, and had stationery printed with the heading thereon containing the name of the Continental Chemical Corporation of Vincennes, Indiana, and also had his name printed thereon as vice president and salesmanager of said corporation, and made use of his knowledge of the business and





the names of customers and the mailing list of customers owned and used by appellant, and also the knowledge he acquired as salesman for the appellant for the use and benefit of said Continental Chemical Corporation, and had embossed letterheads containing the name of said Continental Chemical Company; that it was the manufacturer of "Purity Brand Phosphate," and that its general sales office was located at 762 Wrigley Building, Chicago, Illinois, and also contained the name of "E. M. Paget, Vice-President and Sales-mgr." thereon; that during the term of said contract with appellant he delivered a large quantity of said letterheads to a printer in the City of Chicago with a form of letter prepared by him to be printed thereon, and furnished said printer with the names and addresses of the customers and mailing list of appellant company, to which said form letter was to be addressed and had them dated "April 2, 1924," to be attached to said letter, which date was not the true date said letter was furnished to said printer and not the true date the said letters were printed, but that the true date was prior to the expiration of his contract with appellant; that a large number of said letters bearing said false date, were signed by the appellee as "Vice-President and Salesmanager" of the Continental Chemical Company, and sent by mail to the customers of appellant company soliciting their business; that during the time appellee gave the Continental Chemical Corporation information concerning the business, products, prices, names and affairs of appellant without being requested to do so in and about the performance of his duties under the contract, he was guilty of acts and conduct which were detrimental to appellant, its business and interests.

The issues thus raised by the bill and answer were, whether the appellee had in good faith complied with the conditions of





his contract with appellant so as to entitle him in a court of equity to compel appellant to render him an account of the sales of the products of the company made during the existence of his contract as a basis for a recovery against appellant for additional compensation.

The matter was referred to a master in chancery only upon the question as to whether appellant should account to appellee respecting said matters. Testimony was taken before the master, there was a report in favor of appellee, objections thereto before the master, which were overruled and made exceptions before the chancellor, and upon the exceptions being overruled there was a decree entered for appellee ordering an accounting, which has been brought to this court, by appeal, for review.

The issues in this case involve largely questions of fact. Some testimony of conversations between appellee and E. Iliff, president of appellant company, was offered by appellee, subject to objections, after the death of Iliff. This testimony was incompetent under section four of the Evidence Act, and it is to be presumed that the master and chancellor did not consider it in passing upon the case. The testimony of the witness York was competent and doubtless was considered by the master and the chancellor. There is nothing in the admission of this proof, subject to the objection, that would necessitate a reversal of the cause.

Appellee had been notified by appellant in the early part of March, 1924, that his services would not be required by appellant after March 31, 1924, at the termination of the contract, and testimony was offered by appellant tending to show that as early as March 12th appellee had an interview with Mr. Harvey W. Beggs, president of the Continental Chemical Corporation of Vincennes,



Indiana, manufacturers of phosphate, relative to taking employment with that company. The following Sunday he made a trip to Vincennes, and made arrangements with Mr. Beggs relative to his employment and his official position in said company; that upon his return to Chicago and without any further consultation with the Continental people he rented an office in the Wrigley Building for that company and purchased furniture, rugs, office supplies and a typewriter and installed the same in said office; that he then had letterheads embossed with the name thereon of the "Continental Chemical Corporation, Vincennes, Indiana, Manufacturers of Purity Brand Phosphate, Sales Office, 762 Wrigley Building, Chicago, Illinois", and also his name thereon as vice president and sales manager; that he then prepared a form letter to be printed on these letterheads and delivered the same to the office of Kuhl & Bent, printers in Chicago, with instructions to print fifteen hundred or more of these letters with the date April 2, 1924, which was not the true date that the letters were printed.

The evidence further tends to show that at that time the Iliff-Bruff Company had a mailing list of customers and prospective customers which was kept in its office in Chicago in the custody of appellee as its salesmanager, and that the Iliff-Bruff Company delivered this list from time to time to the same printing company, Kuhl & Bent, for the purpose of getting out and mailing advertising and printed matter, that at the time in question this list was still in the possession of Kuhl & Bent, and that they were instructed by appellee's secretary to use this list in addressing the fifteen hundred or more letters of the Continental Company; that appellee mailed these letters either the night of March 31st or April 1st; that these letters which





he mailed out to the customers of the Iliff-Bruff Chemical Company were prepared by appellee long prior to the expiration of employment and contained this statement: "I am both a stockholder and an officer in the above Company, and I hope to be more substantially interested."

The evidence further tends to show that on March 24, 1924, an inquiry came either by mail or telegraph to the Iliff-Bruff Chemical Company from the Jerome Milling Company of Jerome, Idaho, which was addressed to their salesman, appellee, asking for quotations on a carload of phosphate.

The evidence further tends to show that from this inquiry on April 2, 1924, appellee sold a carload of phosphate to the Jerome Milling Company over the long distance telephone for the Continental Chemical Corporation. Appellee in his testimony states that he spent sixty-seven dollars in talking over the long distance telephone with Jerome, Idaho, to close up this deal.

On the other hand, appellee's proofs tend to show that he had been selling phosphates for approximately twenty-one years and that he had been with appellant company for approximately nine years past; that when he came to appellant company he brought with him a sales list of his own; that he had always had such a mailing list; that in having the form letters prepared for the Continental Chemical Corporation he furnished Kuhl & Bent a list of prospective customers which was his list. The testimony adduced by the appellant on this phase of the case was in conflict with that adduced by appellee.

Proofs were further offered by appellee tending to show that a mailing list might be secured by anyone who desired to pay the price from the "Northwest Miller," which issued an annual year book and gave the list of all the millers making flour in the United States.





On March 5, 1924, appellee corresponded with appellant regarding the matter of further employment, and received a reply dated March 8, 1924, signed by the president of appellant company in which appellant declined to employ appellee after the expiration date of the contract then existing between them, which terminated on March 31, 1924. Appellee, knowing that he was not to be employed by appellant after the date named, had a talk with Mr. Beggs of the Continental Chemical Corporation, a few days after March 8th. He fixes the date as between March 12th and 15th. He went to Vincennes, Indiana, on the Sunday following and entered into a tentative agreement with Mr. Beggs to enter the employment of the Continental Chemical Corporation following the termination of appellee's employment with the appellant. Upon appellee's return to Chicago he saw the agent of the Wrigley Building during the noon hour and arranged for a lease to be sent down to the Continental Chemical Corporation at Vincennes. He purchased some furniture and had it put in the office of the Continental Chemical Corporation in the Wrigley Building on Friday or Saturday prior to March 31st, the last day of his employment with appellant. Appellee took his own mailing list to Kuhl & Bent and had some circular letters prepared, dated April 2, 1924, which were mailed out to prospective users of phosphate, none of which letters were mailed out until after the closing hours of the last day of appellee's employment with appellant. While it is true that appellee's name on these letters appeared as vice president and salesman of the Continental Chemical Corporation, appellee testified that he had not previously thereto entered into any agreement with the Continental Chemical Corporation to become a stockholder or officer in that company, and that at that time he



owned no stock in the corporation but assumed later that he would own stock.

The testimony of appellant further tends to show that the Iliff-Bruff Company had in their employ a salesman by the name of H. H. Sampson, who had been engaged for several years prior to January 1, 1923, in selling a certain by-product for the company, and that on January 1, 1923, the company decided to put him on the road as a salesman of phosphate manufactured by the company; that Mr. Iliff, the president of the company, sent Sampson to Chicago to see Appellee, the salesmanager, and get instructions and directions with reference to selling phosphate; that appellee refused to give him any instructions whatever and advised him to go into some other business that there would be more money for him in the real estate business than there would be in selling phosphate; that he, appellee, had been in the employ of the company for a long time and felt that he could take care of all the sales in that department and felt that he could handle the sales in a much better manner than he could with Sampson's assistance. He further advised Sampson it was a waste of money to call on any but carload customers, while the evidence shows that it was the desire of the company to encourage the sales as much as possible to small as well as large customers.

Appellant further offered proofs tending to show that Sampson, not being able to get any instructions or encouragement from appellee, then went out on the road as salesman under the instructions of the president of the company; that in calling on customers he found that his calls had been preceded by a letter from appellee, advising them that he would give them a discount of fifty cents a barrel on phosphate if one barrel was ordered; seventy-five cents if five barrels were ordered and one dollar





if ten barrels were ordered, providing the orders were sent direct to him by postal card; that Mr. Sampson found these letters in the hands of his customers throughout his trip. He had not been advised by appellee of the fact that this discount was to be offered to the customers and had no knowledge of these letters until he called on the customers.

The testimony as to whether appellee failed to cooperate with Sampson was conflicting, the testimony of Sampson being that appellee refused to give him any assistance, while the testimony of appellee was that he offered to see Sampson at the Chicago office in the evenings, if necessary, and give him such information relative to the trade, customers, etc., as he, appellee, could give but that Sampson told him it was not necessary and that he departed probably thirty minutes after appellee came into the office. As to whether appellee sent letters to the customers of appellant in advance of the calls that Sampson made as Sampson testified had been done, on cross-examination Sampson could remember of but one instance where he found such a letter, stating: "The Milling Company at Jeffersonville, Indiana, is the only name I now recall." Even though appellee did refuse, as Sampson says he did, to give him necessary instructions with reference to appellant's customers, prices, etc., this fact, according to one of appellant's witnesses, was known to the management of appellant company in the early days of 1923, and the testimony of one of appellant's witnesses is that Sampson was sent to the Chicago office to work under appellee in February of that year. Had the appellant been dissatisfied with the conduct of appellee at that time, then would have been the proper time to have cancelled the contract. On the other hand, no serious dispute seems to have arisen between appellant and appellee





over his attitude towards Mr. Sampson until after appellee demanded an accounting for deliveries made under the contract subsequent to March 31, 1924, and which deliveries were numerous and of considerable size.

From all the testimony, which we have read carefully, we are unable to find that appellant had a secret list of the manufacturers of flour and purchasers of its product, but from the proofs it would appear that it was a general trade list, open to the world and capable of being secured by anyone for a small fee. Portions of appellee's testimony were corroborated by the witness York, an employe of appellant company. Appellee testified that he did everything within his power, expending money in telephoning and telegraphing, to secure the order of the Jerome Elevator Company of Idaho prior to April 1, 1924, and we could only come to a contrary conclusion by inference.

There are no proofs showing that appellee was a stockholder in the Continental Chemical Corporation prior to April 1, 1924, and the letterhead statement of his vice presidency, not published until after April 1, 1924, can be considered only as personal "puffing" to better his position after his employment had ceased with the appellant. It can only be said that appellee violated the terms of his contract with appellant if we should hold that under the terms of the contract appellee had no right to accept employment in a competing company, by executory terms or otherwise, prior to April 1, 1924. This is too strict a construction of the contract. Appellee's time was his own after March 31, 1924, and he was at liberty to contract it as he saw fit, so that he did not slack or minimize his loyalty and service to appellant, his present employer. No proofs were offered showing or hinting that appellee's orders and business



for appellant did not keep up to their full measure until the final day of his employment, and we find from all the proofs that appellee did carry out and perform his contract with appellant and is entitled to an accounting.

The decree of the Circuit Court of Vermilion County is therefore affirmed.

Affirmed.





*upward filed  
Oct 29, 1922  
Whitcomb*

67 A

259 I.A. 6781

General No. 8413

Agenda No. 8

April Term, A. D. 1930

Patrick Allen and John W. Sheehan, Appellees.

vs.

Glens Falls Insurance Company of Glens Falls, New  
York, Appellant.

Appeal from Sangamon.

NIEHAUS, J.

This suit was commenced in the circuit court of Sangamon county to recover on an insurance policy issued on the application of appellees, Patrick Allen and John Sheehan, by the appellant Glens Falls Insurance Company. The trial of the case resulted in a verdict and judgment for \$2500.00 with interest against the appellant. This appeal is prosecuted from the judgment.

The appellant defended its liability on the insurance policy issued, on several grounds, which are set up in its special pleas. One of the special defenses set up in the pleas is that the building insured by the policy was falsely represented by the appellees to the appellant company as a dwelling house; when, as a matter of fact, it was a "road house" in which chicken dinners were served to the public; and intoxicating liquors were kept and sold, in violation of the prohibition law; and that the appellees knowingly concealed these facts from the appellant at the time of the application for the policy; another issue in the case presented by the pleading for the jury to pass upon was, that the





appellees in their sworn proofs of loss falsely stated that the building at the time of the fire was used as a dwelling house only and for no other purpose.

It is clear from the evidence, and is not contradicted, that there is a material difference in the rates to be paid by the insured and the risk to be incurred by the insurance company for insurance on a building used only as a dwelling house and one that is used for "road house" purposes; that a building used only for dwelling house purposes is insurable for a lower rate and for a longer period of time, namely, for a three year period; but a building used for commercial or "road house" purposes calls for a materially higher rate to be paid; and can only be insured for the shorter period of one year.

It is contended by the appellant, that the verdict and finding of the jury is contrary to the weight of the evidence on the issues above referred to. A careful consideration of the evidence in the record discloses, that this contention is well founded; and that the verdict of the jury is manifestly against the weight of the evidence upon the issues of fact mentioned, a proper determination of which, is vital to the appellees right of recovery under the terms and provisions of the policy in question. Judgment is therefore reversed and the cause remanded.

Reversed and remanded.



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Original Filed -  
Oct 29 1930  
abstract

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259 I.A. 678<sup>2</sup>

General No. 8431

Agenda No. 21

April Term, 1930

Will County National Bank of Joliet, Illinois, a Corporation, as Administrator of the Estate of Charles M. Gatliff, Deceased, Appellee

vs.

Champaign County Mutual Relief Association, a Corporation. Appellant.

Appeal from Champaign

NIEHAUS, J.

In this case, as in the case of Will County National Bank of Joliet, Illinois, administrator of the Estate of Charles M. Gatliff, Deceased v. Champaign County Mutual Relief Association, (Gen. No. 8430) an appeal is prosecuted from an order of the Circuit Court of Champaign County overruling a demurrer to the declaration in the suit for recovery on a benefit certificate, which had been issued in his life time to Charles M. Gatliff, a deceased member of the association. The benefit fund of \$1000 for which a judgment was rendered was made payable in the certificate in question to Olive Gatliff, wife of the deceased member or to a duly constituted beneficiary; otherwise to the estate of the deceased member. Olive Gatliff having predeceased Charles M. Gatliff; and no other beneficiary having been substituted, the benefit fund represented by the certificate is claimed by the appellee as administrator of Charles





M. Gatliff, deceased, under the terms of the benefit certificate. These facts, together with the other facts alleged as a basis for recovery, are set forth in the declaration. The same questions of law are raised which have already been considered and passed upon in the case above referred to between the same parties (Gen. No. 8430.) As in the case mentioned, the appellant association contends, that it is not liable, because the issuance of the certificate was **ultra vires**, inasmuch as it was payable to the estate of the deceased member; and it is also contended that the appellee as administrator of the estate has no legal right to sue for and recover the amount due, because it could then be taken and used for the payment of the debts and liabilities of the decedent, which would be in violation of the provisions of Section 25 of the Act under which the association was incorporated. These questions are raised, considered and passed upon in the opinion filed in the case referred to as Gen. No. 8430; and our conclusions concerning these matters are stated in the opinion. We desire to add however, that it does not follow as a necessary consequence, that the amount recovered on the benefit certificate would be used in the estate or devoted for the purpose of paying debts or liabilities of the deceased member of the association. There is no presumption, that there are debts or liabilities of the deceased which





which would have to be liquidated by the sum recovered on the benefit certificate; nor has the court any right to assume that the regular assets of the estate of the deceased member are insufficient to pay any debts or liabilities that may be exhibited against his estate. So far as the record discloses, there is nothing which would cause the amount recovered on the benefit certificate to be diverted from or lost to the heirs or devisees of the deceased.

For the reasons stated, and set forth in the opinion filed in Case, Gen. No. 8430, the judgment is affirmed.

Judgment affirmed.



*Opinion filed  
Dec 29, 1930  
abstract*

697

259 I.A. 678<sup>3</sup>

General No. 8434

Agenda No. 23

April Term, A. D. 1930

Kelly Trail, Doing Business as Trail Electric Company,  
Appellee.

vs.

Lena Watters Hall, Appellant.

Appeal from DeWitt.

NIEHAUS, J.

This appeal is prosecuted from a judgment for \$84.49 rendered in the circuit court of DeWitt County against the appellant Lena Watters Hall in favor of the appellee Kelly Trail, who is in the electrical business in the city of Clinton.

The claim of the appellee, which is the subject of this controversy and upon which the judgment was rendered after a trial by jury and a verdict in his favor, in the circuit court, is for electrical wiring and fixtures; also labor furnished in connection therewith for a building owned by the appellant.

The evidence tends to show, that the material and labor was put in appellant's building for the purpose of fitting it up for tenant; and part of it was put in under her direction. Appellant denies, that the appellee furnished the work and material embraced in his claim at her request, or by her direction; and she claims, that she paid him in full for all work and materials which she ordered; and so testified upon the trial. And in this feature of the case the parties directly contradicted each other; so it





became a question of fact for the jury to determine which party was entitled to more credence; and which one gave the jury the true version of the transactions between them; and the conversation which occurred in reference to the matter.

It is contended by the appellant, that the verdict by the jury is contrary to the facts proven; but the jury after hearing all the testimony and considering the circumstances, found that the appellee's version was the correct one in their verdict; and this finding was sustained by the trial court in overruling the appellant's motion for a new trial. Under these circumstances this court would not be justified in saying, that the jury were not warranted in their finding on the questions of fact involved; nor that they should have accepted the appellant's version of the transactions and conversations as the correct one. This court would not be warranted in saying, that the verdict was manifestly against the weight of the evidence, for the reasons stated.

Appellant also contends, that error was committed in giving and refusal of instructions, but we find no error in this respect. The instructions given for appellant cover all the points of which which the appellant was entitled to have given to the jury in reference to her defense.

The record does not disclose any reversible error and judgment is therefore affirmed.





appeal from -  
Set 24 1930  
abandoned

70A

259 I.A. 6784

General No. 8404

Agenda No. 5

April Term, A. D. 1930

LUCY S. FRITZ, et al., Complainants,

vs.

C. M. BOWCOCK, et al, Defendants,

(Lucy S. Fritz, now Lucy Fritz Carson, Mildred Daisy

Glasgow, Admx. of the estate of E. A. Glasgow,

Deceased, F. L. Andrews, P. J. Kruger, John

T. Mulford, W. F. Rixmann, E. J. Stauff-

fer, Sky B. Vaughn, C. E. Davidson,

S. W. Andrews, Stella Reid, Admx.

of the estate of Ward Reid, De-

ceased, John E. Ross, E. M.

Hurt, and Win J. Ross,

Appellants.)

Appeal from the Circuit Court of Sangamon County

PER CURIAM:

In this case Justice Niehaus is disqualified by relation to some of the parties in interest, from taking part in a consideration of the case. The other members of the Court have given the case a careful examination and are divided in opinion as to whether the decree should be affirmed or reversed. It, therefore, follows that the decree of the Circuit Court of Sangamon County should be affirmed. **Binder v. Frederick Langhorst, et al.**, 139 Ill. App. 493, and cases there cited.

Accordingly, the decree of the Circuit Court of Sangamon County is affirmed by operation of Law.

Affirmed.



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT.  
MAY TERM, A. D. 1930.

FILED

SEP 22 1930

CLERK OF THE SUPREME COURT  
FOURTH DISTRICT

TERM NO. 15.

AG. NO. 4.

M. H. ZEIGLER,  
Appellee,

V.

EASTERN AUTOMOBILE INSURANCE  
UNDERWRITERS,  
Appellant.

259 I.A. 678<sup>5</sup>  
APPEAL FROM  
MADISON CIRCUIT  
COURT.

BARRY, P. J. - Appellee was the owner of a Ford sedan on February 28th, 1928, which was then and there being driven by his agent or servant. The car struck and injured Doctor Kerrell, who is appellee's father-in-law. Dr. Kerrell sued appellee and recovered a judgment for \$3,420.00. At the time of the injury appellee was insured by appellant, but appellant took the position that the injury to Doctor Kerrell was not covered by the policy and declined to defend the suit brought against appellee.

Appellee having satisfied the judgment brought this suit on the insurance policy. Appellant filed the general issue and special pleas to the effect that it was not liable because the policy provides that appellant shall not be liable for injury or death sustained by any member of appellee's immediate family; that Doctor Kerrell was, at the time of the alleged injury, a member of appellee's immediate family. Also that the judgment rendered against appellee was the result of fraud and collusion upon the part of appellee and Doctor Kerrell; that appellee had a good defense to the suit on the ground that the driver of the car was not negligent and that Doctor Kerrell was guilty of contributory negligence and that by reason of fraud and collusion appellee interposed no defense and the judgment recovered was for an excessive





amount. Issues were joined on the special pleas and the trial resulted in a verdict and judgment for \$3,495.00.

Appellant's defense, first above mentioned, is based entirely upon written statements made by appellee and his wife under date of September 21, 1928. Appellee's statement is to the effect that in December 1927 Doctor Kerrell came to live with appellee and his wife; that he had his own room and ate his meals with them; that he did not pay for his room or board; that about three or four weeks ago he left their hotel as they were unable to keep him any longer without pay. The statement of appellee's wife was admitted in evidence, over appellee's objection, to the effect that she was an incompetent witness. She would not be a competent witness to testify for or against her husband and the court erred in admitting her statement in evidence. In rebuttal she was called as a witness by appellee and testified, without objection, that during February 1928 Doctor Kerrell was living in Hartford and not at her home. Appellee, Doctor Kerrell, and two other witnesses, testified that the doctor was living in Hartford during the month of February 1928 and was not living with appellee and his wife during that time. The great preponderance of the evidence on that question is in favor of appellee.

Appellant offered no evidence in support of its plea to the effect that appellee had a good defense on the ground that the driver of the car was not negligent and that Doctor Kerrell was guilty of contributory negligence and that the judgment was procured by fraud and collusion.

Appellant complains of the first instruction given for appellee because it uses the word "convinced". In that regard the instruction is more favorable to appellant because it informed the jury that before they could find a verdict for appellee they must be convinced by the evidence that appellant has failed to prove its special defenses. In addition to that it also required appellee to prove by a preponderance of the evidence, all the material allegations in the declaration before appellee was entitled to recover. That part of the instruction was improper but appellant does not claim that appellee failed to prove any part of his

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declaration and for that reason the error in the instruction is not reversible.

The concluding sentence of the second instruction is not accurate but in the state of the proof the jury could not reasonably have found any other verdict and for that reason the giving of this instruction is not reversible error.

Complaint is made of the third instruction, but we think it is substantially accurate. The fourth instruction is in regard to the defense of fraud and collusion. It informed the jury that collusion cannot be presumed but must be proven by clear and convincing evidence. In that regard the instruction is erroneous. Fraud and collusion may be presumed or inferred from facts and circumstances, like any other fact. Of course it cannot be presumed in the absence of evidence which would naturally give rise to a presumption that there was fraud and collusion. However, appellant made no effort to prove that appellee had a good defense to the action brought by Doctor Kerrell. No evidence was offered to show that the driver of the car was not guilty of negligence or that Doctor Kerrell was guilty of contributory negligence. In the state of the proof the giving of appellee's fourth instruction was not reversible error. The court refused an instruction asked by appellant, but this ruling was proper because substantially the same instruction was given to the jury. No reversible error having been pointed out the judgment is affirmed.

AFFIRMED.

Not to be reported in full.



FILED

SEP 23 1930

CLERK OF THE DISTRICT COURT

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

MAY TERM, A. D. 1930

TERM NO. 13.

AGENDA NO. 3.

W. E. BECK,  
Appellee

-vs-

AMERICAN RAILWAY EXPRESS  
COMPANY,  
Appellant.

259 I.A. 679

APPEAL FROM THE CIRCUIT COURT

OF

FAYETTE COUNTY, ILLINOIS.

Fulton, J. - This was an action of Assumpsit, tried by a jury in the Circuit Court of Fayette County, and resulted in a verdict in favor of Appellee for \$225.00. A motion for a new trial was overruled and judgment rendered on the verdict and the Defendant brings this Appeal.

The Declaration alleges in substance that the Defendant was a common carrier for hire; that the Plaintiff was a dealer in hunting and watch dogs at Herrick, Illinois; that on divers dates specially stated, certain dogs were shipped to various parties in different parts of the country; that said dogs were carefully and safely crated, billed and consigned, duly delivered to, and receipted for by Appellant and express charges to destination advanced by Plaintiff; that Defendant did not take proper and ordinary care of said dogs; did not safely carry said dogs to destination and did not deliver said dogs to the consignees, but, through carelessness and negligence on the part of the Defendant, said dogs were entirely lost to the Plaintiff.

An additional count was filed to this Declaration by Appellee to which the Appellant demurred. The demurrer was sustained but on leave of Court first had, the Plaintiff was permitted to amend the original count to the Declaration by alleging that all dogs were shipped, "Collect on Delivery", the amount to be paid by



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the consignee.

No plea seems to have been filed by the Appellant and the case went to trial on the first count of the Declaration and the amendment thereto.

The proofs show the crating and delivery to agent of Appellant of the dogs in good condition for shipment C.O.D. There was evidence to show that neither the money nor the dogs themselves were returned to Appellee. Plaintiff testified that he made frequent inquiries about the shipments and before the expiration of thirty days filed written claim with agent of Defendant.

Appellant contends there is no evidence of failure to deliver by the carrier, but the law in Illinois clearly holds that it takes only slight evidence on the part of the shipper to shift the burden of proof of non-delivery to the carrier.

Woodbury v Frink 14 Ill. 279.  
Chgo. N.W.R.R. Co. v Dickinson 74 Ill. 249.  
Shellaburger etc., v I.C.R.R.Co. 212 App. 1

It is our opinion that the testimony discloses sufficient evidence of negligence, or of failure to deliver, to cast upon Appellant the burden of explaining non-delivery.

Appellant offered no testimony except copies of Shippers' Contract signed by Appellee at the time of each shipment. Section 8 of Shippers' Contract signed by Appellee does not change this rule of law.

Proof by Appellee that he filed claim each time within thirty days from date of shipment satisfies requirements of Section 10 of said Shippers' Contract.

We believe there is sufficient proof of the material facts to sustain the verdict and, finding no harmful error in the record, the judgment of the Circuit Court will be affirmed.

AFFIRMED

Not to be reported in full.





STATE OF ILLINOIS.  
APPELLATE COURT.  
FOURTH DISTRICT.  
MAY TERM, A. D., 1930.

FILED

SEP 22 1930

TERM NO. 10.

AGENDA NO. 14.

259 I.A. 679<sup>2</sup>

John A. Ingram,

Appellee,

vs.

George A. Buehrer,

Appellant.

Appeal from the City Court  
of  
East St. Louis, Illinois.

WOLFE, J:- The appellee, John A. Ingram, started suit against the appellant, George A. Buehrer, in the City Court of East St. Louis for damages that he alleged was caused by the appellant running into him and injuring him on a public street in the town, of National City, Illinois. The appellee recovered a verdict of \$1000.00, and judgment was entered in his favor for that amount.

At the time of the trial the appellee was permitted to amend his declaration to which the appellant filed the general issue. At the close of the plaintiff's case the Court instructed the jury to find the defendant not guilty as charged in the second count of the declaration, thereby leaving but the one count charging negligence, to go to the jury. The negligence as charged in this count of the declaration was that the appel-



lant was driving his automobile at a greater rate of speed than was reasonable and proper, having regard to the traffic and the use of the way, so as to endanger the life and limb of the appellee, etc., to-wit, 45 miles per hour. It was insisted on the motion for a new trial, and is now insisted here by the appellant, that the evidence does not support the charge of negligence as charged in the declaration.

The evidence shows that the appellee alighted from a bus which was proceeding southward on the hard road in the town of National City; that he waited for the bus to pass by, then looked up and down the street and started across the eighteen foot slab to the east side of the street; that as he was crossing the said slab, or just east of it, he was struck by an automobile of the appellant and was injured.

The appellee testified that he saw appellant's car about a block and half away as he, the appellee, started to cross the slab; that he was entirely across the slab before appellants car struck him and knocked him down. There is a graveled pathway about fifteen feet in width east of the concrete highway, and after appellee was struck he was lying about the center of the graveled path. The appellant testified that he did not see the appellee until he was within five or six feet of him; that the appellee stepped immediately in front of the automobile; that appellant immediately swerved his car to the left; that his car struck the appellee, but did not run over him; that the car ran across the street onto the sidewalk on the east side of the graveled road; that he was not traveling at a greater rate of speed than twenty-five miles an hour.

The only other witness to the accident was a lady named



The first of these is the fact that the  
government has been very successful in  
its efforts to reduce the deficit. This  
has been achieved by a combination of  
increased revenue and reduced expenditure.  
The second is the fact that the  
government has been very successful in  
its efforts to reduce the deficit. This  
has been achieved by a combination of  
increased revenue and reduced expenditure.

The third is the fact that the  
government has been very successful in  
its efforts to reduce the deficit. This  
has been achieved by a combination of  
increased revenue and reduced expenditure.  
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its efforts to reduce the deficit. This  
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its efforts to reduce the deficit. This  
has been achieved by a combination of  
increased revenue and reduced expenditure.

Evalyn Y. Kay, who testified she was standing on the east side of the street in front of the police station at the time of the accident; that she did not see the appellant's car until it was within a short distance of and shortly before it hit the appellee; that the car was being driven on the east, or wrong side of the street and going fast; that the appellee had crossed the concrete slab, and was on the dirt or gravel east of the paved road at the time the car hit him; that the appellant drove his car into the platform on the east side of the street. At the time the car stopped the appellee was lying about two feet west of the car; that in her opinion the car was being driven at the rate of from thirty to 35 miles per hour.

The testimony of the appellee was that the car did not run over him, but it knocked him down and then ran into the side of the station; that in his opinion when he first saw the car of the appellant it was a block and a half north, which would be between 500 and 600-feet; that he thought he had plenty of time to cross the street before the car of the appellant could reach him. The appellee did not attempt to say in miles per hour how fast the car of the appellant was approaching, but he said "It come quick like that (Witness snaps his fingers) and hit me."

The appellant insists that the evidence as given was not sufficient on which the jury could find a verdict of guilty as showing that he was driving at an excessive rate of speed, and that such driving was the cause of the injury to the appellee. The jury had the opportunity of seeing the witnesses and hearing them testify, and is in a better position than a reviewing court to judge of the truthfulness of the witnesses. This court could not be justified in setting aside the verdict of a jury





unless we can say that it is manifestly against the weight of the evidence. (Snodgrass vs. City of Chicago, 152 Ill. 600, Dick vs. Zimmerman 105 App, 615; Flynn vs. Chicago City R. R., 158 App. 405)

We are of the opinion that this verdict is not against the weight of the evidence. Therefore, we would not be justified in setting aside the verdict and judgment entered by the trial court.

The appellant insists that he did not receive a fair and impartial trial because the court allowed the appellee to amend his declaration just before going to trial, and that he has since the trial discovered new evidence that he should be allowed to present at another trial.

The appellant went to trial on the amended declaration without any objection. If he was not prepared to meet the allegations in the amended declaration he should have so stated to the trial court and asked for a continuance for time to prepare to meet the charges in the amended declaration. He should not be permitted to wait until an adverse verdict has been rendered against him before informing the court that he was not prepared to meet the charge in the amended declaration.

The appellant filed his motion for a new trial in the lower court and with it several affidavits setting up the fact that the appellant had discovered new evidence that would rebut the testimony of the appellee and his witnesses, and show that the accident could not have occurred as claimed by the appellee. The trial court overruled the motion and the same is assigned as error in this court. The courts do not look with favor upon

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an application for a new trial on the ground of newly discovered evidence. (People v. Lemoile, 288 Ill. 11; Peo. vs. Johnson 298 Ill. 52.) To justify the granting of a new trial the newly discovered evidence must be conclusive and not merely cumulative. The appellant must also show that he had used diligence in preparing his case for trial, and show to the court that he had not been negligent in any manner in trying to procure the newly discovered evidence at the first trial. If the appellant has not shown due diligence in the matter of procuring evidence, he cannot wait until after an adverse verdict of the jury and then be granted a new trial on the ground of newly discovered evidence.

We are of the opinion that the appellant has not made such a showing as would entitle him to a new trial on the ground of newly discovered evidence. We find no reversible error in the case and the judgment of the City Court of East St. Louis, is hereby affirmed.

Not to be reported in full.





STATE OF ILLINOIS.  
APPELLATE COURT  
FOURTH DISTRICT.

MAY TERM, A. D. 1930.

TERM NO. 12

AG. NO. 2

259 I.A. 679<sup>3</sup>

HELLRUNG CONSTRUCTION COM-  
PANY, a Corporation,

vs.

JOSEPH J. ECKHARD AND  
LETA V. ECKHARD, his wife

Appellee,

Appellants..

Appeal from the  
City Court of  
Alton,  
Illinois

Wolfe, J. - The appellee is engaged in construction work and on or about January 1st, 1928, it entered into an oral contract with the appellants whereby it was to reconstruct and repair the appellants' house which had been recently damaged by fire. After the repairing of the house a dispute arose between the parties as to the amount due on the contract.

The appellee filed its bill in the City Court of Alton, Illinois, for a mechanic's lien against the property of the appellants. The bill alleges the amount of material and labor furnished in doing the work; that such material and labor were supplied under the contract and that the price thereof is fair and reasonable. The bill further alleges that there was \$1669.04 due and unpaid under the contract and that the appellees were entitled to a lien on the property for that amount.

The appellants were duly served with a summons. They appeared in court and filed their answer. The answer admits the making of the contract in question and the terms thereof, but denies that the amount claimed by the Company is due thereunder,

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and denies that the appellee is entitled to a lien as contended. The answer charges that the house was turned over to the appellee for the making of the repairs in question; that while in the appellee's possession and custody, the appellee used the heating plant inside the house and permitted the boiler and plant to freeze; that by the reckless and careless manner in which the company performed its work the appellants were forced to clean the plaster from the woodwork and various fixtures; that the woodwork and fixtures were damaged by the carelessness of the appellee; that the appellants had to have same repaired at a cost of \$200.00. The appellee filed a general replication to the answer. The case was heard by the trial Judge sitting as Chancellor.

The Chancellor heard the evidence in open court and found that \$1146.69 was due the appellee for material and labor under the contract.

The only controversy in the case is the amount of credit that should be allowed the appellant for repairing the heating plant, cleaning and refinishing the woodwork and equipment, and cleaning the plaster, etc. The evidence shows that the appellants spent \$151.55 for such repairs. The Chancellor found that the appellants should be credited \$75.77 on the amount found due for material and labor under the contract, leaving a balance due the appellee under this contract of \$1070.92. By agreement of the parties the appellants paid the appellee \$995.14, the amount under the contract, concerning which there was no controversy. The only question in dispute is whether the Chancellor should have allowed the credit of \$151.55 instead of the amount of \$75.77.

It is not disputed that the appellants paid the sum of \$151.55, as set forth in their answer to the bill. At the time of the hearing there was no objection to the testimony of the appellants when they testified as to the amounts they had expended. There was no objection when the exhibits were offered and received in evidence. The appellee by filing a general replication to the answer of the appellants admitted that if the appellants could



prove the allegations of their answer it would be a good defense to their claim for a mechanic's lien. We are of the opinion that the appellants have proved by a preponderance of the evidence that it was through the carelessness of the appellee that the damage was done to the appellants' furnace and other property as set forth in their answer.

The Chancellor erred in not allowing appellants credit for \$151.55 instead of \$75.77. The Judgment of the City Court of Alton, Illinois, is hereby reversed and the case remanded with instruction to enter judgment in accord with the facts as found to be in this opinion.

Not to be reported in full.





STATE OF ILLINOIS.  
APPELLATE COURT  
FOURTH DISTRICT.

MAY TERM, A. D. 1930

TERM NO. 17

AG. NO. 5

259 I.A. 6797

EDGAR D. DODGSON, :  
Plaintiff in Error, : Writ of Error to the  
vs. : Circuit Court of  
: St. Clair County,  
: Illinois  
W. J. HILLGAMYER and :  
MRS. E. HILLGAMYER, :  
Defendants in Error.:

Wolfe, J. - On the 19th day of March, 1926, the plaintiff in error filed his suit in the Circuit Court of St. Clair County, Illinois, against the defendants on a promisory note of \$550.00, dated April 7th, 1916. To the plaintiff's declaration the defendants filed the general issue and special pleas. One of the special pleas alleged, among other things, that there had been a settlement of the amount due the plaintiff in error from the defendant in error, W. J. Hillgamy, but through inadvertence the defendant in error did not demand the note and the cancellation of it was overlooked. To the special pleas the plaintiff in error filed replications. Trial was had before a jury which found for the defendants. After motion for a new trial was overruled, judgment on the verdict was entered.

The plaintiff in error and the defendant in error, W. J. Hillgamy, purchased a saloon in the City of East St. Louis for the sum of \$1100.00. The defendant in error gave his note for \$550.00 to the plaintiff in error for his share of the purchase price of the saloon. The evidence shows that Mrs. Hillgamy signed the note, but had no interest in the saloon, and received no consideration for signing the note with her husband. The de-

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fendant W. J. Hillgamyer, testified that about a year after the note was given (sometime in the spring of 1917) he was notified by the Draft Board that he would have to get into some kind of useful occupation; that he went to Dodgson, plaintiff in error and explained things to him and told him that he would have to turn the business over to him, to which Dodgson said "That would be all right." The defendant Dodgson denies that this conversation took place in the spring of 1917. He says that the defendant in error did not turn over the business to him until sometime in 1919. He admits that he took over the place and ran it after the defendant left the place.

The only question raised by the plaintiff in the case is: Does the evidence justify the verdict? It is admitted that the defendants in error signed the note and that it was given for one-half the purchase price for the saloon. Hillgamyer says, that he had a conversation about leaving and giving his reason therefor in the spring of 1917. Dodgson says it was not until 1919. The armistice was signed on November 11th, 1918. So, in our opinion, Mr. Dodgson must be mistaken in regard to the time that this conversation took place. There is no evidence that the Hillgamyers were indebted to Dodgson for anything except one-half interest in the saloon. We think a fair inference to be drawn from the testimony is that when Hillgamyer turned the saloon back to Dodgson to run, that it was done for the consideration of the indebtedness that was due from Hillgamyer to Dodgson. We cannot say that this verdict is manifestly against the weight of the evidence, and unless we can do so we would not be justified in disturbing the verdict. (Snodgrass vs. City of Chicago, 152 Ill. 600-615; Dick vs. Zimmerman, 105 Ill. App. 615; and Flynn vs. Chicago Ry. Co., 158 App.405)

The judgment of the Circuit Court of St. Clair County is hereby affirmed.

Not to be reported in full.















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